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## Legislation

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### Contents

#### I Legislative acts

##### REGULATIONS

★ 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 (¹)	1
★ Regulation (EU) No 597/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No 812/2004 laying down measures concerning incidental catches of cetaceans in fisheries	62
★ Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC	65
★ Regulation (EU) No 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items	79
★ 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 (¹)	84

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(¹) Text with EEA relevance

## DIRECTIVES

★ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes <sup>(1)</sup> .....	149
★ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) .....	179
★ 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 <sup>(1)</sup> .....	190
★ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU <sup>(1)</sup> .....	349

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<sup>(1)</sup> Text with EEA relevance

## I

*(Legislative acts)*

## REGULATIONS

### 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

(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 Central Bank (¹),

Having regard to the opinion of the European Economic and Social Committee (²),

Acting in accordance with the ordinary legislative procedure (³),

Whereas:

(1) A genuine internal market for financial services is crucial for economic growth and job creation in the Union.

(2) An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

(3) Directive 2003/6/EC of the European Parliament and of the Council (⁴) completed and updated the Union's legal framework to protect market integrity. However, given the legislative, market and technological developments since the entry into force of that Directive, which have resulted in considerable changes to the financial landscape, that Directive should now be replaced. A new legislative instrument is also needed to ensure that there are uniform rules and clarity of key concepts and a single rule book in line with the conclusions of the report of 25 February 2009 by the High Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière (the 'de Larosière Group').

(¹) OJ C 161, 7.6.2012, p. 3.

(²) OJ C 181, 21.6.2012, p. 64.

(³) Position of the European Parliament of 10 September 2013 (not yet published in the Official Journal) and decision of the Council of 14 April 2014.

(⁴) Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, p. 16).

- (4) There is a need to establish a more uniform and stronger framework in order to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants. This Regulation aims at contributing in a determining manner to the proper functioning of the internal market and should therefore be based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted consistently in the case-law of the Court of Justice of the European Union.
- (5) In order to remove the remaining obstacles to trade and the significant distortions of competition resulting from divergences between national laws and to prevent any further obstacles to trade and significant distortions of competition from arising, it is necessary to adopt a Regulation establishing a more uniform interpretation of the Union market abuse framework, which more clearly defines rules applicable in all Member States. Shaping market abuse requirements in the form of a regulation will ensure that those requirements are directly applicable. This should ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a directive. This Regulation will require that all persons follow the same rules in all the Union. It will also reduce regulatory complexity and firms' compliance costs, especially for firms operating on a cross-border basis, and it will contribute to eliminating distortions of competition.
- (6) The Commission Communication of 25 June 2008 on 'A 'Small Business Act' for Europe' calls on the Union and its Member States to design rules in order to reduce administrative burdens, to adapt legislation to the needs of issuers on markets for small and medium-sized enterprises (SMEs) and to facilitate access to finance for those issuers. A number of provisions in Directive 2003/6/EC impose administrative burdens on issuers, in particular on those whose financial instruments are admitted to trading on SME growth markets, which should be reduced.
- (7) Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of this Regulation, it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation. Such behaviour prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets.
- (8) The scope of Directive 2003/6/EC focused on financial instruments admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made. However, in recent years financial instruments have been increasingly traded on multilateral trading facilities (MTFs). There are also financial instruments which are traded only on other types of organised trading facilities (OTFs) or only over the counter (OTC). The scope of this Regulation should therefore include any financial instrument traded on a regulated market, an MTF or an OTF, and any other conduct or action which can have an effect on such a financial instrument irrespective of whether it takes place on a trading venue. In the case of certain types of MTFs which, like regulated markets, help companies to raise equity finance, the prohibition against market abuse also applies where a request for admission to trading on such a market has been made. The scope of this Regulation should therefore include financial instruments for which an application for admission to trading on an MTF has been made. This should improve investor protection, preserve the integrity of markets and ensure that market abuse of such instruments is clearly prohibited.
- (9) For the purposes of transparency, operators of a regulated market, an MTF or an OTF should notify, without delay, their competent authority of details of the financial instruments which they have admitted to trading, for which there has been a request for admission to trading or that have been traded on their trading venue. A second notification should be made when the instrument ceases to be admitted to trading. Such obligations should also apply to financial instruments for which there has been a request for admission to trading on their trading venue and financial instruments that have been admitted to trading prior to the entry into force of this Regulation. The notifications should be submitted to the European Securities and Markets Authority (ESMA) by the competent authorities and ESMA should publish a list of all of the financial instruments notified. This Regulation applies to financial instruments whether or not they are included in the list published by ESMA.
- (10) It is possible that certain financial instruments which are not traded on a trading venue are used for market abuse. This includes financial instruments the price or value of which depends or has an effect on financial instruments traded on a trading venue, or the trading of which has an effect on the price or value of other financial

instruments traded on a trading venue. Examples of where such instruments can be used for market abuse include inside information relating to a share or bond, which can be used to buy a derivative of that share or bond, or an index the value of which depends on that share or bond. Where a financial instrument is used as a reference price, an OTC-traded derivative can be used to benefit from manipulated prices, or be used to manipulate the price of a financial instrument traded on a trading venue. A further example is the planned issue of a new tranche of securities that do not otherwise fall within the scope of this Regulation, but where trading in those securities could affect the price or value of existing listed securities that fall within the scope of this Regulation. This Regulation also covers the situation where the price or value of an instrument traded on a trading venue depends on an OTC-traded instrument. The same principle should apply to spot commodity contracts the prices of which are based on that of a derivative and to the buying of spot commodity contracts to which financial instruments are referenced.

- (11) Trading in securities or associated instruments for the stabilisation of securities or trading in own shares in buy-back programmes can be legitimate for economic reasons and should, therefore, in certain circumstances, be exempt from the prohibitions against market abuse provided that the actions are carried out under the necessary transparency, where relevant information regarding the stabilisation or buy-back programme is disclosed.
- (12) Trading in own shares in buy-back programmes and Stabilising a financial instrument which would not benefit from the exemptions under this Regulation should not of itself be deemed to constitute market abuse.
- (13) Member States, members of the European System of Central Banks (ESCB), ministries and other agencies and special purpose vehicles of one or several Member States, and the Union and certain other public bodies or persons acting on their behalf should not be restricted in carrying out monetary, exchange-rate or public debt management policy insofar as they are undertaken in the public interest and solely in pursuit of those policies. Neither should transactions or orders carried out, or behaviour by, the Union, a special purpose vehicle of one or several Member States, the European Investment Bank, the European Financial Stability Facility, the European Stability Mechanism or an international financial institution established by two or more Member States, be restricted in mobilising funding and providing financial assistance to the benefit of its members. Such an exemption from the scope of this Regulation may, in accordance with this Regulation, be extended to certain public bodies charged with, or intervening in, public debt management and to central banks of third countries. At the same time, the exemptions for monetary, exchange-rate or public debt management policy should not extend to cases where those bodies engage in transactions, orders or behaviour other than in pursuit of those policies or where persons working for those bodies engage in transactions, orders or behaviour on their own account.
- (14) Reasonable investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the *ex ante* available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances in the given circumstances.
- (15) Ex post information can be used to check the presumption that the *ex ante* information was price sensitive, but should not be used to take action against persons who drew reasonable conclusions from *ex ante* information available to them.
- (16) Where inside information concerns a process which occurs in stages, each stage of the process as well as the overall process could constitute inside information. An intermediate step in a protracted process may in itself constitute a set of circumstances or an event which exists or where there is a realistic prospect that they will come into existence or occur, on the basis of an overall assessment of the factors existing at the relevant time. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration. An intermediate step should be deemed to be inside information if it, by itself, meets the criteria laid down in this Regulation for inside information.

- (17) Information which relates to an event or set of circumstances which is an intermediate step in a protracted process may relate, for example, to the state of contract negotiations, terms provisionally agreed in contract negotiations, the possibility of the placement of financial instruments, conditions under which financial instruments will be marketed, provisional terms for the placement of financial instruments, or the consideration of the inclusion of a financial instrument in a major index or the deletion of a financial instrument from such an index.
- (18) Legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances. For derivatives which are wholesale energy products, information required to be disclosed in accordance with Regulation (EU) No 1227/2011 of the European Parliament and of the Council (<sup>(1)</sup>) should, in particular, be considered as inside information.
- (19) This Regulation is not intended to prohibit discussions of a general nature regarding the business and market developments between shareholders and management concerning an issuer. Such relationships are essential for the efficient functioning of markets and should not be prohibited by this Regulation.
- (20) Spot markets and related derivative markets are highly interconnected and global, and market abuse may take place across markets as well as across borders which can lead to significant systemic risks. This is true for both insider dealing and market manipulation. In particular, inside information from a spot market can benefit a person trading on a financial market. Inside information in relation to a derivative of a commodity should be defined as information which both meets the general definition of inside information in relation to financial markets and which is required to be made public in accordance with legal or regulatory provisions at the Union or national level, market rules, contracts or customs on the relevant commodity derivative or spot market. Notable examples of such rules include Regulation (EU) No 1227/2011 for the energy market and the Joint Organisations Database Initiative (JODI) database for oil. Such information may serve as the basis of market participants' decisions to enter into commodity derivatives or the related spot commodity contracts and should therefore constitute inside information required to be made public, where it is likely to have a significant effect on the prices of such derivatives or related spot commodity contracts.

Moreover, manipulative strategies can also extend across spot and derivatives markets. Trading in financial instruments, including commodity derivatives, can be used to manipulate related spot commodity contracts and spot commodity contracts can be used to manipulate related financial instruments. The prohibition of market manipulation should capture these inter-linkages. However, it is not appropriate or practicable to extend the scope of this Regulation to behaviour that does not involve financial instruments, for example, to trading in spot commodity contracts that only affects the spot market. In the specific case of wholesale energy products, the competent authorities should take into account the specific characteristics of the definitions of Regulation (EU) No 1227/2011 when they apply the definitions of inside information, insider dealing and market manipulation under this Regulation to financial instruments related to wholesale energy products.

- (21) Pursuant to Directive 2003/87/EC of the European Parliament and of the Council (<sup>(2)</sup>), the Commission, Member States and other officially designated bodies are, *inter alia*, responsible for the technical issuance of emission allowances, their free allocation to eligible industry sectors and new entrants and more generally the development and implementation of the Union's climate policy framework which underpins the supply of emission allowances to compliance buyers of the Union's emissions trading scheme (EU ETS). In the exercise of those duties, those public bodies can, *inter alia*, have access to price-sensitive, non-public information and, pursuant to Directive 2003/87/EC, may need to perform certain market operations in relation to emission allowances. As a consequence of the classification of emission allowances as financial instruments as part of the review of Directive 2004/39/EC of the European Parliament and of the Council (<sup>(3)</sup>), those instruments will also fall within the scope of this Regulation.

<sup>(1)</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and Transparency (OJ L 326, 8.12.2011, p. 1).

<sup>(2)</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

<sup>(3)</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

In order to preserve the ability of the Commission, Member States and other officially designated bodies to develop and implement the Union's climate policy, the activities of those public bodies, insofar as they are undertaken in the public interest and explicitly in pursuit of that policy and concerning emission allowances, should be exempt from the application of this Regulation. Such exemption should not have a negative impact on overall market transparency, as those public bodies have statutory obligations to operate in a way that ensures orderly, fair and non-discriminatory disclosure of, and access to, any new decisions, developments and data that have a price-sensitive nature. Furthermore, safeguards of fair and non-discriminatory disclosure of specific price-sensitive information held by public authorities exist under Directive 2003/87/EC and the implementing measures adopted pursuant thereto. At the same time, the exemption for public bodies acting in pursuit of the Union's climate policy should not extend to cases in which those public bodies engage in conduct or in transactions which are not in the pursuit of the Union's climate policy or when persons working for those bodies engage in conduct or in transactions on their own account.

- (22) Pursuant to Article 43 TFEU and to the implementation of international agreements concluded under the TFEU, the Commission, Member States and other officially designated bodies are, inter alia, responsible for pursuing the Common Agricultural Policy (CAP) and the Common Fisheries Policy (CFP). In the exercise of those duties, those public bodies undertake activities and take measures aiming to manage the agricultural markets and fisheries, including those of public intervention, imposing additional, or suspending, import duties. In the light of the scope of this Regulation, certain provisions thereof that apply to spot commodity contracts which have or which are likely to have an effect on financial instruments and financial instruments the value of which depends on the value of spot commodity contracts and which have or which are likely to have an effect on spot commodity contracts, it is necessary to ensure that the activity of the Commission, Member States and other bodies officially designated to pursue the CAP and the CFP, is not restricted. In order to preserve the ability of the Commission, Member States and other officially designated bodies to develop and pursue the CAP and the CFP, their activities, insofar as they are undertaken in the public interest and solely in pursuance of those policies, should be exempted from the application of this Regulation. Such exemption should not have a negative impact on overall market transparency, as those public bodies have statutory obligations to operate in a way that ensures orderly, fair and non-discriminatory disclosure of, and access to, any new decisions, developments and data that have a price-sensitive nature. At the same time, the exemption for public bodies acting in pursuance of the CAP and the CFP should not extend to cases where those public bodies engage in conduct or in transactions which are not in pursuance of the CAP and the CFP or where persons working for those bodies engage in conduct or in transactions on their own account.
- (23) The essential characteristic of insider dealing consists in an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and investor confidence. Consequently, the prohibition against insider dealing should apply where a person who is in possession of inside information takes unfair advantage of the benefit gained from that information by entering into market transactions in accordance with that information by acquiring or disposing of, by attempting to acquire or dispose of, by cancelling or amending, or by attempting to cancel or amend, an order to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. Use of inside information can also consist of trading in emission allowances and derivatives thereof and of bidding in the auctions of emission allowances or other auctioned products based thereon that are held pursuant to Commission Regulation (EU) No 1031/2010 (<sup>1</sup>).
- (24) Where a legal or natural person in possession of inside information acquires or disposes of, or attempts to acquire or dispose of, for his own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates, it should be implied that that person has used that information. That presumption is without prejudice to the rights of the defence. The question whether a person has infringed the prohibition on insider dealing or has attempted to commit insider dealing should be analysed in the light of the purpose of this Regulation, which is to protect the integrity of the financial market and to enhance investor confidence, which is based, in turn, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.

(<sup>1</sup>) Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ L 302, 18.11.2010, p. 1).

- (25) Orders placed before a person possesses inside information should not be deemed to be insider dealing. However, where a person comes into possession of inside information, there should be a presumption that any subsequent change relating that information to orders placed before possession of such information, including the cancellation or amendment of an order, or an attempt to cancel or amend an order, constitutes insider dealing. That presumption could, however, be rebutted if the person establishes that he or she did not use the inside information when carrying out the transaction.
- (26) Use of inside information can consist of the acquisition or disposal of a financial instrument, or an auctioned product based on emission allowances, of the cancellation or amendment of an order, or the attempt to acquire or dispose of a financial instrument or to cancel or amend an order, by a person who knows, or ought to have known, that the information constitutes inside information. In this respect, the competent authorities should consider what a normal and reasonable person knows or should have known in the circumstances.
- (27) This Regulation should be interpreted in a manner consistent with the measures adopted by the Member States to protect the interests of holders of transferable securities carrying voting rights in a company (or which may carry such rights as a consequence of the exercise of rights or conversion) where the company is subject to a public take-over bid or any other proposed change of control. In particular this Regulation should be interpreted in a manner consistent with the laws, regulations and administrative provisions adopted in relation to takeover bids, merger transactions and other transactions affecting ownership or control of companies regulated by the supervisory authorities appointed by Member States pursuant to Article 4 of Directive 2004/25/EC of the European Parliament and of the Council<sup>(1)</sup>.
- (28) Research and estimates based on publicly available data, should not per se be regarded as inside information and the mere fact that a transaction is carried out on the basis of research or estimates should not therefore be deemed to constitute use of inside information. However, for example, where the publication or distribution of information is routinely expected by the market and where such publication or distribution contributes to the price-formation process of financial instruments, or the information provides views from a recognised market commentator or institution which may inform the prices of related financial instruments, the information may constitute inside information. Market actors must therefore consider the extent to which the information is non-public and the possible effect on financial instruments traded in advance of its publication or distribution, to establish whether they would be trading on the basis of inside information.
- (29) In order to avoid inadvertently prohibiting forms of financial activity which are legitimate, namely where there is no effect of market abuse, it is necessary to recognise certain legitimate behaviour. This may include, for example, recognising the role of market makers, when acting in the legitimate capacity of providing market liquidity.
- (30) The mere fact that market makers or persons authorised to act as counterparties confine themselves to pursuing their legitimate business of buying or selling financial instruments or that persons authorised to execute orders on behalf of third parties with inside information confine themselves to carrying out, cancelling or amending an order dutifully, should not be deemed to constitute use of such inside information. However, the protection, laid down in this Regulation, of market makers, bodies authorised to act as counterparties or persons authorised to execute orders on behalf of third parties with inside information, does not extend to activities clearly prohibited under this Regulation including, for example, the practice commonly known as 'front-running'. Where legal persons have taken all reasonable measures to prevent market abuse from occurring but nevertheless natural persons within their employment commit market abuse on behalf of the legal person, this should not be deemed to constitute market abuse by the legal person. Another example that should not be deemed to constitute use of inside information is transactions conducted in the discharge of a prior obligation that has become due. The mere fact of having access to inside information relating to another company and using it in the context of a public takeover bid for the purpose of gaining control of that company or proposing a merger with that company should not be deemed to constitute insider dealing.

<sup>(1)</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).

- (31) Since the acquisition or disposal of financial instruments necessarily involves a prior decision to acquire or dispose taken by the person who undertakes one or other of those operations, the mere fact of making such an acquisition or disposal should not be deemed to constitute use of inside information. Acting on the basis of one's own plans and strategies for trading should not be considered as using inside information. However, none of those legal or natural persons should be protected by virtue of their professional function; they should only be protected if they act in a fit and proper manner, meeting both the standards expected of their profession and of this Regulation namely market integrity and investor protection. An infringement could still be deemed to have occurred if the competent authority established that there was an illegitimate reason behind those transactions or orders or that behaviour, or that the person used inside information.
- (32) Market soundings are interactions between a seller of financial instruments and one or more potential investors, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring. Market soundings could involve an initial or secondary offer of relevant securities, and are distinct from ordinary trading. They are a highly valuable tool to gauge the opinion of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned. They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile. Thus the ability to conduct market soundings is important for the proper functioning of financial markets and market soundings should not in themselves be regarded as market abuse.
- (33) Examples of market soundings include situations in which the sell-side firm has been in discussions with an issuer about a potential transaction, and it has decided to gauge potential investor interest in order to determine the terms that will make up a transaction; where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; or where the sell-side is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors.
- (34) Conducting market soundings may require disclosure to potential investors of inside information. There will generally only be the potential to benefit financially from trading on the basis of inside information passed in a market sounding where there is an existing market in the financial instrument that is the subject of the market sounding or in a related financial instrument. Given the timing of such discussions, it is possible that inside information may be disclosed to the potential investor in the course of the market sounding after a financial instrument has been admitted to trading on a regulated market or has been traded on an MTF or an OTF. Before engaging in a market sounding, the disclosing market participant should assess whether that market sounding will involve the disclosure of inside information.
- (35) Inside information should be deemed as being disclosed legitimately if it is disclosed in the normal course of the exercise of a person's employment, profession or duties. Where a market sounding involves the disclosure of inside information, the disclosing market participant will be considered to be acting within the normal course of his employment, profession or duties where, at the time of making the disclosure, he informs and receives the consent of the person to whom the disclosure is made that he may be given inside information; that he will be restricted by the provisions of this Regulation from trading or acting on that information; that reasonable steps must be taken to protect the ongoing confidentiality of the information; and that he must inform the disclosing market participant of the identities of all natural and legal persons to whom the information is disclosed in the course of developing a response to the market sounding. The disclosing market participant should also comply with the obligations, to be set out in detail in regulatory technical standards, regarding the maintenance of records of information disclosed. There should be no presumption that market participants that do not comply with this Regulation when conducting a market sounding have unlawfully disclosed inside information but they should not be able to take advantage of the exemption given to those who have complied with such provisions. The question whether they have infringed the prohibition against the unlawful disclosure of inside information should be analysed in light of all the relevant provisions of this Regulation, and all disclosing market participants should be under an obligation to record in writing their assessment, before engaging in a market sounding, whether that market sounding will involve the disclosure of inside information.

- (36) Potential investors who are the subject of a market sounding should, in turn, consider if the information disclosed to them amounts to inside information which would prohibit them from dealing on the basis of it or further disclosing that information. Potential investors remain subject to the rules on insider dealing and unlawful disclosure of inside information, as set out in this Regulation. In order to assist potential investors in their considerations and as regards what steps they should take so as not to contravene this Regulation, ESMA should issue guidelines.
- (37) Regulation (EU) No 1031/2010 provides for two parallel market abuse regimes applicable to the auctions of emission allowances. However, as a consequence of the classification of emission allowances as financial instruments, this Regulation should constitute a single rule book of market abuse measures applicable to the entirety of the primary and secondary markets in emission allowances. This Regulation should also apply to behaviour or transactions, including bids, relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products based thereon, including when auctioned products are not financial instruments, pursuant to Regulation (EU) No 1031/2010.
- (38) This Regulation should provide measures regarding market manipulation that are capable of being adapted to new forms of trading or new strategies that may be abusive. To reflect the fact that trading in financial instruments is increasingly automated, it is desirable that the definition of market manipulation provide examples of specific abusive strategies that may be carried out by any available means of trading including algorithmic and high-frequency trading. The examples provided are neither intended to be exhaustive nor intended to suggest that the same strategies carried out by other means would not also be abusive.
- (39) The prohibitions against market abuse should also cover those persons who act in collaboration to commit market abuse. Examples could include, but are not limited to, brokers who devise and recommend a trading strategy designed to result in market abuse, persons who encourage a person with inside information to disclose that information unlawfully or persons who develop software in collaboration with a trader for the purpose of facilitating market abuse.
- (40) To ensure that liability is conferred on both the legal person and any natural person who participates in the decision-making of the legal person, it is necessary to give recognition of the different national legal mechanisms in Member States. Such mechanisms should relate directly to the methods of attribution of liability in national law.
- (41) In order to complement the prohibition of market manipulation, this Regulation should include a prohibition against attempting to engage in market manipulation. An attempt to engage in market manipulation should be distinguished from behaviour which is likely to result in market manipulation as both activities are prohibited under this Regulation. Such an attempt may include situations where the activity is started but is not completed, for example as a result of failed technology or an instruction to trade which is not acted upon. Prohibiting attempts to engage in market manipulation is necessary to enable competent authorities to impose sanctions for such attempts.
- (42) Without prejudice to the aim of this Regulation and its directly applicable provisions, a person who enters into transactions or issues orders to trade which may be deemed to constitute market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the market concerned. An accepted market practice can only be established by the competent authority responsible for the market abuse supervision of the market concerned. A practice that is accepted in a particular market cannot be considered applicable to other markets unless the competent authorities of such other markets have officially accepted that practice. An infringement could still be deemed to have occurred if the competent authority established that there was an illegitimate reason behind these transactions or orders to trade.
- (43) This Regulation should also clarify that engaging in market manipulation or attempting to engage in market manipulation in a financial instrument may take the form of using related financial instruments such as derivative instruments that are traded on another trading venue or OTC.

- (44) Many financial instruments are priced by reference to benchmarks. The actual or attempted manipulation of benchmarks, including interbank offer rates, can have a serious impact on market confidence and may result in significant losses to investors or distort the real economy. Therefore, specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that competent authorities can enforce a clear prohibition of the manipulation of benchmarks. Those provisions should cover all published benchmarks including those accessible through the internet whether free of charge or not such as CDS benchmarks and indices of indices. It is necessary to complement the general prohibition of market manipulation by prohibiting the manipulation of the benchmark itself and the transmission of false or misleading information, provision of false or misleading inputs, or any other action that manipulates the calculation of a benchmark, where that calculation is broadly defined to include the receipt and evaluation of all data which relates to the calculation of that benchmark and include in particular trimmed data, and including the benchmark's methodology, whether algorithmic or judgement-based in whole or in part. Those rules are in addition to Regulation (EU) No 1227/2011 which prohibits the deliberate provision of false information to undertakings which provide price assessments or market reports on wholesale energy products with the effect of misleading market participants acting on the basis of those price assessments or market reports.
- (45) In order to ensure uniform market conditions between trading venues and facilities subject to this Regulation, any person who operates regulated markets, MTFs and OTFs should be required to establish and to maintain effective arrangements, systems and procedures aimed at preventing and detecting market manipulation and abusive practices.
- (46) Manipulation or attempted manipulation of financial instruments may also consist in placing orders which may not be executed. Furthermore, a financial instrument may be manipulated through behaviour which occurs outside a trading venue. Persons professionally arranging or executing transactions should be required to establish and to maintain effective arrangements, systems and procedures in place to detect and report suspicious transactions. They should also report suspicious orders and suspicious transactions that take place outside a trading venue.
- (47) The manipulation or attempted manipulation of financial instruments may also consist in disseminating false or misleading information. The spreading of false or misleading information can have a significant impact on the prices of financial instruments in a relatively short period of time. It may consist in the invention of manifestly false information, but also the wilful omission of material facts, as well as the knowingly inaccurate reporting of information. That form of market manipulation is particularly harmful to investors, because it causes them to base their investment decisions on incorrect or distorted information. It is also harmful to issuers, because it reduces the trust in the available information related to them. A lack of market trust can in turn jeopardise an issuer's ability to issue new financial instruments or to secure credit from other market participants in order to finance its operations. Information spreads through the market place very quickly. As a result, the harm to investors and issuers may persist for a relatively long time until the information is found to be false or misleading, and can be corrected by the issuer or those responsible for its dissemination. It is therefore necessary to qualify the spreading of false or misleading information, including rumours and false or misleading news, as being an infringement of this Regulation. It is therefore appropriate not to allow those active in the financial markets to freely express information contrary to their own opinion or better judgement, which they know or should know to be false or misleading, to the detriment of investors and issuers.
- (48) Given the rise in the use of websites, blogs and social media, it is important to clarify that disseminating false or misleading information via the internet, including through social media sites or unattributable blogs, should be considered, for the purposes of this Regulation, to be equivalent to doing so via more traditional communication channels.
- (49) The public disclosure of inside information by an issuer is essential to avoid insider dealing and ensure that investors are not misled. Issuers should therefore be required to inform the public as soon as possible of inside information. However that obligation may, under special circumstances, prejudice the legitimate interests of the issuer. In such circumstances, delayed disclosure should be permitted provided that the delay would not be likely to mislead the public and the issuer is able to ensure the confidentiality of the information. The issuer is only under an obligation to disclose inside information if it has requested or approved admission of the financial instrument to trading.

- (50) For the purposes of applying the requirements relating to public disclosure of inside information and delaying such public disclosure, as provided for in this Regulation, legitimate interests may, in particular, relate to the following non-exhaustive circumstances: (a) ongoing negotiations, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger, although not within the scope of the applicable insolvency law, public disclosure of information may be delayed for a limited period where such a public disclosure would seriously jeopardise the interest of existing and potential shareholders by undermining the conclusion of specific negotiations designed to ensure the long-term financial recovery of the issuer; (b) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between those bodies, provided that public disclosure of the information before such approval, together with the simultaneous announcement that the approval remains pending, would jeopardise the correct assessment of the information by the public.
- (51) Moreover, the requirement to disclose inside information needs to be addressed to the participants in the emission allowance market. In order to avoid exposing the market to reporting that is not useful and to maintain cost-efficiency of the measure foreseen, it appears necessary to limit the regulatory impact of that requirement to only those EU ETS operators which, by virtue of their size and activity, can reasonably be expected to be able to have a significant effect on the price of emission allowances, of auctioned products based thereon, or of derivative financial instruments relating thereto and for bidding in the auctions pursuant to Regulation (EU) No 1031/2010. The Commission should adopt measures establishing a minimum threshold for the purposes of application of that exemption by means of a delegated act. The information to be disclosed should concern the physical operations of the disclosing party and not own plans or strategies for trading emission allowances, auctioned products based thereon, or derivative financial instruments relating thereto. Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011, the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content. In the case of participants in the emission allowance market with aggregate emissions or rated thermal input at or below the threshold set, since the information about their physical operations is deemed to be non-material for the purposes of disclosure, it should also be deemed not to have a significant effect on the price of emission allowances, of auctioned products based thereon, or of the derivative financial instruments relating thereto. Such participants in the emission allowance market should nevertheless be covered by the prohibition of insider dealing in relation to any other information they have access to and which is inside information.
- (52) In order to protect the public interest, to preserve the stability of the financial system and, for example, to avoid liquidity crises in financial institutions from turning into solvency crises due to a sudden withdrawal of funds, it may be appropriate to allow, in exceptional circumstances, the delay of the disclosure of inside information for credit institutions or financial institutions. In particular, this may apply to information pertinent to temporary liquidity problems, where they need to receive central banking lending including emergency liquidity assistance from a central bank where disclosure of the information would have a systemic impact. This delay should be conditional upon the issuer obtaining the consent of the relevant competent authority and it being clear that the wider public and economic interest in delaying disclosure outweighs the interest of the market in receiving the information which is subject to delay.
- (53) In respect of financial institutions, in particular where they receive central bank lending, including emergency liquidity assistance, the assessment of whether the information is of systemic importance and whether delay of disclosure is in the public interest should be made by the competent authority, after consulting, as appropriate, the national central bank, the macro-prudential authority or any other relevant national authority.
- (54) The use or attempted use of inside information to trade on one's own account or on the account of a third party should be clearly prohibited. Use of inside information can also consist of trading in emission allowances and derivatives thereof and of bidding in the auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010 by persons who know, or who ought to know, that the information they possess constitutes inside information. Information regarding the market participant's own plans and strategies for trading should not be considered to be inside information, although information regarding a third party's plans and strategies for trading may amount to inside information.

- (55) The requirement to disclose inside information can be burdensome for small and medium-sized enterprises, as defined in Directive 2014/65/EU of the European Parliament and of the Council (<sup>1</sup>), whose financial instruments are admitted to trading on SME growth markets, given the costs of monitoring information in their possession and seeking legal advice about whether and when information needs to be disclosed. Nevertheless, prompt disclosure of inside information is essential to ensure investor confidence in those issuers. Therefore, ESMA should be able to issue guidelines which assist issuers to comply with the obligation to disclose inside information without compromising investor protection.
- (56) Insider lists are an important tool for regulators when investigating possible market abuse, but national differences in regard to data to be included in those lists impose unnecessary administrative burdens on issuers. Data fields required for insider lists should therefore be uniform in order to reduce those costs. It is important that persons included on insider lists are informed of that fact and of its implications under this Regulation and Directive 2014/57/EU of the European Parliament and of the Council (<sup>2</sup>). The requirement to keep and constantly update insider lists imposes administrative burdens specifically on issuers on SME growth markets. As competent authorities are able to exercise effective market abuse supervision without having those lists available at all times for those issuers, they should be exempt from this obligation in order to reduce the administrative costs imposed by this Regulation. However, such issuers should provide an insider list to the competent authorities upon request.
- (57) The establishment, by issuers or any person acting on their behalf or account, of lists of persons working for them under a contract of employment or otherwise and having access to inside information relating, directly or indirectly, to the issuer, is a valuable measure for protecting market integrity. Such lists may serve issuers or such persons to control the flow of inside information and thereby help manage their confidentiality duties. Moreover, such lists may also constitute a useful tool for competent authorities to identify any person who has access to inside information and the date on which they gained access. Access to inside information relating, directly or indirectly, to the issuer by persons included on such a list is without prejudice to the prohibitions laid down in this Regulation.
- (58) Greater transparency of transactions conducted by persons discharging managerial responsibilities at the issuer level and, where applicable, persons closely associated with them, constitutes a preventive measure against market abuse, particularly insider dealing. The publication of those transactions on at least an individual basis can also be a highly valuable source of information to investors. It is necessary to clarify that the obligation to publish those managers' transactions also includes the pledging or lending of financial instruments, as the pledging of shares can result in a material and potentially destabilising impact on the company in the event of a sudden, unforeseen disposal. Without disclosure, the market would not know that there was the increased possibility of, for example, a significant future change in share ownership, an increase in the supply of shares to the marketplace or a loss of voting rights in that company. For that reason, notification under this Regulation is required where the pledge of the securities is made as part of a wider transaction in which the manager pledges the securities as collateral to gain credit from a third party. Additionally, full and proper market transparency is a prerequisite for the confidence of market actors and, in particular, the confidence of a company's shareholders. It is also necessary to clarify that the obligation to publish those managers' transactions includes transactions by another person exercising discretion for the manager. In order to ensure an appropriate balance between the level of transparency and the number of reports notified to competent authorities and the public, thresholds should be introduced in this Regulation below which transactions need not be notified.
- (59) The notification of transactions conducted by persons discharging managerial responsibilities on their own account, or by a person closely associated with them, is not only valuable information for market participants, but also constitutes an additional means for competent authorities to supervise markets. The obligation to notify transactions is without prejudice to the prohibitions laid down in this Regulation.
- (60) Notification of transactions should be in accordance with the rules on transfer of personal data laid down in Directive 95/46/EC of the European Parliament and of the Council (<sup>3</sup>).

(<sup>1</sup>) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/67/EU (see page 349 of this Official Journal).

(<sup>2</sup>) Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (see page 179 of this Official Journal).

(<sup>3</sup>) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on protection of individuals with regard to the processing of personal data and on the movement of such data (OJ L 281, 23.11.1995, p. 31).

- (61) Persons discharging managerial responsibilities should be prohibited from trading before the announcement of an interim financial report or a year-end report which the relevant issuer is obliged to make public according to the rules of the trading venue where the issuer's shares are admitted to trading or according to national law, unless specific and restricted circumstances exist which would justify a permission by the issuer allowing a person discharging managerial responsibilities to trade. However, any such permission by the issuer is without prejudice to the prohibitions laid down in this Regulation.
- (62) A set of effective tools and powers and resources for the competent authority of each Member State guarantees supervisory effectiveness. Accordingly, this Regulation, in particular, provides for a minimum set of supervisory and investigative powers competent authorities of Member States should be entrusted with under national law. Those powers should be exercised, where the national law so requires, by application to the competent judicial authorities. When exercising their powers under this Regulation competent authorities should act objectively and impartially and should remain autonomous in their decision making.
- (63) Market undertakings and all economic actors should also contribute to market integrity. In that sense, the designation of a single competent authority for market abuse should not exclude collaboration links or delegation under the responsibility of the competent authority, between that authority and market undertakings with a view to guaranteeing efficient supervision of compliance with the provisions in this Regulation. Where persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy in one or more financial instruments also deal on own account in such instruments, the competent authorities should, *inter alia*, be able to require or demand from such persons any information necessary to determine whether the recommendations produced or disseminated by that person are compliant with this Regulation.
- (64) For the purpose of detecting cases of insider dealing and market manipulation, it is necessary for competent authorities to have, in accordance with national law, the ability to access the premises of natural and legal persons in order to seize documents. Access to such premises is necessary where there is a reasonable suspicion that documents and other data relating to the subject matter of an investigation exist and may be relevant to prove a case of insider dealing or market abuse. Additionally access to such premises is necessary where the person of whom a demand for information has already been made fails, wholly or in part, to comply with it or where there are reasonable grounds for believing that if a demand were to be made it would not be complied with or that the documents or information to which the information requirement relates would be removed, tampered with or destroyed. If prior authorisation is needed from the judicial authority of the Member State concerned, in accordance with national law, access to premises should take place after having obtained that prior judicial authorisation.
- (65) Existing recordings of telephone conversations and data traffic records from investment firms, credit institutions and financial institutions executing and documenting the execution of transactions, as well as existing telephone and data traffic records from telecommunications operators, constitute crucial, and sometimes the only, evidence to detect and prove the existence of insider dealing and market manipulation. Telephone and data traffic records may establish the identity of a person responsible for the dissemination of false or misleading information or that persons have been in contact at a certain time, and that a relationship exists between two or more people. Therefore, competent authorities should be able to require existing recordings of telephone conversations, electronic communications and data traffic records held by an investment firm, a credit institution or a financial institution in accordance with Directive 2014/65/EU. Access to data and telephone records is necessary to provide evidence and investigate leads on possible insider dealing or market manipulation, and therefore for detecting and imposing sanctions for market abuse. In order to introduce a level playing field in the Union in relation to the access to telephone and existing data traffic records held by a telecommunications operator or the existing recordings of telephone conversations and data traffic held by an investment firm, a credit institution or a financial institution, competent authorities should, in accordance with national law, be able to require existing telephone and existing data traffic records held by a telecommunications operator, insofar as permitted under national law and existing recordings of telephone conversations as well as data traffic held by an investment firm, in cases where a reasonable suspicion exists that such records related to the subject matter of the inspection or investigation may be relevant to prove insider dealing or market manipulation infringing this Regulation. Access to telephone and data traffic records held by a telecommunications operator does not encompass access to the content of voice communications by telephone.

- (66) While this Regulation specifies a minimum set of powers competent authorities should have, those powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. For the exercise of those powers, which may amount to serious interferences with the right to respect for private and family life, home and communications, Member States should have in place adequate and effective safeguards against any abuse, for instance, where appropriate a requirement to obtain prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result.
- (67) Since market abuse can take place across borders and markets, in all but exceptional circumstances competent authorities should be required to cooperate and exchange information with other competent and regulatory authorities, and with ESMA, in particular in relation to investigation activities. Where a competent authority is convinced that market abuse is being, or has been, carried out in another Member State or affects financial instruments traded in another Member State, it should notify that fact to the competent authority and ESMA. In cases of market abuse with cross-border effects, ESMA should be able to coordinate the investigation if requested to do so by one of the competent authorities concerned.
- (68) It is necessary for competent authorities to have the necessary tools for effective cross-market order book surveillance. Pursuant to Directive 2014/65/EU, competent authorities are able to request and receive data from other competent authorities relating to the order book to assist in monitoring and detecting market manipulation on a cross-border basis.
- (69) In order to ensure exchanges of information and cooperation with third-country authorities in relation to the effective enforcement of this Regulation, competent authorities should conclude cooperation arrangements with their counterparts in third countries. Any transfer of personal data carried out on the basis of those agreements should comply with Directive 95/46/EC and with Regulation (EC) No 45/2001 of the European Parliament and of the Council<sup>(1)</sup>.
- (70) A sound prudential and conduct of business framework for the financial sector should rest on strong supervisory, investigation and sanction regimes. To that end, supervisory authorities should be equipped with sufficient powers to act and should be able to rely on equal, strong and deterrent sanction regimes against all financial misconduct, and sanctions should be enforced effectively. However, the de Larosière Group considered that none of those elements is currently in place. A review of existing powers to impose sanctions and their practical application aimed at promoting convergence of sanctions across the range of supervisory activities has been carried out in the Commission Communication of 8 December 2010 on Reinforcing sanctioning regimes in the financial sector.
- (71) Therefore, a set of administrative sanctions and other administrative measures should be provided for to ensure a common approach in Member States and to enhance their deterrent effect. The possibility of a ban from exercising management functions within investment firms should be available to the competent authority. Sanctions imposed in specific cases should be determined taking into account where appropriate factors such as the disgorgement of any identified financial benefit, the gravity and duration of the infringement, any aggravating or mitigating factors, the need for fines to have a deterrent effect and, where appropriate, include a discount for cooperation with the competent authority. In particular, the actual amount of administrative fines to be imposed in a specific case may reach the maximum level provided for in this Regulation, or the higher level provided for in national law, for very serious infringements, while fines significantly lower than the maximum level may be applied to minor infringements or in case of settlement. This Regulation does not limit Member States' ability to provide for higher administrative sanctions or other administrative measures.
- (72) Even though nothing prevents Member States from laying down rules for administrative as well as criminal sanctions for the same infringements, they should not be required to lay down rules for administrative sanctions for infringements of this Regulation which are already subject to national criminal law by 3 July 2016. In accordance with national law, Member States are not obliged to impose both administrative and

<sup>(1)</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

criminal sanctions for the same offence, but they can do so if their national law so permits. However, maintenance of criminal sanctions rather than administrative sanctions for infringements of this Regulation or of Directive 2014/57/EU should not reduce or otherwise affect the ability of competent authorities to cooperate and access and exchange information in a timely manner with competent authorities in other Member States for the purposes of this Regulation, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.

- (73) In order to ensure that decisions made by competent authorities have a dissuasive effect on the public at large, they should normally be published. The publication of decisions is also an important tool for competent authorities to inform market participants of what behaviour is considered to be an infringement of this Regulation and to promote good behaviour amongst market participants. If such publication causes disproportionate damage to the persons involved or jeopardises the stability of financial markets or an ongoing investigation the competent authority should publish the administrative sanctions and other administrative measures on an anonymous basis in accordance with national law or delay the publication. Competent authorities should have the option of not publishing sanctions and other administrative measures where anonymous or delayed publication is considered to be insufficient to ensure that the stability of the financial markets will not be jeopardised. Competent authorities should also not be required to publish measures which are deemed to be of a minor nature and the publication of which would be disproportionate.
- (74) Whistleblowers may bring new information to the attention of competent authorities which assists them in detecting and imposing sanctions in cases of insider dealing and market manipulation. However, whistleblowing may be deterred for fear of retaliation, or for lack of incentives. Reporting of infringements of this Regulation is necessary to ensure that a competent authority may detect and impose sanctions for market abuse. Measures regarding whistleblowing are necessary to facilitate detection of market abuse and to ensure the protection and the respect of the rights of the whistleblower and the accused person. This Regulation should therefore ensure that adequate arrangements are in place to enable whistleblowers to alert competent authorities to possible infringements of this Regulation and to protect them from retaliation. Member States should be allowed to provide for financial incentives for those persons who offer relevant information about potential infringements of this Regulation. However, whistleblowers should only be entitled to such financial incentives where they bring to light new information which they are not already legally obliged to notify and where that information results in a sanction for an infringement of this Regulation. Member States should also ensure that whistleblowing schemes that they implement include mechanisms that provide appropriate protection of an accused person, particularly with regard to the right to the protection of his personal data and procedures to ensure the right of the accused person of defence and to be heard before the adoption of a decision concerning him as well as the right to seek effective remedy before a court against a decision concerning him.
- (75) Since Member States have adopted legislation implementing Directive 2003/6/EC, and since the delegated acts, regulatory technical standards and implementing technical standards provided for in this Regulation should be adopted before the framework to be introduced can be usefully applied, it is necessary to defer the application of the substantive provisions of this Regulation for a sufficient period of time.
- (76) In order to facilitate a smooth transition to the entry into application of this Regulation, market practices existing before the entry into force of this Regulation and accepted by competent authorities in accordance with Commission Regulation (EC) No 2273/2003 (<sup>1</sup>) for the purpose of applying point 2(a) of Article 1 of Directive 2003/6/EC, may remain applicable provided that they are notified to ESMA within a prescribed time period, until the competent authority has made a decision regarding the continuation of those practices in accordance with this Regulation.
- (77) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (Charter). Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles. In particular, when this Regulation refers to rules governing the freedom of the press and the freedom of expression in other media and the rules or codes governing the journalist profession, account should be taken of those freedoms as guaranteed in the Union and in the Member States and as recognised pursuant to Article 11 of the Charter and to other relevant provisions.

<sup>(1)</sup> Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJ L 336, 23.12.2003, p. 33).

- (78) In order to increase transparency and to better inform the operation of the sanction regimes, competent authorities should provide anonymised and aggregated data to ESMA on an annual basis. That data should comprise the number of investigations that have been opened, the number that are ongoing and the number that have been closed during the relevant period.
- (79) Directive 95/46/EC and Regulation (EC) No 45/2001 govern the processing of personal data carried out by ESMA within the framework of this Regulation and under the supervision of the Member States competent authorities, in particular the public independent authorities designated by the Member States. Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001.
- (80) This Regulation, as well as the delegated acts, implementing acts, regulatory technical standards, implementing technical standards and guidelines adopted in accordance therewith, are without prejudice to the application of Union rules on competition.
- (81) In order to specify the requirements set out in this Regulation, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of the exemption from the scope of this Regulation of certain public bodies and central banks of third countries and of certain designated public bodies of third countries that have a linking agreement with the Union within the meaning of Article 25 of Directive 2003/87/EC; the indicators for manipulative behaviour listed in Annex I to this Regulation; the thresholds for determining the application of the public disclosure obligation to emission allowance market participants; the circumstances under which trading during a closed period is permitted; and the types of certain transactions conducted by persons discharging managerial responsibilities or persons closely associated with them that would trigger a requirement to notify. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (82) In order to ensure uniform conditions for the implementation of this Regulation in respect of procedures for the reporting of infringements of this Regulation, implementing powers should be conferred on the Commission to specify those procedures, including the arrangements for following up of the reports and measures for the protection of persons working under a contract of employment and measures for the protection of personal data. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council (¹).
- (83) Technical standards in financial services should ensure uniform conditions across the Union in matters covered by this Regulation. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA with the elaboration of draft regulatory technical standards and draft implementing technical standards which do not involve policy choices, for submission to the Commission.
- (84) The Commission should be empowered to adopt the draft regulatory technical standards developed by ESMA to specify the content of notifications that will have to be made by the operators of regulated markets, MTFs and OTFs concerning the financial instruments that are admitted to trading, traded, or for which a request for admission to trading on their trading venue has been made; the manner and conditions of compilation, publication and maintenance of the list of those instruments by ESMA; the conditions that buy-back programmes and stabilisation measures must meet including conditions for trading, time and volume restrictions, disclosure and reporting obligations and price conditions for the stabilisation; in relation to procedures and arrangements, systems for trading venues aimed at preventing and detecting market abuse and of systems and templates to be used by

(¹) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

persons in order to detect and notify suspicious orders and transactions; appropriate arrangements, procedures and record-keeping requirements in the process of market soundings; and in respect of technical arrangements for categories of persons for objective presentation of information recommending an investment strategy and for disclosure of particular interests or indications of conflicts of interest by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>(1)</sup>. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.

- (85) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1093/2010. ESMA should be entrusted with drafting implementing technical standards for submission to the Commission with regard to public disclosure of inside information, formats of insider lists and formats and procedures for the cooperation and exchange of information of competent authorities among themselves and with ESMA.
- (86) Since the objective of this Regulation, namely to prevent market abuse in the form of insider dealing, the unlawful disclosure of inside information and market manipulation, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, 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.
- (87) The provisions of Directive 2003/6/EC being no longer relevant or sufficient, that Directive should be repealed from 3 July 2016. The requirements and prohibitions of this Regulation are strictly related to those in Directive 2014/65/EU and should therefore enter into force on the date of entry into force of that Directive.
- (88) For the correct application of this Regulation, it is necessary that Member States take all necessary measures in order to ensure that their national law comply by 3 July 2016 with the provisions of this Regulation concerning competent authorities and their powers, administrative sanctions and other administrative measures, the reporting of infringements and the publication of decisions.
- (89) The European Data Protection Supervisor delivered an opinion on 10 February 2012<sup>(2)</sup>,

HAVE ADOPTED THIS REGULATION:

## CHAPTER 1

### GENERAL PROVISIONS

#### *Article 1*

##### **Subject matter**

This Regulation establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation (market abuse) as well as measures to prevent market abuse to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets.

#### *Article 2*

##### **Scope**

1. This Regulation applies to the following:

1. financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;

<sup>(1)</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).

<sup>(2)</sup> OJ C 177, 20.6.2012, p. 1.

- (b) financial instruments traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;
- (c) financial instruments traded on an OTF;
- (d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

This Regulation also applies to behaviour or transactions, including bids, relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products based thereon, including when auctioned products are not financial instruments, pursuant to Regulation (EU) No 1031/2010. Without prejudice to any specific provisions referring to bids submitted in the context of an auction, any requirements and prohibitions in this Regulation referring to orders to trade shall apply to such bids.

2. Articles 12 and 15 also apply to:

- (a) spot commodity contracts, which are not wholesale energy products, where the transaction, order or behaviour has or is likely or intended to have an effect on the price or value of a financial instrument referred to in paragraph 1;
- (b) types of financial instruments, including derivative contracts or derivative instruments for the transfer of credit risk, where the transaction, order, bid or behaviour has or is likely to have an effect on the price or value of a spot commodity contract where the price or value depends on the price or value of those financial instruments; and
- (c) behaviour in relation to benchmarks.

3. This Regulation applies to any transaction, order or behaviour concerning any financial instrument as referred to in paragraphs 1 and 2, irrespective of whether or not such transaction, order or behaviour takes place on a trading venue.

4. The prohibitions and requirements in this Regulation shall apply to actions and omissions, in the Union and in a third country, concerning the instruments referred to in paragraphs 1 and 2.

### *Article 3*

#### **Definitions**

1. For the purposes of this Regulation, the following definitions apply:

- (1) 'financial instrument' means a financial instrument as defined in point (15) of Article 4(1) of Directive 2014/65/EU;
- (2) 'investment firm' means an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU;
- (3) 'credit institution' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (<sup>(1)</sup>);
- (4) 'financial institution' means a financial institution as defined in point (26) of Article 4(1) of Regulation (EU) No 575/2013;
- (5) 'market operator' means a market operator as defined in point (18) of Article 4(1) of Directive 2014/65/EU;
- (6) 'regulated market' means a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU;

<sup>(1)</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).

- (7) 'multilateral trading facility' or 'MTF' means a multilateral system as defined in point (22) of Article 4(1) of Directive 2014/65/EU;
- (8) 'organised trading facility' or 'OTF' means a system or facility in the Union as defined in point (23) of Article 4(1) of Directive 2014/65/EU;
- (9) 'accepted market practice' means a specific market practice that is accepted by a competent authority in accordance with Article 13;
- (10) 'trading venue' means a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU;
- (11) 'SME growth market' means SME growth market as defined in point (12) of Article 4(1) of Directive 2014/65/EU;
- (12) 'competent authority' means an authority designated in accordance with Article 22, unless otherwise specified in this Regulation;
- (13) 'person' means a natural or legal person;
- (14) 'commodity' means a commodity as defined in point (1) of Article 2 of Commission Regulation (EC) No 1287/2006 (<sup>1</sup>);
- (15) 'spot commodity contract' means a contract for the supply of a commodity traded on a spot market which is promptly delivered when the transaction is settled, and a contract for the supply of a commodity that is not a financial instrument, including a physically settled forward contract;
- (16) 'spot market' means a commodity market in which commodities are sold for cash and promptly delivered when the transaction is settled, and other non-financial markets, such as forward markets for commodities;
- (17) 'buy-back programme' means trading in own shares in accordance with Articles 21 to 27 of Directive 2012/30/EU of the European Parliament and of the Council (<sup>2</sup>);
- (18) 'algorithmic trading' means algorithmic trading as defined in point (39) of Article 4(1) of Directive 2014/65/EU;
- (19) 'emission allowance' means emission allowance as described in point (11) of Section C of Annex I to Directive 2014/65/EU;
- (20) 'emission allowance market participant' means any person who enters into transactions, including the placing of orders to trade, in emission allowances, auctioned products based thereon, or derivatives thereof and who does not benefit from an exemption pursuant to the second subparagraph of Article 17(2);
- (21) 'issuer' means a legal entity governed by private or public law, which issues or proposes to issue financial instruments, the issuer being, in case of depository receipts representing financial instruments, the issuer of the financial instrument represented;
- (22) 'wholesale energy product' means wholesale energy product as defined in point (4) of Article 2 of Regulation (EU) No 1227/2011;

(<sup>1</sup>) Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 1).

(<sup>2</sup>) Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

(23) 'national regulatory authority' means national regulatory authority as defined in point (10) of Article 2 of Regulation (EU) No 1227/2011;

(24) 'commodity derivatives' means commodity derivatives as defined in point (30) of Article 2(1) of Regulation (EU) No 600/2014 of the European Parliament and of the Council (<sup>(1)</sup>);

(25) 'person discharging managerial responsibilities' means a person within an issuer, an emission allowance market participant or another entity referred to in Article 19(10), who is:

(a) a member of the administrative, management or supervisory body of that entity; or

(b) a senior executive who is not a member of the bodies referred to in point (a), who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity;

(26) 'person closely associated' means:

(a) a spouse, or a partner considered to be equivalent to a spouse in accordance with national law;

(b) a dependent child, in accordance with national law;

(c) a relative who has shared the same household for at least one year on the date of the transaction concerned; or

(d) a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to in point (a), (b) or (c), which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person;

(27) 'data traffic records' means records of traffic data as defined in point (b) of the second paragraph of Article 2 of Directive 2002/58/EC of the European Parliament and the Council (<sup>(2)</sup>);

(28) 'person professionally arranging or executing transactions' means a person professionally engaged in the reception and transmission of orders for, or in the execution of transactions in, financial instruments;

(29) 'benchmark' means any rate, index or figure, made available to the public or published that is periodically or regularly determined by the application of a formula to, or on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates or other values, or surveys, and by reference to which the amount payable under a financial instrument or the value of a financial instrument is determined;

(30) 'market maker' means a market maker as defined in point (7) of Article 4(1) of Directive 2014/65/EU;

(31) 'stake-building' means an acquisition of securities in a company which does not trigger a legal or regulatory obligation to make an announcement of a takeover bid in relation to that company;

(32) 'disclosing market participant' means a person who falls into any of the categories set out in points (a) to (d) of Article 11(1) or of Article 11(2), and discloses information in the course of a market sounding;

(<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 (see page 84 of this Official Journal).

(<sup>(2)</sup>) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

(33) 'high-frequency trading' means high-frequency algorithmic trading technique as defined in point (40) of Article 4(1) of Directive 2014/65/EU;

(34) 'information recommending or suggesting an investment strategy' means information:

(i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or

(ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument;

(35) 'investment recommendations' means information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public.

2. For the purposes of Article 5, the following definitions apply:

(a) 'securities' means:

(i) shares and other securities equivalent to shares;

(ii) bonds and other forms of securitised debt; or

(iii) securitised debt convertible or exchangeable into shares or into other securities equivalent to shares.

(b) 'associated instruments' means the following financial instruments, including those which are not admitted to trading or traded on a trading venue, or for which a request for admission to trading on a trading venue has not been made:

(i) contracts or rights to subscribe for, acquire or dispose of securities;

(ii) financial derivatives of securities;

(iii) where the securities are convertible or exchangeable debt instruments, the securities into which such convertible or exchangeable debt instruments may be converted or exchanged;

(iv) instruments which are issued or guaranteed by the issuer or guarantor of the securities and whose market price is likely to materially influence the price of the securities, or vice versa;

(v) where the securities are securities equivalent to shares, the shares represented by those securities and any other securities equivalent to those shares;

(c) 'significant distribution' means an initial or secondary offer of securities that is distinct from ordinary trading both in terms of the amount in value of the securities to be offered and the selling method to be employed;

(d) 'stabilisation' means a purchase or offer to purchase securities, or a transaction in associated instruments equivalent thereto, which is undertaken by a credit institution or an investment firm in the context of a significant distribution of such securities exclusively for supporting the market price of those securities for a predetermined period of time, due to a selling pressure in such securities.

**Article 4****Notifications and list of financial instruments**

1. Market operators of regulated markets and investment firms and market operators operating an MTF or an OTF shall, without delay, notify the competent authority of the trading venue of any financial instrument for which a request for admission to trading on their trading venue is made, which is admitted to trading, or which is traded for the first time.

They shall also notify the competent authority of the trading venue when a financial instrument ceases to be traded or to be admitted to trading, unless the date on which the financial instrument ceases to be traded or to be admitted to trading is known and was referred to in the notification made in accordance with the first subparagraph.

Notifications referred to in this paragraph shall include, as appropriate, the names and identifiers of the financial instruments concerned, and the date and time of the request for admission to trading, admission to trading, and the date and time of the first trade.

Market operators and investment firms shall also transmit to the competent authority of the trading venue the information set out in the third subparagraph with regard to financial instruments that were the subject of a request for admission to trading or that were admitted to trading before 2 July 2014, and that are still admitted to trading or traded on that date.

2. Competent authorities of the trading venue shall transmit notifications that they receive pursuant to paragraph 1 to ESMA without delay. ESMA shall publish those notifications on its website in the form of a list immediately on receipt. ESMA shall update that list immediately on receipt of a notification by a competent authority of the trading venue. The list shall not limit the scope of this Regulation.

3. The list shall contain the following information:

- (a) the names and identifiers of financial instruments which are the subject of a request for admission to trading, admitted to trading or traded for the first time, on regulated markets, MTFs and OTFs;
- (b) the dates and times of the requests for admission to trading, of the admissions to trading, or of the first trades;
- (c) details of the trading venues on which the financial instruments are the subject of a request for admission to trading, admitted to trading or traded for the first time; and
- (d) the date and time at which the financial instruments cease to be traded or to be admitted to trading.

4. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to lay down:

- (a) the content of the notifications referred to in paragraph 1; and
- (b) the manner and conditions of the compilation, publication and maintenance of the list referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council (1).

(1) 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).

5. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to lay down the timing, format and template of the submission of notifications under paragraphs 1 and 2.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## Article 5

### **Exemption for buy-back programmes and stabilisation**

1. The prohibitions in Articles 14 and 15 of this Regulation do not apply to trading in own shares in buy-back programmes where:

- (a) the full details of the programme are disclosed prior to the start of trading;
- (b) trades are reported as being part of the buy-back programme to the competent authority of the trading venue in accordance with paragraph 3 and subsequently disclosed to the public;
- (c) adequate limits with regard to price and volume are complied with; and
- (d) it is carried out in accordance with the objectives referred to in paragraph 2 and the conditions set out in this Article and in the regulatory technical standards referred to in paragraph 6.

2. In order to benefit from the exemption provided for in paragraph 1, a buy-back programme shall have as its sole purpose:

- (a) to reduce the capital of an issuer;
- (b) to meet obligations arising from debt financial instruments that are exchangeable into equity instruments; or
- (c) to meet obligations arising from share option programmes, or other allocations of shares, to employees or to members of the administrative, management or supervisory bodies of the issuer or of an associate company.

3. In order to benefit from the exemption provided for in paragraph 1, the issuer shall report to the competent authority of the trading venue on which the shares have been admitted to trading or are traded each transaction relating to the buy-back programme, including the information specified in Article 25(1) and (2) and Article 26(1), (2) and (3) of Regulation (EU) No 600/2014.

4. The prohibitions in Articles 14 and 15 of this Regulation do not apply to trading in securities or associated instruments for the stabilisation of securities where:

- (a) stabilisation is carried out for a limited period;
- (b) relevant information about the stabilisation is disclosed and notified to the competent authority of the trading venue in accordance with paragraph 5;
- (c) adequate limits with regard to price are complied with; and
- (d) such trading complies with the conditions for stabilisation laid down in the regulatory technical standards referred to in paragraph 6.

5. Without prejudice to Article 23(1), the details of all stabilisation transactions shall be notified by issuers, offerors, or entities undertaking the stabilisation, whether or not they act on behalf of such persons, to the competent authority of the trading venue no later than the end of the seventh daily market session following the date of execution of such transactions.

6. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the conditions that buy-back programmes and stabilisation measures referred to in paragraphs 1 and 4 must meet, including conditions for trading, restrictions regarding time and volume, disclosure and reporting obligations, and price conditions.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 6

### **Exemption for monetary and public debt management activities and climate policy activities**

1. This Regulation does not apply to transactions, orders or behaviour, in pursuit of monetary, exchange rate or public debt management policy by:

- (a) a Member State;
- (b) the members of the ESCB;
- (c) a ministry, agency or special purpose vehicle of one or several Member States, or by a person acting on its behalf;
- (d) in the case of a Member State that is a federal state, a member making up the federation.

2. This Regulation does not apply to transactions, orders or behaviour carried out by the Commission or any other officially designated body or by any person acting on its behalf, in pursuit of public debt management policy.

This Regulation does not apply to such transactions, orders or behaviour carried out by:

- (a) the Union;
- (b) a special purpose vehicle of one or several Member States;
- (c) the European Investment Bank;
- (d) the European Financial Stability Facility;
- (e) the European Stability Mechanism;
- (f) an international financial institution established by two or more Member States which has the purpose to mobilise funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems.

3. This Regulation does not apply to the activity of a Member State, the Commission or any other officially designated body, or of any person acting on their behalf, which concerns emission allowances and which is undertaken in pursuit of the Union's climate policy in accordance with Directive 2003/87/EC.

4. This Regulation does not apply to the activities of a Member State, the Commission or any other officially designated body, or of any person acting on their behalf, that are undertaken in pursuit of the Union's Common Agricultural Policy or of the Union's Common Fisheries Policy in accordance with acts adopted or with international agreements concluded under the TFEU.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 35 to extend the exemption referred to in paragraph 1 to certain public bodies and central banks of third countries.

To that end, the Commission shall, by 3 January 2016, prepare and present to the European Parliament and to the Council a report assessing the international treatment of public bodies charged with, or intervening in, public debt management and of central banks in third countries.

The report shall include a comparative analysis of the treatment of those bodies and central banks within the legal framework of third countries, and the risk management standards applicable to the transactions entered into by those bodies and central banks in those jurisdictions. If the report concludes, in particular in regard to the comparative analysis, that the exemption of the monetary responsibilities of those third-country central banks from the obligations and prohibitions of this Regulation is necessary the Commission shall extend the exemption referred to in paragraph 1 also to the central banks of those third countries.

6. The Commission shall also be empowered to adopt delegated acts in accordance with Article 35 to extend the exemption set out in paragraph 3 to certain designated public bodies of third countries that have entered into an agreement with the Union pursuant to Article 25 of Directive 2003/87/EC.

7. This Article shall not apply to persons working under a contract of employment or otherwise for the entities referred to in this Article where those persons carry out transactions or orders, or engage in behaviour, directly or indirectly, on their own account.

## CHAPTER 2

### **INSIDE INFORMATION, INSIDER DEALING, UNLAWFUL DISCLOSURE OF INSIDE INFORMATION AND MARKET MANIPULATION**

#### *Article 7*

##### **Inside information**

1. For the purposes of this Regulation, inside information shall comprise the following types of information:

(a) information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;

(b) in relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets;

(c) in relation to emission allowances or auctioned products based thereon, information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more such instruments, and which, if it were made public, would be likely to have a significant effect on the prices of such instruments or on the prices of related derivative financial instruments;

(d) for persons charged with the execution of orders concerning financial instruments, it also means information conveyed by a client and relating to the client's pending orders in financial instruments, which is of a precise nature, relating directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments, the price of related spot commodity contracts, or on the price of related derivative financial instruments.

2. For the purposes of paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.

3. An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.

4. For the purposes of paragraph 1, information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

In the case of participants in the emission allowance market with aggregate emissions or rated thermal input at or below the threshold set in accordance with the second subparagraph of Article 17(2), information about their physical operations shall be deemed not to have a significant effect on the price of emission allowances, of auctioned products based thereon, or of derivative financial instruments.

5. ESMA shall issue guidelines to establish a non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in point (b) of paragraph 1. ESMA shall duly take into account specificities of those markets.

## Article 8

### **Insider dealing**

1. For the purposes of this Regulation, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010, the use of inside information shall also comprise submitting, modifying or withdrawing a bid by a person for its own account or for the account of a third party.

2. For the purposes of this Regulation, recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and:

(a) recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal, or

(b) recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates, or induces that person to make such a cancellation or amendment.

3. The use of the recommendations or inducements referred to in paragraph 2 amounts to insider dealing within the meaning of this Article where the person using the recommendation or inducement knows or ought to know that it is based upon inside information.

4. This Article applies to any person who possesses inside information as a result of:

- (a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
- (b) having a holding in the capital of the issuer or emission allowance market participant;
- (c) having access to the information through the exercise of an employment, profession or duties; or
- (d) being involved in criminal activities.

This Article also applies to any person who possesses inside information under circumstances other than those referred to in the first subparagraph where that person knows or ought to know that it is inside information.

5. Where the person is a legal person, this Article shall also apply, in accordance with national law, to the natural persons who participate in the decision to carry out the acquisition, disposal, cancellation or amendment of an order for the account of the legal person concerned.

## Article 9

### **Legitimate behaviour**

1. For the purposes of Articles 8 and 14, it shall not be deemed from the mere fact that a legal person is or has been in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal, where that legal person:

- (a) has established, implemented and maintained adequate and effective internal arrangements and procedures that effectively ensure that neither the natural person who made the decision on its behalf to acquire or dispose of financial instruments to which the information relates, nor another natural person who may have had an influence on that decision, was in possession of the inside information; and
- (b) has not encouraged, made a recommendation to, induced or otherwise influenced the natural person who, on behalf of the legal person, acquired or disposed of financial instruments to which the information relates.

2. For the purposes of Articles 8 and 14, it shall not be deemed from the mere fact that a person is in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal where that person:

- (a) for the financial instrument to which that information relates, is a market maker or a person authorised to act as a counterparty, and the acquisition or disposal of financial instruments to which that information relates is made legitimately in the normal course of the exercise of its function as a market maker or as a counterparty for that financial instrument; or
- (b) is authorised to execute orders on behalf of third parties, and the acquisition or disposal of financial instruments to which the order relates, is made to carry out such an order legitimately in the normal course of the exercise of that person's employment, profession or duties.

3. For the purposes of Articles 8 and 14, it shall not be deemed from the mere fact that a person is in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal where that person conducts a transaction to acquire or dispose of financial instruments and that transaction is carried out in the discharge of an obligation that has become due in good faith and not to circumvent the prohibition against insider dealing and:

- (a) that obligation results from an order placed or an agreement concluded before the person concerned possessed inside information; or
- (b) that transaction is carried out to satisfy a legal or regulatory obligation that arose, before the person concerned possessed inside information.

4. For the purposes of Article 8 and 14, it shall not be deemed from the mere fact that a person is in possession of inside information that that person has used that information and has thus engaged in insider dealing, where such person has obtained that inside information in the conduct of a public takeover or merger with a company and uses that inside information solely for the purpose of proceeding with that merger or public takeover, provided that at the point of approval of the merger or acceptance of the offer by the shareholders of that company, any inside information has been made public or has otherwise ceased to constitute inside information.

This paragraph shall not apply to stake-building.

5. For the purposes of Articles 8 and 14, the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information.

6. Notwithstanding paragraphs 1 to 5 of this Article, an infringement of the prohibition of insider dealing set out in Article 14 may still be deemed to have occurred if the competent authority establishes that there was an illegitimate reason for the orders to trade, transactions or behaviours concerned.

## Article 10

### **Unlawful disclosure of inside information**

1. For the purposes of this Regulation, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

This paragraph applies to any natural or legal person in the situations or circumstances referred to in Article 8(4).

2. For the purposes of this Regulation the onward disclosure of recommendations or inducements referred to in Article 8(2) amounts to unlawful disclosure of inside information under this Article where the person disclosing the recommendation or inducement knows or ought to know that it was based on inside information.

## Article 11

### **Market soundings**

1. A market sounding comprises the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more potential investors by:

- (a) an issuer;
- (b) a secondary offeror of a financial instrument, in such quantity or value that the transaction is distinct from ordinary trading and involves a selling method based on the prior assessment of potential interest from potential investors;

(c) an emission allowance market participant; or

(d) a third party acting on behalf or on the account of a person referred to in point (a), (b) or (c).

2. Without prejudice to Article 23(3), disclosure of inside information by a person intending to make a takeover bid for the securities of a company or a merger with a company to parties entitled to the securities, shall also constitute a market sounding, provided that:

(a) the information is necessary to enable the parties entitled to the securities to form an opinion on their willingness to offer their securities; and

(b) the willingness of parties entitled to the securities to offer their securities is reasonably required for the decision to make the takeover bid or merger.

3. A disclosing market participant shall, prior to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information. The disclosing market participant shall make a written record of its conclusion and the reasons therefor. It shall provide such written records to the competent authority upon request. This obligation shall apply to each disclosure of information throughout the course of the market sounding. The disclosing market participant shall update the written records referred to in this paragraph accordingly.

4. For the purposes of Article 10(1), disclosure of inside information made in the course of a market sounding shall be deemed to be made in the normal exercise of a person's employment, profession or duties where the disclosing market participant complies with paragraphs 3 and 5 of this Article.

5. For the purposes of paragraph 4, the disclosing market participant shall, before making the disclosure:

(a) obtain the consent of the person receiving the market sounding to receive inside information;

(b) inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information, by acquiring or disposing of, for his own account or for the account of a third party, directly or indirectly, financial instruments relating to that information;

(c) inform the person receiving the market sounding that he is prohibited from using that information, or attempting to use that information, by cancelling or amending an order which has already been placed concerning a financial instrument to which the information relates; and

(d) inform the person receiving the market sounding that by agreeing to receive the information he is obliged to keep the information confidential.

The disclosing market participant shall make and maintain a record of all information given to the person receiving the market sounding, including the information given in accordance with points (a) to (d) of the first subparagraph, and the identity of the potential investors to whom the information has been disclosed, including but not limited to the legal and natural persons acting on behalf of the potential investor, and the date and time of each disclosure. The disclosing market participant shall provide that record to the competent authority upon request.

6. Where information that has been disclosed in the course of a market sounding ceases to be inside information according to the assessment of the disclosing market participant, the disclosing market participant shall inform the recipient accordingly, as soon as possible.

The disclosing market participant shall maintain a record of the information given in accordance with this paragraph and shall provide it to the competent authority upon request.

7. Notwithstanding the provisions of this Article, the person receiving the market sounding shall assess for itself whether it is in possession of inside information or when it ceases to be in possession of inside information.

8. The disclosing market participant shall keep the records referred to in this Article for a period of at least five years.

9. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine appropriate arrangements, procedures and record keeping requirements for persons to comply with the requirements laid down in paragraphs 4, 5, 6 and 8.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

10. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to specify the systems and notification templates to be used by persons to comply with the requirements established by paragraphs 4, 5, 6 and 8 of this Article, particularly the precise format of the records referred to in paragraphs 4 to 8 and the technical means for appropriate communication of the information referred to in paragraph 6 to the person receiving the market sounding.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

11. ESMA shall issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to persons receiving market soundings, regarding:

- (a) the factors that such persons are to take into account when information is disclosed to them as part of a market sounding in order for them to assess whether the information amounts to inside information;
- (b) the steps that such persons are to take if inside information has been disclosed to them in order to comply with Articles 8 and 10 of this Regulation; and
- (c) the records that such persons are to maintain in order to demonstrate that they have complied with Articles 8 and 10 of this Regulation.

## Article 12

### Market manipulation

1. For the purposes of this Regulation, market manipulation shall comprise the following activities:

(a) entering into a transaction, placing an order to trade or any other behaviour which:

- (i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances; or

- (ii) secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level;

unless the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction, order or behaviour have been carried out for legitimate reasons, and conform with an accepted market practice as established in accordance with Article 13;

- (b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances, which employs a fictitious device or any other form of deception or contrivance;
- (c) disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument, a related spot commodity contract or an auctioned product based on emission allowances or secures, or is likely to secure, the price of one or several financial instruments, a related spot commodity contract or an auctioned product based on emission allowances at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading;
- (d) transmitting false or misleading information or providing false or misleading inputs in relation to a benchmark where the person who made the transmission or provided the input knew or ought to have known that it was false or misleading, or any other behaviour which manipulates the calculation of a benchmark.

2. The following behaviour shall, inter alia, be considered as market manipulation:

- (a) the conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument, related spot commodity contracts or auctioned products based on emission allowances which has, or is likely to have, the effect of fixing, directly or indirectly, purchase or sale prices or creates, or is likely to create, other unfair trading conditions;
- (b) the buying or selling of financial instruments, at the opening or closing of the market, which has or is likely to have the effect of misleading investors acting on the basis of the prices displayed, including the opening or closing prices;
- (c) the placing of orders to a trading venue, including any cancellation or modification thereof, by any available means of trading, including by electronic means, such as algorithmic and high-frequency trading strategies, and which has one of the effects referred to in paragraph 1(a) or (b), by:
- (i) disrupting or delaying the functioning of the trading system of the trading venue or being likely to do so;
- (ii) making it more difficult for other persons to identify genuine orders on the trading system of the trading venue or being likely to do so, including by entering orders which result in the overloading or destabilisation of the order book; or
- (iii) creating or being likely to create a false or misleading signal about the supply of, or demand for, or price of, a financial instrument, in particular by entering orders to initiate or exacerbate a trend;
- (d) the taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument, related spot commodity contract or an auctioned product based on emission allowances (or indirectly about its issuer) while having previously taken positions on that financial instrument, a related spot commodity contract or an auctioned product based on emission allowances and profiting subsequently from the impact of the opinions voiced on the price of that instrument, related spot commodity contract or an auctioned product based on emission allowances, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way;

- (e) the buying or selling on the secondary market of emission allowances or related derivatives prior to the auction held pursuant to Regulation (EU) No 1031/2010 with the effect of fixing the auction clearing price for the auctioned products at an abnormal or artificial level or misleading bidders bidding in the auctions.

3. For the purposes of applying paragraph 1(a) and (b), and without prejudice to the forms of behaviour set out in paragraph 2, Annex I defines non-exhaustive indicators relating to the employment of a fictitious device or any other form of deception or contrivance, and non-exhaustive indicators related to false or misleading signals and to price securing.

4. Where the person referred to in this Article is a legal person, this Article shall also apply, in accordance with national law, to the natural persons who participate in the decision to carry out activities for the account of the legal person concerned.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 35 specifying the indicators laid down in Annex I, in order to clarify their elements and to take into account technical developments on financial markets.

### Article 13

#### **Accepted market practices**

1. The prohibition in Article 15 shall not apply to the activities referred to in Article 12(1)(a), provided that the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction, order or behaviour have been carried out for legitimate reasons, and conform with an accepted market practice as established in accordance with this Article.

2. A competent authority may establish an accepted market practice, taking into account the following criteria:

- (a) whether the market practice provides for a substantial level of transparency to the market;
- (b) whether the market practice ensures a high degree of safeguards to the operation of market forces and the proper interplay of the forces of supply and demand;
- (c) whether the market practice has a positive impact on market liquidity and efficiency;
- (d) whether the market practice takes into account the trading mechanism of the relevant market and enables market participants to react properly and in a timely manner to the new market situation created by that practice;
- (e) whether the market practice does not create risks for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the Union;
- (f) the outcome of any investigation of the relevant market practice by any competent authority or by another authority, in particular whether the relevant market practice infringed rules or regulations designed to prevent market abuse, or codes of conduct, irrespective of whether it concerns the relevant market or directly or indirectly related markets within the Union; and
- (g) the structural characteristics of the relevant market, *inter alia*, whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail-investor participation in the relevant market.

A market practice that has been established by a competent authority as an accepted market practice in a particular market shall not be considered to be applicable to other markets unless the competent authorities of those other markets have accepted that practice pursuant to this Article.

3. Before establishing an accepted market practice in accordance with paragraph 2, the competent authority shall notify ESMA and the other competent authorities of its intention to establish an accepted market practice and shall provide the details of that assessment made in accordance with the criteria laid down in paragraph 2. Such a notification shall be made at least three months before the accepted market practice is intended to take effect.

4. Within two months following receipt of the notification, ESMA shall issue an opinion to the notifying competent authority assessing the compatibility of the accepted market practice with paragraph 2 and with the regulatory technical standards adopted pursuant to paragraph 7. ESMA shall also assess whether the establishment of the accepted market practice would not threaten the market confidence in the Union's financial market. The opinion shall be published on ESMA's website.

5. Where a competent authority establishes an accepted market practice contrary to the opinion of ESMA issued in accordance with paragraph 4, it shall publish on its website within 24 hours of establishing the accepted market practice a notice setting out in full its reasons for doing so, including why the accepted market practice does not threaten market confidence.

6. Where a competent authority considers that another competent authority has established an accepted market practice that does not meet the criteria set out in paragraph 2, ESMA shall assist the authorities concerned in reaching an agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

If the competent authorities concerned fail to reach an agreement, ESMA may take a decision in accordance with Article 19(3) of Regulation (EU) No 1095/2010.

7. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards specifying the criteria, the procedure and the requirements for establishing an accepted market practice under paragraphs 2, 3 and 4, and the requirements for maintaining it, terminating it, or modifying the conditions for its acceptance.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

8. Competent authorities shall review regularly, and at least every two years, the accepted market practices that they have established, in particular by taking into account significant changes to the relevant market environment, such as changes to trading rules or to market infrastructures, with a view to deciding whether to maintain it, to terminate it, or to modify the conditions for its acceptance.

9. ESMA shall publish on its website a list of accepted market practices and in which Member States they are applicable.

10. ESMA shall monitor the application of accepted market practices and shall submit an annual report to the Commission on how they are applied in the markets concerned.

11. Competent authorities shall notify accepted market practices that they have established before 2 July 2014 to ESMA within three months of the entry into force of the regulatory technical standards referred to in paragraph 7.

The accepted market practices referred to in the first subparagraph of this paragraph shall continue to apply in the Member State concerned until the competent authority has made a decision regarding the continuation of that practice following ESMA's opinion under paragraph 4.

#### *Article 14*

##### **Prohibition of insider dealing and of unlawful disclosure of inside information**

A person shall not:

- (a) engage or attempt to engage in insider dealing;
- (b) recommend that another person engage in insider dealing or induce another person to engage in insider dealing; or
- (c) unlawfully disclose inside information.

#### *Article 15*

##### **Prohibition of market manipulation**

A person shall not engage in or attempt to engage in market manipulation.

#### *Article 16*

##### **Prevention and detection of market abuse**

1. Market operators and investment firms that operate a trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation, in accordance with Articles 31 and 54 of Directive 2014/65/EU.

A person referred to in the first subparagraph shall report orders and transactions, including any cancellation or modification thereof, that could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation to the competent authority of the trading venue without delay.

2. Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions. Where such a person has a reasonable suspicion that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation, the person shall notify the competent authority as referred to in paragraph 3 without delay.

3. Without prejudice to Article 22, persons professionally arranging or executing transactions shall be subject to the rules of notification of the Member State in which they are registered or have their head office, or, in the case of a branch, the Member State where the branch is situated. The notification shall be addressed to the competent authority of that Member State.

4. The competent authorities as referred to in paragraph 3 receiving the notification of suspicious orders and transactions shall transmit such information immediately to the competent authorities of the trading venues concerned.

5. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine:

- (a) appropriate arrangements, systems and procedures for persons to comply with the requirements established in paragraphs 1 and 2; and
- (b) the notification templates to be used by persons to comply with the requirements established in paragraphs 1 and 2.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2016.

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

## CHAPTER 3

## DISCLOSURE REQUIREMENTS

*Article 17***Public disclosure of inside information**

1. An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.

The issuer shall ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, in the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC of the European Parliament and the Council<sup>(1)</sup>. The issuer shall not combine the disclosure of inside information to the public with the marketing of its activities. The issuer shall post and maintain on its website for a period of at least five years, all inside information it is required to disclose publicly.

This Article shall apply to issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of instruments only traded on an MTF or on an OTF, issuers who have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State.

2. An emission allowance market participant shall publicly, effectively and in a timely manner disclose inside information concerning emission allowances which it holds in respect of its business, including aviation activities as specified in Annex I to Directive 2003/87/EC or installations within the meaning of Article 3(e) of that Directive which the participant concerned, or its parent undertaking or related undertaking, owns or controls or for the operational matters of which the participant, or its parent undertaking or related undertaking, is responsible, in whole or in part. With regard to installations, such disclosure shall include information relevant to the capacity and utilisation of installations, including planned or unplanned unavailability of such installations.

The first subparagraph shall not apply to a participant in the emission allowance market where the installations or aviation activities that it owns, controls or is responsible for, in the preceding year have had emissions not exceeding a minimum threshold of carbon dioxide equivalent and, where they carry out combustion activities, have had a rated thermal input not exceeding a minimum threshold.

The Commission shall be empowered to adopt delegated acts in accordance with Article 35 establishing a minimum threshold of carbon dioxide equivalent and a minimum threshold of rated thermal input for the purposes of the application of the exemption provided for in the second subparagraph of this paragraph.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 35 specifying the competent authority for the notifications of paragraphs 4 and 5 of this Article.

4. An issuer or an emission allowance market participant, may, on its own responsibility, delay disclosure to the public of inside information provided that all of the following conditions are met:

(a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

<sup>(1)</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).

- (b) delay of disclosure is not likely to mislead the public;
- (c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

In the case of a protracted process that occurs in stages and that is intended to bring about, or that results in, a particular circumstance or a particular event, an issuer or an emission allowance market participant may on its own responsibility delay the public disclosure of inside information relating to this process, subject to points (a), (b) and (c) of the first subparagraph.

Where an issuer or emission allowance market participant has delayed the disclosure of inside information under this paragraph, it shall inform the competent authority specified under paragraph 3 that disclosure of the information was delayed and shall provide a written explanation of how the conditions set out in this paragraph were met, immediately after the information is disclosed to the public. Alternatively, Member States may provide that a record of such an explanation is to be provided only upon the request of the competent authority specified under paragraph 3.

5. In order to preserve the stability of the financial system, an issuer that is a credit institution or a financial institution, may, on its own responsibility, delay the public disclosure of inside information, including information which is related to a temporary liquidity problem and, in particular, the need to receive temporary liquidity assistance from a central bank or lender of last resort, provided that all of the following conditions are met:

- (a) the disclosure of the inside information entails a risk of undermining the financial stability of the issuer and of the financial system;
- (b) it is in the public interest to delay the disclosure;
- (c) the confidentiality of that information can be ensured; and
- (d) the competent authority specified under paragraph 3 has consented to the delay on the basis that the conditions in points (a), (b) and (c) are met.

6. For the purposes of points (a) to (d) of paragraph 5, an issuer shall notify the competent authority specified under paragraph 3 of its intention to delay the disclosure of the inside information and provide evidence that the conditions set out in points (a), (b) and (c) of paragraph 5 are met. The competent authority specified under paragraph 3 shall consult, as appropriate, the national central bank or the macro-prudential authority, where instituted, or, alternatively, the following authorities:

- (a) where the issuer is a credit institution or an investment firm the authority designated in accordance with Article 133(1) of Directive 2013/36/EU of the European Parliament and of the Council<sup>(1)</sup>;
- (b) in cases other than those referred to in point (a), any other national authority responsible for the supervision of the issuer.

The competent authority specified under paragraph 3 shall ensure that disclosure of the inside information is delayed only for a period as is necessary in the public interest. The competent authority specified under paragraph 3 shall evaluate at least on a weekly basis whether the conditions set out in points (a), (b) and (c) of paragraph 5 are still met.

If the competent authority specified under paragraph 3 does not consent to the delay of disclosure of the inside information, the issuer shall disclose the inside information immediately.

This paragraph shall apply to cases where the issuer does not decide to delay the disclosure of inside information in accordance with paragraph 4.

<sup>(1)</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).

Reference in this paragraph to the competent authority specified under paragraph 3 is without prejudice to the ability of the competent authority to exercise its functions in any of the ways referred to in Article 23(1).

7. Where disclosure of inside information has been delayed in accordance with paragraph 4 or 5 and the confidentiality of that inside information is no longer ensured, the issuer or the emission allowance market participant shall disclose that inside information to the public as soon as possible.

This paragraph includes situations where a rumour explicitly relates to inside information the disclosure of which has been delayed in accordance with paragraph 4 or 5, where that rumour is sufficiently accurate to indicate that the confidentiality of that information is no longer ensured.

8. Where an issuer or an emission allowance market participant, or a person acting on their behalf or for their account, discloses any inside information to any third party in the normal course of the exercise of an employment, profession or duties as referred to in Article 10(1), they must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure, and promptly in the case of a non-intentional disclosure. This paragraph shall not apply if the person receiving the information owes a duty of confidentiality, regardless of whether such duty is based on a law, on regulations, on articles of association, or on a contract.

9. Inside information relating to issuers whose financial instruments are admitted to trading on an SME growth market, may be posted on the trading venue's website instead of on the website of the issuer where the trading venue chooses to provide this facility for issuers on that market.

10. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine:

- (a) the technical means for appropriate public disclosure of inside information as referred to in paragraphs 1, 2, 8 and 9; and
- (b) the technical means for delaying the public disclosure of inside information as referred to in paragraphs 4 and 5.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

11. ESMA shall issue guidelines to establish a non-exhaustive indicative list of the legitimate interests of issuers, as referred to in point (a) of paragraph 4, and of situations in which delay of disclosure of inside information is likely to mislead the public as referred to in point (b) of paragraph 4.

## *Article 18*

### **Insider lists**

1. Issuers or any person acting on their behalf or on their account, shall:

- (a) draw up a list of all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information, such as advisers, accountants or credit rating agencies (insider list);
- (b) promptly update the insider list in accordance with paragraph 4; and
- (c) provide the insider list to the competent authority as soon as possible upon its request.

2. Issuers or any person acting on their behalf or on their account, shall take all reasonable steps to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information.

Where another person acting on behalf or on the account of the issuer assumes the task of drawing up and updating the insider list, the issuer remains fully responsible for complying with this Article. The issuer shall always retain a right of access to the insider list.

3. The insider list shall include at least:

- (a) the identity of any person having access to inside information;
- (b) the reason for including that person in the insider list;
- (c) the date and time at which that person obtained access to inside information; and
- (d) the date on which the insider list was drawn up.

4. Issuers or any person acting on their behalf or on their account shall update the insider list promptly, including the date of the update, in the following circumstances:

- (a) where there is a change in the reason for including a person already on the insider list;
- (b) where there is a new person who has access to inside information and needs, therefore, to be added to the insider list; and
- (c) where a person ceases to have access to inside information.

Each update shall specify the date and time when the change triggering the update occurred.

5. Issuers or any person acting on their behalf or on their account shall retain the insider list for a period of at least five years after it is drawn up or updated.

6. Issuers whose financial instruments are admitted to trading on an SME growth market shall be exempt from drawing up an insider list, provided that the following conditions are met:

- (a) the issuer takes all reasonable steps to ensure that any person with access to inside information acknowledges the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing and unlawful disclosure of inside information; and
- (b) the issuer is able to provide the competent authority, upon request, with an insider list.

7. This Article shall apply to issuers who have requested or approved admission of their financial instruments to trading on a regulated market in a Member State or, in the case of an instrument only traded on an MTF or an OTF, have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF in a Member State.

8. Paragraphs 1 to 5 of this Article shall also apply to:

- (a) emission allowance market participants in relation to inside information concerning emission allowances that arises in relation to the physical operations of that emission allowance market participant;

- (b) any auction platform, auctioneer and auction monitor in relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010.

9. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the precise format of insider lists and the format for updating insider lists referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### Article 19

##### **Managers' transactions**

1. Persons discharging managerial responsibilities, as well as persons closely associated with them, shall notify the issuer or the emission allowance market participant and the competent authority referred to in the second subparagraph of paragraph 2:

- (a) in respect of issuers, of every transaction conducted on their own account relating to the shares or debt instruments of that issuer or to derivatives or other financial instruments linked thereto;
- (b) in respect of emission allowance market participants, of every transaction conducted on their own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto.

Such notifications shall be made promptly and no later than three business days after the date of the transaction.

The first subparagraph applies once the total amount of transactions has reached the threshold set out in paragraph 8 or 9, as applicable, within a calendar year.

2. For the purposes of paragraph 1, and without prejudice to the right of Member States to provide for notification obligations other than those referred to in this Article, all transactions conducted on the own account of the persons referred to in paragraph 1, shall be notified by those persons to the competent authorities.

The rules applicable to notifications, with which persons referred to in paragraph 1 must comply, shall be those of the Member State where the issuer or emission allowance market participant is registered. Notifications shall be made within three working days of the transaction date to the competent authority of that Member State. Where the issuer is not registered in a Member State, the notification shall be made to the competent authority of the home Member State in accordance with point (i) of Article 2(1) of Directive 2004/109/EC or, in the absence thereof, to the competent authority of the trading venue.

3. The issuer or emission allowance market participant shall ensure that the information that is notified in accordance with paragraph 1 is made public promptly and no later than three business days after the transaction in a manner which enables fast access to this information on a non-discriminatory basis in accordance with the implementing technical standards referred to in point (a) of Article 17(10).

The issuer or emission allowance market participant shall use such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Union, and, where applicable, it shall use the officially appointed mechanism referred to in Article 21 of Directive 2004/109/EC.

Alternatively, national law may provide that a competent authority may itself make public the information.

4. This Article shall apply to issuers who:

- (a) have requested or approved admission of their financial instruments to trading on a regulated market; or
- (b) in the case of an instrument only traded on an MTF or an OTF, have approved trading of their financial instruments on an MTF or an OTF or have requested admission to trading of their financial instruments on an MTF.

5. Issuers and emission allowance market participants shall notify the person discharging managerial responsibilities of their obligations under this Article in writing. Issuers and emission allowance market participants shall draw up a list of all persons discharging managerial responsibilities and persons closely associated with them.

Persons discharging managerial responsibilities shall notify the persons closely associated with them of their obligations under this Article in writing and shall keep a copy of this notification.

6. A notification of transactions referred to in paragraph 1 shall contain the following information:

- (a) the name of the person;
- (b) the reason for the notification;
- (c) the name of the relevant issuer or emission allowance market participant;
- (d) a description and the identifier of the financial instrument;
- (e) the nature of the transaction(s) (e.g. acquisition or disposal), indicating whether it is linked to the exercise of share option programmes or to the specific examples set out in paragraph 7;
- (f) the date and place of the transaction(s); and
- (g) the price and volume of the transaction(s). In the case of a pledge whose terms provide for its value to change, this should be disclosed together with its value at the date of the pledge.

7. For the purposes of paragraph 1, transactions that must be notified shall also include:

- (a) the pledging or lending of financial instruments by or on behalf of a person discharging managerial responsibilities or a person closely associated with such a person, as referred to in paragraph 1;
- (b) transactions undertaken by persons professionally arranging or executing transactions or by another person on behalf of a person discharging managerial responsibilities or a person closely associated with such a person, as referred to in paragraph 1, including where discretion is exercised;
- (c) transactions made under a life insurance policy, defined in accordance with Directive 2009/138/EC of the European Parliament and of the Council (<sup>(1)</sup>), where:
  - (i) the policyholder is a person discharging managerial responsibilities or a person closely associated with such a person, as referred to in paragraph 1,

<sup>(1)</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

- (ii) the investment risk is borne by the policyholder, and
- (iii) the policyholder has the power or discretion to make investment decisions regarding specific instruments in that life insurance policy or to execute transactions regarding specific instruments for that life insurance policy.

For the purposes of point (a), a pledge, or a similar security interest, of financial instruments in connection with the depositing of the financial instruments in a custody account does not need to be notified, unless and until such time that such pledge or other security interest is designated to secure a specific credit facility.

Insofar as a policyholder of an insurance contract is required to notify transactions according to this paragraph, an obligation to notify is not incumbent on the insurance company.

8. Paragraph 1 shall apply to any subsequent transaction once a total amount of EUR 5 000 has been reached within a calendar year. The threshold of EUR 5 000 shall be calculated by adding without netting all transactions referred to in paragraph 1.

9. A competent authority may decide to increase the threshold set out in paragraph 8 to EUR 20 000 and shall inform ESMA of its decision and the justification for its decision, with specific reference to market conditions, to adopt the higher threshold prior to its application. ESMA shall publish on its website the list of thresholds that apply in accordance with this Article and the justifications provided by competent authorities for such thresholds.

10. This Article shall also apply to transactions by persons discharging managerial responsibilities within any auction platform, auctioneer and auction monitor involved in the auctions held under Regulation (EU) No 1031/2010 and to persons closely associated with such persons in so far as their transactions involve emission allowances, derivatives thereof or auctioned products based thereon. Those persons shall notify their transactions to the auction platforms, auctioneers and auction monitor, as applicable, and to the competent authority where the auction platform, auctioneer or auction monitor, as applicable, is registered. The information that is so notified shall be made public by the auction platforms, auctioneers, auction monitor or competent authority in accordance with paragraph 3.

11. Without prejudice to Articles 14 and 15, a person discharging managerial responsibilities within an issuer shall not conduct any transactions on its own account or for the account of a third party, directly or indirectly, relating to the shares or debt instruments of the issuer or to derivatives or other financial instruments linked to them during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public according to:

- (a) the rules of the trading venue where the issuer's shares are admitted to trading; or
- (b) national law.

12. Without prejudice to Articles 14 and 15, an issuer may allow a person discharging managerial responsibilities within it to trade on its own account or for the account of a third party during a closed period as referred to in paragraph 11 either:

- (a) on a case-by-case basis due to the existence of exceptional circumstances, such as severe financial difficulty, which require the immediate sale of shares; or
- (b) due to the characteristics of the trading involved for transactions made under, or related to, an employee share or saving scheme, qualification or entitlement of shares, or transactions where the beneficial interest in the relevant security does not change.

13. The Commission shall be empowered to adopt delegated acts in accordance with Article 35 specifying the circumstances under which trading during a closed period may be permitted by the issuer, as referred to in paragraph 12, including the circumstances that would be considered as exceptional and the types of transaction that would justify the permission for trading.

14. The Commission shall be empowered to adopt delegated acts in accordance with Article 35, specifying types of transactions that would trigger the requirement referred to in paragraph 1.

15. In order to ensure uniform application of paragraph 1, ESMA shall develop draft implementing technical standards concerning the format and template in which the information referred to in paragraph 1 is to be notified and made public.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 20*

##### **Investment recommendations and statistics**

1. Persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy shall take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates.

2. Public institutions disseminating statistics or forecasts liable to have a significant effect on financial markets shall disseminate them in an objective and transparent way.

3. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine the technical arrangements for the categories of person referred to in paragraph 1, for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

The technical arrangements laid down in the regulatory technical standards referred to in paragraph 3 shall not apply to journalists who are subject to equivalent appropriate regulation in a Member State, including equivalent appropriate self-regulation, provided that such regulation achieves similar effects as those technical arrangements. Member State shall notify the text of that equivalent appropriate regulation to the Commission.

#### *Article 21*

##### **Disclosure or dissemination of information in the media**

For the purposes of Article 10, Article 12(1)(c) and Article 20, where information is disclosed or disseminated and where recommendations are produced or disseminated for the purpose of journalism or other form of expression in the media, such disclosure or dissemination of information shall be assessed taking into account the rules governing the freedom of the press and freedom of expression in other media and the rules or codes governing the journalist profession, unless:

- (a) the persons concerned, or persons closely associated with them, derive, directly or indirectly, an advantage or profits from the disclosure or the dissemination of the information in question; or

- (b) the disclosure or the dissemination is made with the intention of misleading the market as to the supply of, demand for, or price of financial instruments.

## CHAPTER 4

### ESMA AND COMPETENT AUTHORITIES

#### *Article 22*

##### **Competent authorities**

Without prejudice to the competences of the judicial authorities, each Member State shall designate a single administrative competent authority for the purpose of this Regulation. Member States shall inform the Commission, ESMA and the other competent authorities of other Member States accordingly. The competent authority shall ensure that the provisions of this Regulation are applied on its territory, regarding all actions carried out on its territory, and actions carried out abroad relating to instruments admitted to trading on a regulated market, for which a request for admission to trading on such market has been made, auctioned on an auction platform or which are traded on an MTF or an OTF or for which a request for admission to trading has been made on an MTF operating within its territory.

#### *Article 23*

##### **Powers of competent authorities**

1. Competent authorities shall exercise their functions and powers in any of the following ways:

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

2. In order to fulfil their duties under this Regulation, competent authorities shall have, in accordance with national law, at least the following supervisory and investigatory powers:

- (a) to access any document and data in any form, and to receive or take a copy thereof;
- (b) to require or demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and question any such person with a view to obtain information;
- (c) in relation to commodity derivatives, to request information from market participants on related spot markets according to standardised formats, obtain reports on transactions, and have direct access to traders' systems;
- (d) to carry out on-site inspections and investigations at sites other than at the private residences of natural persons;
- (e) subject to the second subparagraph, to enter the premises of natural and legal persons in order to seize documents and data in any form where a reasonable suspicion exists that documents or data relating to the subject matter of the inspection or investigation may be relevant to prove a case of insider dealing or market manipulation infringing this Regulation;
- (f) to refer matters for criminal investigation;
- (g) to require existing recordings of telephone conversations, electronic communications or data traffic records held by investment firms, credit institutions or financial institutions;

- (h) to require, insofar as permitted by national law, existing data traffic records held by a telecommunications operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to the investigation of an infringement of point (a) or (b) of Article 14 or Article 15;
- (i) to request the freezing or sequestration of assets, or both;
- (j) to suspend trading of the financial instrument concerned;
- (k) to require the temporary cessation of any practice that the competent authority considers contrary to this Regulation;
- (l) to impose a temporary prohibition on the exercise of professional activity; and
- (m) to take all necessary measures to ensure that the public is correctly informed, *inter alia*, by correcting false or misleading disclosed information, including by requiring an issuer or other person who has published or disseminated false or misleading information to publish a corrective statement.

Where in accordance with national law prior authorisation to enter premises of natural and legal persons referred to in point (e) of the first subparagraph is needed from the judicial authority of the Member State concerned, the power as referred to in that point shall be used only after having obtained such prior authorisation.

3. Member States shall ensure that appropriate measures are in place so that competent authorities have all the supervisory and investigatory powers that are necessary to fulfil their duties.

This Regulation is without prejudice to laws, regulations and administrative provisions adopted in relation to takeover bids, merger transactions and other transactions affecting the ownership or control of companies regulated by the supervisory authorities appointed by Member States pursuant to Article 4 of Directive 2004/25/EC that impose requirements in addition to the requirements of this Regulation.

4. A person making information available to the competent authority in accordance with this Regulation shall not be considered to be infringing any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the person notifying in liability of any kind related to such notification.

#### Article 24

##### **Cooperation with ESMA**

1. The competent authorities shall cooperate with ESMA for the purposes of this Regulation, in accordance with Regulation (EU) No 1095/2010.

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

3. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraph 2.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

**Article 25****Obligation to cooperate**

1. Competent authorities shall cooperate with each other and with ESMA where necessary for the purposes of this Regulation, unless one of the exceptions in paragraph 2 applies. Competent authorities shall render assistance to competent authorities of other Member States and ESMA. In particular, they shall exchange information without undue delay and cooperate in investigation, supervision and enforcement activities.

The obligation to cooperate and assist laid down in the first subparagraph shall also apply as regards the Commission in relation to the exchange of information relating to commodities which are agricultural products listed in Annex I to the TFEU.

The competent authorities and ESMA shall cooperate in accordance with Regulation (EU) No 1095/2010, in particular Article 35 thereof.

Where Member States have chosen, in accordance with Article 30(1), second subparagraph, to lay down criminal sanctions for infringements of the provisions of this Regulation referred to in that Article, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible infringements of this Regulation and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Regulation.

2. A competent authority may refuse to act on a request for information or a request to cooperate with an investigation only in the following exceptional circumstances, namely where:

- (a) communication of relevant information could adversely affect the security of the Member State addressed, in particular the fight against terrorism and other serious crimes;
- (b) complying with the request is likely adversely to affect its own investigation, enforcement activities or, where applicable, a criminal investigation;
- (c) judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed; or
- (d) a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.

3. Competent authorities and ESMA shall cooperate with the Agency for the Cooperation of Energy Regulators (ACER), established under Regulation (EC) No 713/2009 of the European Parliament and of the Council (<sup>1</sup>), and the national regulatory authorities of the Member States to ensure that a coordinated approach is taken to the enforcement of the relevant rules where transactions, orders to trade or other actions or behaviours relate to one or more financial instruments to which this Regulation applies and also to one or more wholesale energy products to which Article 3, 4 and 5 of Regulation (EU) No 1227/2011 apply. Competent authorities shall consider the specific characteristics of the definitions of Article 2 of Regulation (EU) No 1227/2011 and the provisions of Article 3, 4 and 5 of Regulation (EU) No 1227/2011 when they apply Articles 7, 8 and 12 of this Regulation to financial instruments related to wholesale energy products.

4. Competent authorities shall, on request, immediately supply any information required for the purpose referred to in paragraph 1.

<sup>(1)</sup> Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1).

5. Where a competent authority is convinced that acts contrary to the provisions of this Regulation are being, or have been, carried out on the territory of another Member State or that acts are affecting financial instruments traded on a trading venue situated in another Member State, it shall give notice of that fact in as specific a manner as possible to the competent authority of the other Member State and to ESMA and, in relation to wholesale energy products, to ACER. The competent authorities of the various Member States involved shall consult each other and ESMA and, in relation to wholesale energy products, ACER, on the appropriate action to take and inform each other of significant interim developments. They shall coordinate their action, in order to avoid possible duplication and overlap when applying administrative sanctions and other administrative measures to those cross-border cases in accordance with Articles 30 and 31, and shall assist each other in the enforcement of their decisions.

6. The competent authority of one Member State may request assistance from the competent authority of another Member State with regard to on-site inspections or investigations.

A requesting competent authority may inform ESMA of any request referred to in the first subparagraph. In the case of an investigation or an inspection with cross-border effect, ESMA shall, if requested to do so by one of the competent authorities, coordinate the investigation or inspection.

Where a competent authority receives a request from a competent authority of another Member State to carry out an on-site inspection or an investigation, it may do any of the following:

- (a) carry out the on-site inspection or investigation itself;
- (b) allow the competent authority which submitted the request to participate in an on-site inspection or investigation;
- (c) allow the competent authority which submitted the request to carry out the on-site inspection or investigation itself;
- (d) appoint auditors or experts to carry out the on-site inspection or investigation;
- (e) share specific tasks related to supervisory activities with the other competent authorities.

Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of pecuniary sanctions.

7. Without prejudice to Article 258 TFEU, a competent authority whose request for information or assistance in accordance with paragraphs 1, 3, 4 and 5 is not acted upon within a reasonable time or whose request for information or assistance is rejected may refer that rejection or absence of action within a reasonable timeframe to ESMA.

In those situations, ESMA may act in accordance with Article 19 of Regulation (EU) No 1095/2010, without prejudice to the possibility of ESMA acting in accordance with Article 17 of Regulation (EU) No 1095/2010.

8. Competent authorities shall cooperate and exchange information with relevant national and third-country regulatory authorities responsible for the related spot markets where they have reasonable grounds to suspect that acts, which constitute insider dealing, unlawful disclosure of information or market manipulation infringing this Regulation, are being, or have been, carried out. Such cooperation shall ensure a consolidated overview of the financial and spot markets, and shall detect and impose sanctions for cross-market and cross-border market abuses.

In relation to emission allowances, the cooperation and exchange of information provided for under the first subparagraph shall also be ensured with:

- (a) the auction monitor, with regard to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010; and

- (b) competent authorities, registry administrators, including the Central Administrator, and other public bodies charged with the supervision of compliance under Directive 2003/87/EC.

ESMA shall perform a facilitation and coordination role in relation to the cooperation and exchange of information between competent authorities and regulatory authorities in other Member States and third countries. Competent authorities shall, where possible, conclude cooperation arrangements with third-country regulatory authorities responsible for the related spot markets in accordance with Article 26.

9. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information and assistance as referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 26*

#### **Cooperation with third countries**

1. The competent authorities of Member States shall, where necessary, conclude cooperation arrangements with supervisory authorities of third countries concerning the exchange of information with supervisory authorities in third countries and the enforcement of obligations arising under this Regulation in third countries. Those cooperation arrangements shall ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties under this Regulation.

A competent authority shall inform ESMA and the other competent authorities where it proposes to enter into such an arrangement.

2. ESMA shall, where possible, facilitate and coordinate the development of cooperation arrangements between the competent authorities and the relevant supervisory authorities of third countries.

In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards containing a template document for cooperation arrangements that are to be used by competent authorities of Member States where possible.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

ESMA shall also, where possible, facilitate and coordinate the exchange between competent authorities of information obtained from supervisory authorities of third countries that may be relevant to the taking of measures under Articles 30 and 31.

3. The competent authorities shall conclude cooperation arrangements on exchange of information with the supervisory authorities of third countries only where the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 27. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

*Article 27***Professional secrecy**

1. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 2 and 3.
2. All the information exchanged between the competent authorities under this Regulation that concerns business or operational conditions and other economic or personal affairs shall be considered to be confidential and shall be subject to the requirements of professional secrecy, except where the competent authority states at the time of communication that such information may be disclosed or such disclosure is necessary for legal proceedings.
3. The obligation of professional secrecy applies to all persons who work or who have worked for the competent authority or for any authority or market undertaking to whom the competent authority has delegated its powers, including auditors and experts contracted by the competent authority. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by Union or national law.

*Article 28***Data protection**

With regard to the processing of personal data within the framework of this Regulation, competent authorities shall carry out their tasks for the purposes of this Regulation in accordance with the national laws, regulations or administrative provisions transposing Directive 95/46/EC. With regard to the processing of personal data by ESMA within the framework of this Regulation, ESMA shall comply with the provisions of Regulation (EC) No 45/2001.

Personal data shall be retained for a maximum period of five years.

*Article 29***Disclosure of personal data to third countries**

1. The competent authority of a Member State may transfer personal data to a third country provided the requirements of Directive 95/46/EC are fulfilled and only on a case-by-case basis. The competent authority shall ensure that the transfer is necessary for the purpose of this Regulation and that the third country does not transfer the data to another third country unless it is given express written authorisation and complies with the conditions specified by the competent authority of the Member State.
2. The competent authority of a Member State shall only disclose personal data received from a competent authority of another Member State to a supervisory authority of a third country where the competent authority of the Member State concerned has obtained express agreement from the competent authority which transmitted the data and, where applicable, the data is disclosed solely for the purposes for which that competent authority gave its agreement.
3. Where a cooperation agreement provides for the exchange of personal data, it shall comply with the national laws, regulations or administrative provisions transposing Directive 95/46/EC.

**CHAPTER 5****ADMINISTRATIVE MEASURES AND SANCTIONS***Article 30***Administrative sanctions and other administrative measures**

1. Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements:

- (a) infringements of Articles 14 and 15, Article 16(1) and (2), Article 17(1), (2), (4) and (5), and (8), Article 18(1) to (6), Article 19(1), (2), (3), (5), (6), (7) and (11) and Article 20(1); and

- (b) failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23(2).

Member States may decide not to lay down rules for administrative sanctions as referred to in the first subparagraph where the infringements referred to in point (a) or point (b) of that subparagraph are already subject to criminal sanctions in their national law by 3 July 2016. Where they so decide, Member States shall notify, in detail, to the Commission and to ESMA, the relevant parts of their criminal law.

By 3 July 2016, Member States shall notify, in detail, the rules referred to in the first and second subparagraph to the Commission and to ESMA. They shall notify the Commission and ESMA without delay of any subsequent amendments thereto.

2. Member States shall, in accordance with national law, ensure that competent authorities have the power to impose at least the following administrative sanctions and to take at least the following administrative measures in the event of the infringements referred to in point (a) of the first subparagraph of paragraph 1:

- (a) an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;
- (b) the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;
- (c) a public warning which indicates the person responsible for the infringement and the nature of the infringement;
- (d) withdrawal or suspension of the authorisation of an investment firm;
- (e) a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;
- (f) in the event of repeated infringements of Article 14 or 15, a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement, from exercising management functions in investment firms;
- (g) a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;
- (h) maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined;
  - (i) in respect of a natural person, maximum administrative pecuniary sanctions of at least:
    - (i) for infringements of Articles 14 and 15, EUR 5 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;
    - (ii) for infringements of Articles 16 and 17, EUR 1 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and
    - (iii) for infringements of Articles 18, 19 and 20, EUR 500 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and

- (j) in respect of legal persons, maximum administrative pecuniary sanctions of at least:
  - (i) for infringements of Articles 14 and 15, EUR 15 000 000 or 15 % of the total annual turnover of the legal person according to the last available accounts approved by the management body, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;
  - (ii) for infringements of Articles 16 and 17, EUR 2 500 000 or 2 % of its total annual turnover according to the last available accounts approved by the management body, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014; and
  - (iii) for infringements of Articles 18, 19 and 20, EUR 1 000 000 or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014.

References to the competent authority in this paragraph are without prejudice to the ability of the competent authority to exercise its functions in any ways referred to in Article 23(1).

For the purposes of points (j)(i) and (ii) of the first subparagraph, where the legal person is a parent undertaking or a subsidiary undertaking which is required to prepare consolidated financial accounts pursuant to Directive 2013/34/EU<sup>(1)</sup>, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant accounting directives – Council Directive 86/635/EEC<sup>(2)</sup> for banks and Council Directive 91/674/EEC<sup>(3)</sup> for insurance companies – according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking.

3. Member States may provide that competent authorities have powers in addition to those referred to in paragraph 2 and may provide for higher levels of sanctions than those established in that paragraph.

## Article 31

### **Exercise of supervisory powers and imposition of sanctions**

1. Member States shall ensure that when determining the type and level of administrative sanctions, competent authorities take into account all relevant circumstances, including, where appropriate:

- (a) the gravity and duration of the infringement;
- (b) the degree of responsibility of the person responsible for the infringement;
- (c) the financial strength of the person responsible for the infringement, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;
- (d) the importance of the profits gained or losses avoided by the person responsible for the infringement, insofar as they can be determined;
- (e) the level of cooperation of the person responsible for the infringement with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

<sup>(1)</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

<sup>(2)</sup> Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ L 372, 31.12.1986, p. 1).

<sup>(3)</sup> Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31.12.1991, p. 7).

- (f) previous infringements by the person responsible for the infringement; and
- (g) measures taken by the person responsible for the infringement to prevent its repetition.

2. In the exercise of their powers to impose administrative sanctions and other administrative measures under Article 30, competent authorities shall cooperate closely to ensure that the exercise of their supervisory and investigative powers, and the administrative sanctions that they impose, and the other administrative measures that they take, are effective and appropriate under this Regulation. They shall coordinate their actions in accordance with Article 25 in order to avoid duplication and overlaps when exercising their supervisory and investigative powers and when imposing administrative sanctions in respect of cross-border cases.

#### *Article 32*

##### **Reporting of infringements**

1. Member States shall ensure that competent authorities establish effective mechanisms to enable reporting of actual or potential infringements of this Regulation to competent authorities.

2. The mechanisms referred to in paragraph 1 shall include at least:

- (a) specific procedures for the receipt of reports of infringements and their follow-up, including the establishment of secure communication channels for such reports;
- (b) within their employment, appropriate protection for persons working under a contract of employment, who report infringements or are accused of infringements, against retaliation, discrimination or other types of unfair treatment at a minimum; and
- (c) protection of personal data both of the person who reports the infringement and the natural person who allegedly committed the infringement, including protection in relation to preserving the confidentiality of their identity, at all stages of the procedure without prejudice to disclosure of information being required by national law in the context of investigations or subsequent judicial proceedings.

3. Member States shall require employers who carry out activities that are regulated by financial services regulation to have in place appropriate internal procedures for their employees to report infringements of this Regulation.

4. Member States may provide for financial incentives to persons who offer relevant information about potential infringements of this Regulation to be granted in accordance with national law where such persons do not have other pre-existing legal or contractual duties to report such information, and provided that the information is new, and that it results in the imposition of an administrative or criminal sanction, or the taking of another administrative measure, for an infringement of this Regulation.

5. The Commission shall adopt implementing acts to specify the procedures referred to in paragraph 1, including the arrangements for reporting and for following-up reports, and measures for the protection of persons working under a contract of employment and measures for the protection of personal data. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 36(2).

#### *Article 33*

##### **Exchange of information with ESMA**

1. Competent authorities shall provide ESMA annually with aggregated information regarding all administrative sanctions and other administrative measures imposed by the competent authority in accordance with Articles 30, 31 and 32. ESMA shall publish that information in an annual report. Competent authorities shall also provide ESMA annually with anonymised and aggregated data regarding all administrative investigations undertaken in accordance with those Articles.

2. Where Member States have, in accordance with the second subparagraph of Article 30(1), laid down criminal sanctions for the infringements referred to in that Article, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal penalties imposed by the judicial authorities in accordance with Articles 30, 31 and 32. ESMA shall publish data on criminal sanctions imposed in an annual report.

3. Where the competent authority has disclosed administrative or criminal sanctions or other administrative measures to the public, it shall simultaneously notify ESMA thereof.

4. Where a published administrative or criminal sanction or other administrative measure relates to an investment firm authorised in accordance with Directive 2014/65/EU, ESMA shall add a reference to that published sanction or measure in the register of investment firms established under Article 5(3) of that Directive.

5. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 34*

#### **Publication of decisions**

1. Subject to the third subparagraph, competent authorities shall publish any decision imposing an administrative sanction or other administrative measure in relation to an infringement of this Regulation on their website immediately after the person subject to that decision has been informed of that decision. Such publication shall include at least information on the type and nature of the infringement and the identity of the person subject to the decision.

The first subparagraph does not apply to decisions imposing measures that are of an investigatory nature.

Where a competent authority considers that the publication of the identity of the legal person subject to the decision, or of the personal data of a natural person, would be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where such publication would jeopardise an ongoing investigation or the stability of the financial markets, it shall do any of the following:

- (a) defer publication of the decision until the reasons for that deferral cease to exist;
- (b) publish the decision on an anonymous basis in accordance with national law where such publication ensures the effective protection of the personal data concerned;
- (c) not publish the decision in the event that the competent authority is of the opinion that publication in accordance with point (a) or (b) will be insufficient to ensure:
  - (i) that the stability of financial markets is not jeopardised; or
  - (ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

Where a competent authority takes a decision to publish a decision on an anonymous basis as referred to in point (b) of the third subparagraph, it may postpone the publication of the relevant data for a reasonable period of time where it is foreseeable that the reasons for anonymous publication will cease to exist during that period.

2. Where the decision is subject to an appeal before a national judicial, administrative or other authority, competent authorities shall also publish immediately on their website such information and any subsequent information on the outcome of such an appeal. Moreover, any decision annulling a decision subject to appeal shall also be published.

3. Competent authorities shall ensure that any decision that is published in accordance with this Article shall remain accessible on their website for a period of at least five years after its publication. Personal data contained in such publications shall be kept on the website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.

## CHAPTER 6

### DELEGATED ACTS AND IMPLEMENTING ACTS

#### Article 35

##### Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 6(5) and (6), Article 12(5), the third subparagraph of Article 17(2), Article 17(3), and Article 19(13) and (14) shall be conferred on the Commission for an indeterminate period of time from 2 July 2014.

3. The delegation of power referred to in Article 6(5) and (6), Article 12(5), the third subparagraph of Article 17(2), Article 17(3), and Article 19(13) and (14), may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to referred to Article 6(5) and (6), Article 12(5), the third subparagraph of Article 17(2), Article 17(3), or Article 19(13) or (14), shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.

#### Article 36

##### Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC (<sup>1</sup>). That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

(<sup>1</sup>) Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ L 191, 13.7.2001, p. 45).

CHAPTER 7  
**FINAL PROVISIONS**

*Article 37*

**Repeal of Directive 2003/6/EC and its implementing measures**

Directive 2003/6/EC and Commission Directives 2004/72/EC (¹), 2003/125/EC (²) and 2003/124/EC (³) and Commission Regulation (EC) No 2273/2003 (⁴) shall be repealed with effect from 3 July 2016. References to Directive 2003/6/EC shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex II to this Regulation.

*Article 38*

**Report**

By 3 July 2019, the Commission shall submit a report to the European Parliament and to the Council on the application of this Regulation, together with a legislative proposal to amend it if appropriate. That report shall assess, *inter alia*:

- (a) the appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation;
- (b) whether the definition of inside information is sufficient to cover all information relevant for competent authorities to effectively combat market abuse;
- (c) the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply;
- (d) the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for such a framework; and
- (e) the scope of the application of the benchmark provisions.

For the purposes of point (a) of the first subparagraph, ESMA shall undertake a mapping exercise of the application of administrative sanctions and, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of this Regulation, of the application of such criminal sanctions within Member States. That exercise shall also include any data made available under Article 33(1) and (2).

*Article 39*

**Entry into force and application**

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

(¹) Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions (OJ L 162, 30.4.2004, p. 70).

(²) Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest (OJ L 339, 24.12.2003, p. 73).

(³) Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ L 339, 24.12.2003, p. 70).

(⁴) Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (OJ L 336, 23.12.2003, p. 33).

2. It shall apply from 3 July 2016 except for Article 4(4) and (5), Article 5(6), Article 6(5) and (6), Article 7(5), Article 11(9), (10) and (11), Article 12(5), Article 13(7) and (11), Article 16(5), the third subparagraph of Article 17(2), Article 17(3), (10) and (11), Article 18(9), Article 19(13), (14) and (15), Article 20(3), Article 24(3), Article 25(9), the second, third and fourth subparagraphs of Article 26(2), Article 32(5) and Article 33(5), which shall apply on 2 July 2014.

3. Member States shall take the necessary measures to comply with Articles 22, 23 and 30, Article 31(1) and Articles 32 and 34 by 3 July 2016.

4. References in this Regulation to Directive 2014/65/EU and Regulation (EU) No 600/2014 shall, before 3 January 2017, be read as references to Directive 2004/39/EC in accordance with the correlation table set out in Annex IV to Directive 2014/65/EU in so far as that correlation table contains provisions referring to Directive 2004/39/EC.

Where reference in the provisions of this Regulation is made to OTFs, SME growth markets, emission allowances or auctioned products based thereon, those provisions shall not apply to OTFs, SME growth markets, emission allowances or auctioned products based thereon until 3 January 2017.

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

Done at Strasbourg, 16 April 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

## ANNEX I

**A. Indicators of manipulative behaviour relating to false or misleading signals and to price securing**

For the purposes of applying point (a) of Article 12(1) of this Regulation, and without prejudice to the forms of behaviour set out in paragraph 2 of that Article, the following non-exhaustive indicators, which shall not necessarily be deemed, in themselves, to constitute market manipulation, shall be taken into account when transactions or orders to trade are examined by market participants and competent authorities:

- (a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant financial instrument, related spot commodity contract, or auctioned product based on emission allowances, in particular when those activities lead to a significant change in their prices;
- (b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, lead to significant changes in the price of that financial instrument, related spot commodity contract, or auctioned product based on emission allowances;
- (c) whether transactions undertaken lead to no change in beneficial ownership of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances;
- (d) the extent to which orders to trade given or transactions undertaken or orders cancelled include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, and might be associated with significant changes in the price of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances;
- (e) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;
- (f) the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances, or more generally the representation of the order book available to market participants, and are removed before they are executed; and
- (g) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations.

**B. Indicators of manipulative behaviour relating to the employment of a fictitious device or any other form of deception or contrivance**

For the purposes of applying point (b) of Article 12(1) of this Regulation, and without prejudice to the forms of behaviour set out in paragraph 2 of that Article thereof, the following non-exhaustive indicators, which shall not necessarily be deemed, in themselves, to constitute market manipulation, shall be taken into account where transactions or orders to trade are examined by market participants and competent authorities:

- (a) whether orders to trade given or transactions undertaken by persons are preceded or followed by dissemination of false or misleading information by the same persons or by persons linked to them; and
- (b) whether orders to trade are given or transactions are undertaken by persons before or after the same persons or persons linked to them produce or disseminate investment recommendations which are erroneous, biased, or demonstrably influenced by material interest.

## ANNEX II

**Correlation table**

This Regulation	Directive 2003/6/EC
Article 1	
Article 2	
Article 2(1)(a)	Article 9, first paragraph
Article 2(1)(b)	
Article 2(1)(c)	
Article 2(1)(d)	Article 9, second paragraph
Article 2(3)	Article 9, first paragraph
Article 2(4)	Article 10 (a)
Point (1) of Article 3(1)	Article 1(3)
Point (2) of Article 3(1)	
Point (3) of Article 3(1)	
Point (4) of Article 3(1)	
Point (5) of Article 3(1)	
Point (6) of Article 3(1)	Article 1(4)
Point (7) of Article 3(1)	
Point (8) of Article 3(1)	
Point (9) of Article 3(1)	Article 1(5)
Point (10) of Article 3(1)	
Point (11) of Article 3(1)	
Point (12) of Article 3(1)	Article 1(7)
Point (13) of Article 3(1)	Article 1(6)
Points (14) to (35) of Article 3(1)	
Article 4	
Article 5	Article 8
Article 6(1)	Article 7
Article 6(2)	
Article 6(3)	
Article 6(4)	
Article 6(5)	
Article 6(6)	
Article 6(7)	

This Regulation	Directive 2003/6/EC
Article 7(1)(a)	Article 1(1), first paragraph
Article 7(1)(b)	Article 1(1), second paragraph
Article 7(1)(c)	
Article 7(1)(d)	Article 1(1), third paragraph
Article 7(2)	
Article 7(3)	
Article 7(4)	
Article 7(5)	
Article 8(1)	Article 2(1), first subparagraph
Article 8(2)	
Article 8(2)(a)	Article 3(b)
Article 8(2)(b)	
Article 8(3)	
Article 8(4)(a)	Article 2(1)(a)
Article 8(4)(b)	Article 2(1)(b)
Article 8(4)(c)	Article 2(1)(c)
Article 8(4)(d)	Article 2(1)(d)
Article 8(4), second subparagraph	Article 4
Article 8(5)	Article 2(2)
Article 9(1)	
Article 9(2)	
Article 9(3)(a)	Article 2(3)
Article 9(3)(b)	Article 2(3)
Article 9(4)	
Article 9(5)	
Article 9(6)	
Article 10(1)	Article 3(a)
Article 10(2)	
Article 11	
Article 12(1)	
Article 12(1)(a)	Article 1(2)(a)
Article 12(1)(b)	Article 1(2)(b)
Article 12(1)(c)	Article 1(2)(c)

This Regulation	Directive 2003/6/EC
Article 12(1)(d)	
Article 12(2)(a)	Article 1(2), first indent of second paragraph
Article 12(2)(b)	Article 1(2), second indent of second paragraph
Article 12(2)(c)	
Article 12(2)(d)	Article 1(2), third indent of second paragraph
Article 12(2)(e)	
Article 12(3)	
Article 12(4)	
Article 12(5)	Article 1(2), third paragraph
Article 13(1)	Article 1(2)(a), second paragraph
Article 13(1)	
Article 13(2)	
Article 13(3)	
Article 13(4)	
Article 13(5)	
Article 13(6)	
Article 13(7)	
Article 13(8)	
Article 13(9)	
Article 13(10)	
Article 13(11)	
Article 14(a)	Article 2(1), first paragraph
Article 14(b)	Article 3(b)
Article 14(c)	Article 3(a)
Article 15	Article 5
Article 16(1)	Article 6(6)
Article 16(2)	Article 6(9)
Article 16(3)	
Article 16(4)	
Article 16(5)	Article 6(10), seventh indent
Article 17(1)	Article 6(1)
Article 17(1), third subparagraph	Article 9, third paragraph
Article 17(2)	

This Regulation	Directive 2003/6/EC
Article 17(3)	
Article 17(4)	Article 6(2)
Article 17(5)	
Article 17(6)	
Article 17(7)	
Article 17(8)	Article 6(3), first and second subparagraph
Article 17(9)	
Article 17(10)	Article 6(10), first and second indent
Article 17(11)	
Article 18(1)	Article 6(3), third subparagraph
Article 18(2)	
Article 18(3)	
Article 18(4)	
Article 18(5)	
Article 18(6)	
Article 18(7)	Article 9, third paragraph
Article 18(8)	
Article 18(9)	Article 6(10), fourth indent
Article 19(1)	Article 6(4)
Article 19(1)(a)	Article 6(4)
Article 19(1)(b)	
Article 19(2)	
Article 19(3)	
Article 19(4)(a)	
Article 19(4)(b)	
Article 19(5) to (13)	
Article 19(14)	Article 6(10), fifth indent
Article 19(15)	Article 6(10), fifth indent
Article 20(1)	Article 6(5)
Article 20(2)	Article 6(8)
Article 20(3)	Article 6(10), sixth indent and Article 6(11)
Article 21	Article 1(2)(c), second sentence
Article 22	Article 11, first paragraph and Article 10
Article 23(1)	Article 12(1)

This Regulation	Directive 2003/6/EC
Article 23(1)(a)	Article 12(1)(a)
Article 23(1)(b)	Article 12(1)(b)
Article 23(1)(c)	Article 12(1)(c)
Article 23(1)(d)	Article 12(1)(d)
Article 23(2)(a)	Article 12(2)(a)
Article 23(2)(b)	Article 12(2)(b)
Article 23(2)(c)	
Article 23(2)(d)	Article 12(2)(c)
Article 23(2)(e)	
Article 23(2)(f)	
Article 23(2)(g)	Article 12(2)(d)
Article 23(2)(h)	Article 12(2)(d)
Article 23(2)(i)	Article 12(2)(g)
Article 23(2)(j)	Article 12(2)(f)
Article 23(2)(k)	Article 12(2)(e)
Article 23(2)(l)	Article 12(2)(h)
Article 23(2)(m)	Article 6(7)
Article 23(3)	
Article 23(4)	
Article 24(1)	Article 15a(1)
Article 24(2)	Article 15a(2)
Article 24(3)	
Article 25(1) first subparagraph	Article 16(1)
Article 25(2)	Article 16(2) and Article 16(4), fourth subparagraph
Article 25(2)(a)	Article 16(2), first indent of second subparagraph and Article 16(4) fourth subparagraph
Article 25(2)(b)	
Article 25(2)(c)	Article 16(2), second indent of second subparagraph and Article 16(4), fourth subparagraph
Article 25(2)(d)	Article 16(2) third indent of second subparagraph and Article 16(4) fourth subparagraph
Article 25(3)	
Article 25(4)	Article 16(2), first sentence
Article 25(5)	Article 16(3)
Article 25(6)	Article 16(4)

This Regulation	Directive 2003/6/EC
Article 25(7)	Article 16(2), fourth subparagraph and Article 16(4), fourth subparagraph
Article 25(8)	
Article 25(9)	Article 16(5)
Article 26	
Article 27(1)	
Article 27(2)	
Article 27(3)	Article 13
Article 28	
Article 29	
Article 30(1) first subparagraph	Article 14(1)
Article 30(1)(a)	
Article 30(1)(b)	Article 14(3)
Article 30(2)	
Article 30(3)	
Article 31	
Article 32	
Article 33(1)	Article 14(5), first subparagraph
Article 33(2)	
Article 33(3)	Article 14(5), second subparagraph
Article 33(4)	Article 14(5), third subparagraph
Article 33(5)	
Article 34(1)	Article 14(4)
Article 34(2)	
Article 34(3)	
Article 35	
Article 36(1)	Article 17(1)
Article 36(2)	
Article 37	Article 20
Article 38	
Article 39	Article 21
Annex	

**REGULATION (EU) No 597/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 16 April 2014**

**amending Council Regulation (EC) No 812/2004 laying down measures concerning incidental catches of cetaceans in fisheries**

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 43(2) 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>,

Acting in accordance with the ordinary legislative procedure<sup>(2)</sup>,

Whereas:

- (1) Council Regulation (EC) No 812/2004<sup>(3)</sup> confers powers on the Commission in order to implement some of the provisions of that Regulation. Following the entry into force of the Lisbon Treaty, it is appropriate to align those powers to Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU).
- (2) In order to ensure the efficient adaptation of certain provisions of Regulation (EC) No 812/2004 to technical and scientific progress, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of technical specifications and conditions relating to the signal characteristics and implementation characteristics of the use of acoustic deterrent devices. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (3) In order to ensure uniform conditions for the implementation of the provisions of Regulation (EC) No 812/2004 laying down rules on the procedure and format for reporting by Member States, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>(4)</sup>.
- (4) In view of the requirement for Member States to take the necessary measures to establish a system of strict protection for cetaceans in accordance with Regulation (EC) No 812/2004, and given the shortcomings of that Regulation identified by the Commission, the appropriateness and effectiveness of the provisions of that Regulation for protecting cetaceans should be reviewed by 31 December 2015. On the basis of that review, the Commission should, if appropriate, submit to the European Parliament and to the Council an overarching legislative proposal for ensuring the effective protection of cetaceans, including through the regionalisation process.
- (5) Regulation (EC) No 812/2004 should therefore be amended accordingly,

<sup>(1)</sup> OJ C 11, 15.1.2013, p. 85.

<sup>(2)</sup> Position of the European Parliament of 16 April 2013 (not yet published in the Official Journal) and position of the Council at first reading of 3 March 2014 (not yet published in the Official Journal). Position of the European Parliament of 16 April 2014 (not yet published in the Official Journal).

<sup>(3)</sup> Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 (OJ L 150, 30.4.2004, p. 12).

<sup>(4)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

HAVE ADOPTED THIS REGULATION:

*Article 1*

Regulation (EC) No 812/2004 is amended as follows:

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

'1. Acoustic deterrent devices used in application of Article 2(1) shall comply with the technical specifications and conditions of use set out in Annex II. In order to ensure that Annex II continues to reflect the state of technical and scientific progress, the Commission shall be empowered to adopt delegated acts, in accordance with Article 8a, updating the signal characteristics and the corresponding implementation characteristics therein. When adopting those delegated acts, the Commission shall make provision for sufficient time for the implementation of such adaptations.:'

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

'3. By 31 December 2015, the Commission shall review the effectiveness of the measures provided for in this Regulation and shall, if appropriate, submit to the European Parliament and to the Council an overarching legislative proposal for ensuring the effective protection of cetaceans.';

(3) Article 8 is replaced by the following:

*Article 8*

**Implementation**

The Commission may adopt implementing acts establishing detailed rules on the procedure for and the format of the reporting provided for in Article 6. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 8b(2).';

(4) the following Articles are inserted:

*Article 8a*

**Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 3(1) shall be conferred on the Commission for a period of four years from 2 July 2014. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the four-year period. The delegation of power shall be tacitly extended for periods of identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 3(1) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 3(1) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

#### *Article 8b*

##### **Committee procedure**

1. The Commission shall be assisted by the Committee for fisheries and aquaculture established by Article 47 of Regulation (EU) No 1380/2013 of the European Parliament and of the Council (\*). That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council (\*\*).

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

(\*) Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ L 354, 28.12.2013, p. 22).

(\*\*) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).'

#### *Article 2*

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

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

Done at Strasbourg, 16 April 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

**REGULATION (EU) No 598/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 16 April 2014**

**on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC**

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 100(2) 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 (¹),

Having regard to the opinion of the Committee of the Regions (²),

Acting in accordance with the ordinary legislative procedure (³),

Whereas:

- (1) A key objective of the common transport policy is sustainable development. This requires an integrated approach aimed at ensuring both the effective functioning of Union transport systems and protection of the environment.
- (2) Sustainable development of air transport requires the introduction of measures aimed at reducing the noise impact from aircraft at Union airports. Those measures should improve the noise environment around Union airports in order to maintain or increase the quality of life of neighbouring citizens and foster compatibility between aviation activities and residential areas, in particular where night flights are concerned.
- (3) Resolution A33/7 of the International Civil Aviation Organization (ICAO) introduces the concept of a 'Balanced Approach' to noise management (Balanced Approach) and establishes a coherent method to address aircraft noise. The Balanced Approach should remain the foundation of noise regulation for aviation as a global industry. The Balanced Approach recognises the value of, and does not prejudge, relevant legal obligations, existing agreements, current laws and established policies. Incorporating the international rules of the Balanced Approach in this Regulation should substantially lessen the risk of international disputes in the event of third-country carriers being affected by noise-related operating restrictions.
- (4) Following the removal of the noisiest aircraft pursuant to Directive 2002/30/EC of the European Parliament and of the Council (⁴) and Directive 2006/93/EC of the European Parliament and of the Council (⁵), an update of how to use operating restriction measures is required to enable authorities to deal with the current noisiest aircraft so as to improve the noise environment around Union airports within the international framework of the Balanced Approach.

(¹) OJ C 181, 21.6.2012, p. 173.

(²) OJ C 277, 13.9.2012, p. 110.

(³) Position of the European Parliament of 12 December 2012 (not yet published in the Official Journal) and position of the Council at first reading of 24 March 2014 ([not yet published in the Official Journal]). Position of the European Parliament of 15 April 2014 (not yet published in the Official Journal).

(⁴) Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports (OJ L 85, 28.3.2002, p. 40).

(⁵) Directive 2006/93/EC of the European Parliament and of the Council of 12 December 2006 on the regulation of the operation of aeroplanes covered by Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988) (OJ L 374, 27.12.2006, p. 1).

- (5) The report from the Commission of 15 February 2008 entitled 'Noise Operation Restrictions at EU Airports' pointed to the need to clarify in the text of Directive 2002/30/EC the allocation of responsibilities and the precise rights and obligations of interested parties during the noise assessment process so as to guarantee that cost-effective measures are taken to achieve the noise abatement objectives for each airport.
- (6) The introduction of operating restrictions by Member States at Union airports on a case-by-case basis, whilst limiting capacity, can contribute to improving the noise climate around airports. However, there is a possibility of distorting competition or hampering the overall efficiency of the Union aviation network through the inefficient use of existing capacity. Since the achievement of the specific noise abatement objective of this Regulation cannot be sufficiently achieved by the Member States but can rather, by reason of harmonised rules on the process for introducing operating restrictions as part of the noise management process, 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. Such a harmonised method does not impose noise quality objectives, which continue to derive from Directive 2002/49/EC of the European Parliament and of the Council<sup>(1)</sup>, other relevant Union rules or legislation within each Member State, and does not prejudge the concrete selection of measures.
- (7) This Regulation should only apply to Member States in which an airport with more than 50 000 civil aircraft movements per calendar year is located and when the introduction of noise-related operating restrictions is being considered at such an airport.
- (8) This Regulation should apply to aircraft engaged in civil aviation. It should not apply to aircraft such as military aircraft and aircraft undertaking customs, police and fire-fighting operations. Furthermore, various operations of an exceptional nature, such as flights for urgent humanitarian reasons, search and rescue in emergency situations, medical assistance, and disaster relief, should be exempted from this Regulation.
- (9) While noise assessments should be carried out on a regular basis in accordance with Directive 2002/49/EC, such assessments should only lead to additional noise abatement measures if the current combination of noise mitigating measures does not achieve the noise abatement objectives, taking into account expected airport development. For airports where a noise problem has been identified, additional noise abatement measures should be identified in accordance with the Balanced Approach methodology. In order to ensure a wide application of the Balanced Approach within the Union, its use is recommended whenever it is considered adequate by the individual Member State concerned, even beyond the scope of this Regulation. Noise-related operating restrictions should be introduced only when other Balanced Approach measures are not sufficient to attain the specific noise abatement objectives.
- (10) While a cost-benefit analysis provides an indication of the total economic welfare effects by comparing all costs and benefits, a cost-effectiveness assessment focuses on achieving a given objective in the most cost-effective way, requiring a comparison of only the costs. This Regulation should not prevent Member States from using cost-benefit analyses where appropriate.
- (11) The importance of health aspects needs to be recognised in relation to noise problems, and it is therefore important that those aspects be taken into consideration in a consistent manner at all airports when a decision is taken on noise abatement objectives, taking into account the existence of common Union rules in this area. Therefore, health aspects should be assessed in accordance with Union legislation on the evaluation of noise effects.
- (12) Noise assessments should be based on objective and measurable criteria common to all Member States and should build on existing information available, such as information arising from the implementation of Directive 2002/49/EC. Member States should ensure that such information is reliable, that it is obtained in a transparent manner and that it is accessible to competent authorities and stakeholders. Competent authorities should put in place the necessary monitoring tools.

<sup>(1)</sup> Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (OJ L 189, 18.7.2002, p. 12).

- (13) The competent authority responsible for adopting noise-related operating restrictions should be independent of any organisation involved in the airport's operation, air transport or air navigation service provision, or representing the interests thereof and of the residents living in the vicinity of the airport. This should not be understood as requiring Member States to modify their administrative structures or decision-making procedures.
- (14) It is recognised that Member States have decided on noise-related operating restrictions in accordance with national legislation based on nationally acknowledged noise methods, which, as yet, might not be fully consistent with the method described in the authoritative European Civil Aviation Conference Report Doc 29 entitled 'Standard Method of Computing Noise Contours around Civil Airports' (ECAC Doc 29) nor use the internationally recognised aircraft noise performance information. However, the efficiency and effectiveness of a noise-related operating restriction should be assessed in accordance with the methods prescribed in ECAC Doc 29 and the Balanced Approach. Accordingly, Member States should adapt their assessments of operating restrictions in national legislation towards full compliance with ECAC Doc 29.
- (15) A new and wider definition of operating restrictions as compared to Directive 2002/30/EC should be introduced in order to facilitate the implementation of new technologies and new operational capabilities of aircraft and ground equipment. Its application should not lead to delay in the implementation of operational measures which could immediately alleviate the noise impact without substantially affecting the operational capacity of an airport. Such measures should therefore not be considered to constitute new operating restrictions.
- (16) The centralisation of information on noise would substantially reduce the administrative burden for both aircraft operators and airport operators. Such information is currently provided and managed at the level of individual airports. Those data need to be placed at the disposal of aircraft operators and airports for operational purposes. It is important to use the databank of the European Aviation Safety Agency ('the Agency') concerning noise performance certification as a validation tool with the European Organisation for the Safety of Air Navigation (Eurocontrol) data on individual flights. Such data are currently already systematically requested for central flow management purposes, but are not at present available to the Commission or to the Agency, and need to be specified for the purpose of this Regulation and for performance regulation of air traffic management. Good access to validated modelling data, determined in accordance with internationally recognised processes and best practices, should improve the quality of mapping of noise contours of individual airports to support policy decisions.
- (17) To avoid unwanted consequences for aviation safety, airport capacity and competition, the Commission should notify the relevant competent authority if it finds that the process followed for the introduction of noise-related operating restrictions does not meet the requirements of this Regulation. The relevant competent authority should examine the Commission notification and should inform the Commission of its intentions before introducing the operating restrictions.
- (18) In order to take account of the Balanced Approach, provision should be made for the possibility of exemptions in special circumstances for operators from developing third countries, without which such operators would suffer undue hardship. Reference to 'developing countries' is to be understood in the light of this specific aviation context and does not include all countries that would otherwise be referred to as such, within the international community. In particular, it is necessary to ensure that any such exemptions are compatible with the principle of non-discrimination.
- (19) In order to reflect the continuous technological progress in engine and airframe technologies and the methods used to map noise contours, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission with respect to regularly updating the noise standards for aircraft referred to in this Regulation and the reference to the associated certification methods, taking into account, when appropriate, changes in relevant ICAO documents and updating the reference to the method for computing noise contours, taking into account, when appropriate, changes in relevant ICAO documents. In addition, changes to ECAC Doc 29 should also be taken into consideration for technical updates through delegated acts, as appropriate. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of all relevant documents to the European Parliament and to the Council.

- (20) While this Regulation requires a regular assessment of the noise situation at airports, such an assessment does not necessarily entail the adoption of new noise-related operating restrictions or the review of existing ones. Therefore, this Regulation does not require the review of noise-related operating restrictions already in place at the date of its entry into force, including those resulting from court decisions or local mediation processes. Minor technical amendments to measures without substantive implications for capacity or operations should not be considered as new noise-related operating restrictions.
- (21) Where the consultation process preceding the adoption of a noise-related operating restriction was launched under Directive 2002/30/EC and is still ongoing at the date of entry into force of this Regulation, it is appropriate to allow the final decision to be taken in accordance with Directive 2002/30/EC in order to preserve the progress already achieved in that process.
- (22) Considering the need for the consistent application of the noise assessment method within the Union aviation market, this Regulation sets out common rules in the field of noise operating restrictions.
- (23) Directive 2002/30/EC should therefore be repealed,

HAVE ADOPTED THIS REGULATION:

## Article 1

### **Subject matter, objectives and scope**

1. This Regulation lays down, where a noise problem has been identified, rules on the process to be followed for the introduction of noise-related operating restrictions in a consistent manner on an airport-by-airport basis, so as to help improve the noise climate and to limit or reduce the number of people significantly affected by potentially harmful effects of aircraft noise, in accordance with the Balanced Approach.
2. The objectives of this Regulation are:
  - (a) to facilitate the achievement of specific noise abatement objectives, including health aspects, at the level of individual airports, while respecting relevant Union rules, in particular those laid down in Directive 2002/49/EC, and the legislation within each Member State;
  - (b) to enable the use of operating restrictions in accordance with the Balanced Approach so as to achieve the sustainable development of the airport and air traffic management network capacity from a gate-to-gate perspective.
3. This Regulation shall apply to aircraft engaged in civil aviation. It shall not apply to aircraft engaged in military, customs, police or similar operations.

## Article 2

### **Definitions**

For the purpose of this Regulation, the following definitions shall apply:

- (1) 'aircraft' means fixed-wing aircraft with a maximum certificated take-off mass of 34 000 kg or more, or with a certificated maximum internal accommodation for the aircraft type in question consisting of 19 passenger seats or more, excluding any seats for crew only;
- (2) 'airport' means an airport which has more than 50 000 civil aircraft movements per calendar year (a movement being a take-off or landing), on the basis of the average number of movements in the last three calendar years before the noise assessment;

- (3) 'Balanced Approach' means the process developed by the International Civil Aviation Organization under which the range of available measures, namely the reduction of aircraft noise at source, land-use planning and management, noise abatement operational procedures and operating restrictions, is considered in a consistent way with a view to addressing the noise problem in the most cost-effective way on an airport-by-airport basis;
- (4) 'marginally compliant aircraft' means aircraft which are certified in accordance with limits laid down in Volume 1, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation signed on 7 December 1944 (the Chicago Convention) by a cumulative margin of less than 8 EPNdB (Effective Perceived Noise in Decibels) during a transitional period ending on 14 June 2020, and by a cumulative margin of less than 10 EPNdB following the end of that transitional period, whereby the cumulative margin is the figure expressed in EPNdB obtained by adding the individual margins (i.e. the differences between the certificated noise level and the maximum permitted noise level) at each of the three reference noise measurement points defined in Volume 1, Part II, Chapter 3 of Annex 16 to the Chicago Convention;
- (5) 'noise-related action' means any measure that affects the noise climate around airports, for which the principles of the Balanced Approach apply, including other non-operational actions that can affect the number of people exposed to aircraft noise;
- (6) 'operating restriction' means a noise-related action that limits access to or reduces the operational capacity of an airport, including operating restrictions aimed at the withdrawal from operations of marginally compliant aircraft at specific airports as well as operating restrictions of a partial nature, which for example apply for an identified period of time during the day or only for certain runways at the airport.

#### *Article 3*

##### **Competent authorities**

1. A Member State in which an airport as referred to in point (2) of Article 2 is located shall designate one or more competent authorities responsible for the process to be followed when adopting operating restrictions.
2. The competent authorities shall be independent of any organisation which could be affected by noise-related action. That independence may be achieved through a functional separation.
3. The Member States shall notify the Commission, in a timely manner, of the names and addresses of the designated competent authorities referred to in paragraph 1. The Commission shall publish that information.

#### *Article 4*

##### **Right of appeal**

1. Member States shall ensure the right to appeal against operating restrictions adopted pursuant to this Regulation before an appeal body other than the authority that adopted the contested restriction, in accordance with national legislation and procedures.
2. The Member State in which an airport as referred to in point (2) of Article 2 is located shall notify the Commission, in a timely manner, of the name and address of the designated appeal body referred to in paragraph 1 or, where appropriate, of the arrangements for ensuring that an appeal body is appointed.

#### *Article 5*

##### **General rules on aircraft noise management**

1. Member States shall ensure that the noise situation at an individual airport as referred to in point (2) of Article 2 is assessed in accordance with Directive 2002/49/EC.

2. Member States shall ensure that the Balanced Approach is adopted in respect of aircraft noise management at those airports where a noise problem has been identified. To that end, they shall ensure that:

- (a) the noise abatement objective for that airport, taking into account, as appropriate, Article 8 of, and Annex V to, Directive 2002/49/EC, is defined;
- (b) measures available to reduce the noise impact are identified;
- (c) the likely cost-effectiveness of the noise mitigation measures is thoroughly evaluated;
- (d) the measures, taking into account public interest in the field of air transport as regards the development prospects of their airports, are selected without detriment to safety;
- (e) the stakeholders are consulted in a transparent way on the intended actions;
- (f) the measures are adopted and sufficient notification is provided for;
- (g) the measures are implemented; and
- (h) dispute resolution is provided for.

3. Member States shall ensure that, when noise-related action is taken, the following combination of available measures is considered, with a view to determining the most cost-effective measure or combination of measures:

- (a) the foreseeable effect of a reduction of aircraft noise at source;
- (b) land-use planning and management;
- (c) noise abatement operational procedures;
- (d) not applying operating restrictions as a first resort, but only after consideration of the other measures of the Balanced Approach.

The available measures may if necessary include the withdrawal of marginally compliant aircraft. Member States, or airport managing bodies, as appropriate, may offer economic incentives to encourage aircraft operators to use less noisy aircraft during the transitional period referred to in point (4) of Article 2. Those economic incentives shall comply with the applicable rules on State aid.

4. The measures may, within the Balanced Approach, be differentiated according to aircraft type, aircraft noise performance, use of airport and air navigation facilities, flight path and/or the timeframe covered.

5. Without prejudice to paragraph 4, operating restrictions which take the form of the withdrawal of marginally compliant aircraft from airport operations shall not affect civil subsonic aircraft that comply, through either original certification or re-certification, with the noise standard laid down in Volume 1, Part II, Chapter 4 of Annex 16 to the Chicago Convention.

6. Measures or a combination of measures taken in accordance with this Regulation for a given airport shall not be more restrictive than is necessary in order to achieve the environmental noise abatement objectives set for that airport. Operating restrictions shall be non-discriminatory, in particular on grounds of nationality or identity, and shall not be arbitrary.

## Article 6

### **Rules on noise assessment**

1. The competent authorities shall ensure that the noise situation at airports for which they are responsible is assessed on a regular basis, in accordance with Directive 2002/49/EC and the legislation applicable within each Member State. The competent authorities may call on the support of the Performance Review Body referred to in Article 3 of Commission Regulation (EU) No 691/2010 <sup>(1)</sup>.

2. If the assessment referred to in paragraph 1 indicates that new operating restriction measures may be required to address a noise problem at an airport, the competent authorities shall ensure that:

- (a) the method, indicators and information in Annex I are applied in such a way as to take due account of the contribution of each type of measure under the Balanced Approach, before operating restrictions are introduced;
- (b) at the appropriate level, technical cooperation is established between the airport operators, aircraft operators and air navigation service providers to examine measures to mitigate noise. The competent authorities shall also ensure that local residents, or their representatives, and relevant local authorities are consulted, and that technical information on noise mitigation measures is provided to them;
- (c) the cost-effectiveness of any new operating restriction is assessed, in accordance with Annex II. Minor technical amendments to measures without substantive implications on capacity or operations shall not be considered new operating restrictions;
- (d) the process of consultation with interested parties, which may take the form of a mediation process, is organised in a timely and substantive manner, ensuring openness and transparency as regards data and computation methodologies. Interested parties shall have at least three months prior to the adoption of the new operating restrictions to submit comments. The interested parties shall include at least:
  - (i) local residents living in the vicinity of the airport and affected by air traffic noise, or their representatives, and the relevant local authorities;
  - (ii) representatives of local businesses based in the vicinity of the airport, whose activities are affected by air traffic and the operation of the airport;
  - (iii) relevant airport operators;
  - (iv) representatives of those aircraft operators which may be affected by noise-related actions;
  - (v) the relevant air navigation service providers;
  - (vi) the Network Manager, as defined in Commission Regulation (EU) No 677/2011 <sup>(2)</sup>;
- (vii) where applicable, the designated slots coordinator.

<sup>(1)</sup> Commission Regulation (EU) No 691/2010 of 29 July 2010 laying down a performance scheme for air navigation services and network functions and amending Regulation (EC) No 2096/2005 laying down common requirements for the provision of air navigation services (OJ L 201, 3.8.2010, p. 1).

<sup>(2)</sup> Commission Regulation (EU) No 677/2011 of 7 July 2011 laying down detailed rules for the implementation of air traffic management (ATM) network functions and amending Regulation (EU) No 691/2010 (OJ L 185, 15.7.2011, p. 1).

3. The competent authorities shall follow up and monitor the implementation of the operating restrictions and take action as appropriate. They shall ensure that relevant information is made available free of charge and that it is readily and promptly accessible to local residents living in the vicinity of the airports and to the relevant local authorities.

4. The relevant information may include:

- (a) while respecting national law, information on alleged infringements due to changes in flight procedures, in terms of their impact and the reasons why such changes were made;
- (b) the general criteria applied when distributing and managing traffic in each airport, to the extent that those criteria may have an environmental or noise impact; and
- (c) data collected by noise measuring systems, if available.

## Article 7

### Noise performance information

1. Decisions on noise-related operating restrictions shall be based on the noise performance of the aircraft as determined by the certification procedure conducted in accordance with Volume 1 of Annex 16 to the Chicago Convention, sixth edition of March 2011.

2. At the request of the Commission, aircraft operators shall communicate the following noise information in respect of the aircraft that they operate at Union airports:

- (a) the aircraft nationality and registration mark;
- (b) the noise documentation of the aircraft used, together with the associated maximum take-off weight;
- (c) any modification of the aircraft which affects its noise performance and is stated on the noise documentation.

3. Upon request of the Agency, holders of an aircraft type certificate or a supplemental type certificate issued in accordance with Regulation (EC) No 216/2008 of the European Parliament and of the Council (<sup>1</sup>), and legal or natural persons operating aircraft for which no type certificate has been issued under that Regulation, shall provide aircraft noise and performance information for noise modelling purposes. The Agency shall specify the data required and the timeframe for, and the form and manner of, its provision. The Agency shall verify the received aircraft noise and performance information for modelling purposes and shall make the information available to other parties for noise modelling purposes.

4. The data referred to in paragraphs 2 and 3 of this Article shall be limited to what is strictly necessary and shall be provided free of charge, in electronic form and using the format specified, where applicable.

5. The Agency shall verify the aircraft noise and performance data for modelling purposes in relation to its tasks performed in accordance with Article 6(1) of Regulation (EC) No 216/2008.

<sup>(1)</sup> Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ L 79, 19.3.2008, p. 1).

6. Data shall be stored in a central database and made available to competent authorities, aircraft operators, air navigation service providers and airport operators for operational purposes.

### Article 8

#### **Rules on the introduction of operating restrictions**

1. Before introducing an operating restriction, the competent authorities shall give to the Member States, the Commission and the relevant interested parties six months' notice, ending at least two months prior to the determination of the slot coordination parameters as defined in point (m) of Article 2 of Council Regulation (EEC) No 95/93 (<sup>(1)</sup>) for the airport concerned for the relevant scheduling period.

2. Following the assessment carried out in accordance with Article 6, the notification shall be accompanied by a written report in accordance with the requirements specified in Article 5 explaining the reasons for introducing the operating restriction, the noise abatement objective established for the airport, the measures that were considered to meet that objective, and the evaluation of the likely cost-effectiveness of the various measures considered, including, where relevant, their cross-border impact.

3. At the request of a Member State or on its own initiative, the Commission may, within a period of three months after the day on which it receives notice under paragraph 1, review the process for the introduction of an operating restriction. Where the Commission finds that the introduction of a noise-related operating restriction does not follow the process set out in this Regulation, it may notify the relevant competent authority accordingly. The relevant competent authority shall examine the Commission notification and inform the Commission of its intentions before introducing the operating restriction.

4. Where the operating restriction concerns the withdrawal of marginally compliant aircraft from an airport, no additional services above the number of movements with marginally compliant aircraft in the corresponding period of the previous year shall be allowed at that airport six months after the notification referred to in paragraph 1. The Member States shall ensure that the competent authorities decide on the annual rate for reducing the number of movements of marginally compliant aircraft of affected operators at that airport, taking due account of the age of the aircraft and the composition of the total fleet. Without prejudice to Article 5(4), that rate shall not be more than 25 % of the number of movements of marginally compliant aircraft for each operator serving that airport.

### Article 9

#### **Developing countries**

1. In order to avoid undue economic hardship, the competent authorities may exempt marginally compliant aircraft registered in developing countries from noise operating restrictions, while fully respecting the principle of non-discrimination, provided that such aircraft:

(a) are granted a noise certification to the standards specified in Chapter 3, Volume 1 of Annex 16 to the Chicago Convention;

(b) were operated in the Union during the five-year period preceding the entry into force of this Regulation;

(c) were on the register of the developing country concerned in that five-year period; and

(d) continue to be operated by a natural or legal person established in that country.

2. Where a Member State grants an exemption provided for in paragraph 1, it shall forthwith inform the competent authorities of the other Member States and the Commission thereof.

<sup>(1)</sup> Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

### Article 10

#### **Exemption for aircraft operations of an exceptional nature**

The competent authorities may, on a case-by-case basis, authorise individual operations at airports for which they are responsible in respect of marginally compliant aircraft which could not otherwise take place on the basis of this Regulation.

The exemption shall be limited to:

- (a) operations which are of such an exceptional nature that it would be unreasonable to withhold a temporary exemption, including humanitarian aid flights; or
- (b) non-revenue flights for the purpose of alterations, repair or maintenance.

### Article 11

#### **Delegated acts**

The Commission shall be empowered to adopt delegated acts in accordance with Article 12 concerning:

- (a) technical updates to the noise certification standards provided for in Article 5(5) and point (a) of Article 9(1), and to the certification procedure provided for in Article 7(1);
- (b) technical updates to the methodology and indicators set out in Annex I.

The purpose of those updates shall be to take into account changes to relevant international rules, as appropriate.

### Article 12

#### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 11 shall be conferred on the Commission for a period of five years from 13 June 2016. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 11 may be revoked by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the powers specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 11 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

*Article 13***Information and revision**

Member States shall upon request submit information on the application of this Regulation to the Commission.

No later than 14 June 2021, the Commission shall report to the European Parliament and to the Council on the application of this Regulation.

That report shall be accompanied, where necessary, by proposals for revision of this Regulation.

*Article 14***Existing operating restrictions**

Noise-related operating restrictions which were already introduced before 13 June 2016 shall remain in force until the competent authorities decide to revise them in accordance with this Regulation.

*Article 15***Repeal**

Directive 2002/30/EC is repealed with effect from 13 June 2016.

*Article 16***Transitional provisions**

Notwithstanding Article 15 of this Regulation, noise-related operating restrictions adopted after 13 June 2016 may be adopted in accordance with Directive 2002/30/EC where the consultation process prior to their adoption was ongoing at that date and provided that those restrictions are adopted at the latest one year after that date.

*Article 17***Entry into force**

This Regulation shall enter into force on 13 June 2016.

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

Done at Strasbourg, 16 April 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

## ANNEX I

**ASSESSMENT OF THE NOISE SITUATION AT AN AIRPORT****Methodology:**

Competent authorities will ensure the use of noise assessment methods which have been developed in accordance with the European Civil Aviation Conference Report Doc 29 entitled 'Standard Method of Computing Noise Contours around Civil Airports', 3rd Edition.

**Indicators:**

1. Air traffic noise impact will be described, at least, in terms of noise indicators  $L_{den}$  and  $L_{night}$  which are defined and calculated in accordance with Annex I to Directive 2002/49/EC.
2. Additional noise indicators which have an objective basis may be used.

**Noise management information:**

1. Current inventory
- 1.1. A description of the airport, including information about its size, location, surroundings, air traffic volume and mix.
- 1.2. A description of any environmental objectives for the airport and the national context. This will include a description of the aircraft noise abatement objectives for the airport.
- 1.3. Details of noise contours for the relevant previous years — including an assessment of the number of people affected by aircraft noise, carried out in accordance with Annex II to Directive 2002/49/EC.
- 1.4. A description of the existing and planned measures to manage aircraft noise already implemented in the framework of the Balanced Approach and their impact on and contribution to the noise situation, by reference to:
  - 1.4.1. For reduction at source:
    - (a) information on the current aircraft fleet and any expected technology improvements;
    - (b) specific fleet renewal plans.
  - 1.4.2. For land-use planning and management:
    - (a) planning instruments in place, such as comprehensive planning or noise zoning;
    - (b) mitigating measures in place, such as building codes, noise insulation programmes or measures to reduce areas of sensitive land use;
    - (c) consultation process in respect of the land-use measures;
    - (d) monitoring of encroachment.
  - 1.4.3. For noise abatement operational measures, to the extent that those measures do not restrict the capacity of an airport:
    - (a) use of preferential runways;
    - (b) use of noise-preferential routes;

1.4.3. For noise abatement operational measures, to the extent that those measures do not restrict the capacity of an airport:

- (a) use of preferential runways;
- (b) use of noise-preferential routes;

- (c) use of noise abatement take-off and approach procedures;
- (d) indication of the extent to which those measures are regulated under environment indicators, as mentioned in Annex I to Regulation (EU) No 691/2010.

1.4.4. For operating restrictions:

- (a) use of global restrictions, such as a cap on movements or noise quotas;
- (b) use of aircraft-specific restrictions, such as the withdrawal of marginally compliant aircraft;
- (c) use of partial restrictions, drawing a distinction between daytime measures and night-time measures.

1.4.5. The financial instruments in place, such as noise-related airport charges.

2. Forecast without new measures

- 2.1. Descriptions of airport developments, if any, already approved and in the pipeline, for example, increased capacity, runway and/or terminal expansion, approach and take-off forecasts, projected future traffic mix and estimated growth and a detailed study of the noise impact on the surrounding area caused by expanding the capacity, runways and terminals and by modifying flight paths and approach and take-off routes.
- 2.2. In the case of airport capacity extension, the benefits of making that additional capacity available within the wider aviation network and the region.
- 2.3. A description of the effect on noise climate without further measures, and of those measures already planned to ameliorate the noise impact over the same period.
- 2.4. Forecast noise contours — including an assessment of the number of people likely to be affected by aircraft noise — distinguishing between established residential areas, newly constructed or planned residential areas and planned future residential areas that have already been granted authorisation by the competent authorities.
- 2.5. Evaluation of the consequences and possible costs of not taking action to reduce the impact of increased noise, if it is expected to occur.

3. Assessment of additional measures

- 3.1. Outline of the additional measures available and an indication of the main reasons for their selection. Description of those measures chosen for further analysis and information on the outcome of the cost-efficiency analysis, in particular the cost of introducing those measures; the number of people expected to benefit and the timeframe; and a ranking of the overall effectiveness of particular measures.
- 3.2. An overview of the possible environmental and competitive effects of the proposed measures on other airports, operators and other interested parties.
- 3.3. Reasons for selection of the preferred option.
- 3.4. A non-technical summary.

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**ANNEX II****Assessment of the cost-effectiveness of noise-related operating restrictions**

The cost-effectiveness of envisaged noise-related operating restrictions will be assessed taking due account of the following elements, to the extent possible, in quantifiable terms:

- (1) the anticipated noise benefit of the envisaged measures, now and in the future;
- (2) the safety of aviation operations, including third-party risks;
- (3) the capacity of the airport;
- (4) any effects on the European aviation network.

In addition, competent authorities may take due account of the following factors:

- (1) the health and safety of local residents living in the vicinity of the airport;
  - (2) environmental sustainability, including interdependencies between noise and emissions;
  - (3) any direct, indirect or catalytic employment and economic effects.
- 

**Statement by the Commission on the revision of Directive 2002/49/EC**

The Commission is discussing with the Member States Annex II to Directive 2002/49/EC (noise calculation methods) with a view to adopting it in the coming months.

Based on work the WHO is currently undertaking regarding the methodology to assess health implications of the noise impact, the Commission intends to revise Annex III to Directive 2002/49/ EC (estimation of health impact, dose response curves).

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**REGULATION (EU) No 599/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 16 April 2014**

**amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items**

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 207 thereof,

Having regard to the proposal from the European Commission,

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

Acting in accordance with the ordinary legislative procedure <sup>(1)</sup>,

Whereas:

- (1) Council Regulation (EC) No 428/2009 <sup>(2)</sup> requires dual-use items to be subject to effective control when they are exported from or transit through the Union, or are delivered to a third country as a result of brokering services provided by a broker resident or established in the Union.
- (2) In order to enable Member States and the Union to comply with their international commitments, Annex I to Regulation (EC) No 428/2009 establishes the common list of dual-use items that are subject to controls in the Union. Decisions on the items subject to controls are taken within the framework of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Chemical Weapons Convention.
- (3) Regulation (EC) No 428/2009 provides for the list of dual-use items set out in Annex I to that Regulation to be updated in conformity with the relevant obligations and commitments, and any modifications thereto, that Member States have accepted as members of the international non-proliferation regimes and export control arrangements, or by ratification of relevant international treaties.
- (4) The list of dual-use items set out in Annex I to Regulation (EC) No 428/2009 needs to be updated regularly so as to ensure full compliance with international security obligations, to guarantee transparency, and to maintain competitiveness of exporters. Delays with regard to the updating of that list of dual-use items may have negative effects on security and international non-proliferation efforts, as well as on the performance of economic activities by exporters in the Union. At the same time, the technical nature of the amendments and the fact that those amendments are to be in conformity with decisions taken in the international export control regimes means that an accelerated procedure should be used to bring the necessary updates into force in the Union.
- (5) Regulation (EC) No 428/2009 introduces Union General Export Authorisations as one of the four types of export authorisations available under that Regulation. Union General Export Authorisations allow exporters established in the Union to export certain specified items to certain specified destinations subject to the conditions of those authorisations.
- (6) Annex II to Regulation (EC) No 428/2009 sets out the Union General Export Authorisations currently in force in the Union. Given the nature of such Union General Export Authorisations, there may be a need to remove certain destinations from the scope of those authorisations, in particular if changing circumstances show that facilitated export transactions should no longer be authorised under a Union General Export Authorisation for a particular destination. Such removal of a destination from the scope of a Union General Export Authorisation should not preclude an exporter from applying for another type of export authorisation under the relevant provisions of Regulation (EC) No 428/2009.

<sup>(1)</sup> Position of the European Parliament of 23 October 2012 (OJ C 68 E, 7.3.2014, p. 112) and position of the Council at first reading of 3 March 2014 (OJ C 100, 4.4.2014, p. 6). Position of the European Parliament of 3 April 2014 (not yet published in the Official Journal).

<sup>(2)</sup> Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134, 29.5.2009, p. 1).

- (7) In order to ensure regular and timely updates of the common list of dual-use items in conformity with the obligations and commitments taken by Member States within the international export control regimes, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of amending Annex I to Regulation (EC) No 428/2009 within the scope of Article 15 of that Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.
- (8) In order to allow for a swift Union response to changing circumstances as regards the assessment of the sensitivity of exports under Union General Export Authorisations, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of amending Annex II to Regulation (EC) No 428/2009 as regards the removal of destinations from the scope of the Union General Export Authorisations. Given that such modifications should only be made in response to an increase in the assessment of the risk of the relevant exports, and that the continued use of Union General Export Authorisations for those exports could have an imminent adverse effect on the security of the Union and its Member States, an urgency procedure may be used by the Commission.
- (9) The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (10) Regulation (EC) No 428/2009 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

#### Article 1

Regulation (EC) No 428/2009 is amended as follows:

- (1) in Article 9(1), the following subparagraphs are added:

'In order to ensure that only low-risk transactions are covered by the Union General Export Authorisations included in Annexes IIa to IIf, the Commission shall be empowered to adopt delegated acts in accordance with Article 23a to remove destinations from the scope of those Union General Export Authorisations, if such destinations become subject to an arms embargo as referred to in Article 4(2).

Where, in cases of such arms embargoes, imperative grounds of urgency require a removal of particular destinations from the scope of a Union General Export Authorisation, the procedure provided for in Article 23b shall apply to delegated acts adopted pursuant to this paragraph';

- (2) in Article 15, the following paragraph is added:

'3. The Commission shall be empowered to adopt delegated acts in accordance with Article 23a concerning updating the list of dual-use items set out in Annex I. The updating of Annex I shall be performed within the scope set out in paragraph 1 of this Article. Where the updating of Annex I concerns dual-use items which are also listed in Annexes IIa to IIg or IV, those Annexes shall be amended accordingly;

- (3) the following Articles are inserted:

*'Article 23a*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 9(1) and Article 15(3) shall be conferred on the Commission for a period of five years from 2 July 2014. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 9(1) and Article 15(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 9(1) and Article 15(3) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

#### *Article 23b*

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 23a(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council.'

#### *Article 2*

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

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

Done at Strasbourg, 16 April 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

**Joint Statement by the European Parliament, the Council and the Commission on the review of the dual-use export control system**

The European Parliament, the Council and the Commission recognise the importance of continuously enhancing the effectiveness and coherence of the EU's strategic export controls regime, ensuring a high level of security and adequate transparency without impeding competitiveness and legitimate trade in dual-use items.

The three institutions consider that modernisation and further convergence of the system is needed in order to keep up with new threats and rapid technological changes, to reduce distortions, create a genuine common market for dual-use items (uniform level playing field for exporters) and continue serving as an export control model for third countries.

To this end, it is essential to streamline the process for updating the control lists (Annexes to the Regulation); strengthen risk assessment and exchange of information, develop improved industry standards, and reduce disparities in implementation.

The European Parliament, the Council and the Commission acknowledge the issues regarding the export of certain information and communication technologies (ICT) that can be used in connection with human rights violations as well as to undermine the EU's security, particularly for technologies used for mass-surveillance, monitoring, tracking, tracing and censoring, as well as for software vulnerabilities.

Technical consultations have been initiated in this respect, including in the framework of EU Dual Use Peer Visit, the Dual Use Coordination Group, and the export control regimes, and actions continue to be taken to address situations of urgency through sanctions (pursuant to Article 215 TFEU), or national measures. Efforts will also be intensified to promote multilateral agreements in the context of export control regimes, and options will be explored to address this issue in the context of the on-going review of EU dual-use export control policy, and the preparation of a Commission Communication. In this context the three institutions took note of the agreement on 4 December 2013 by the Participating States of the Wassenaar Arrangement to adopt controls on complex surveillance tools that enable unauthorised access to computer systems, and on IP-network surveillance systems.

The European Parliament, the Council and the Commission also commit to further development of the existing 'catch-all' mechanism for dual-use items falling outside the Annex I of the Regulation, in order to further enhance the export control system and its application within the European single market.

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**Commission Statement on delegated acts**

In the context of this Regulation, the Commission recalls the commitment it has taken in paragraph 15 of the Framework Agreement on relations between the European Parliament and the European Commission to provide to the Parliament full information and documentation on its meetings with national experts within the framework of its work on the preparation of delegated acts.

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**Commission Statement on updating the Regulation**

In order to ensure a more integrated, efficient and coherent European approach to the movement (exports, transfer, brokering and transit) of strategic items, the Commission will put forward a new proposal for updating the Regulation as expeditiously as possible.

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**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  
(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 Central Bank<sup>(1)</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>(2)</sup>,

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

Whereas:

- (1) The financial crisis has exposed weaknesses in the transparency of financial markets which can contribute to harmful socioeconomic effects. Strengthening transparency is one of the shared principles to strengthen the financial system as confirmed by the G20 Leaders' statement in London on 2 April 2009. In order to strengthen the transparency and improve the functioning of the internal market for financial instruments, a new framework establishing uniform requirements for the transparency of transactions in markets for financial instruments should be put in place. The framework should establish comprehensive rules for a broad range of financial instruments. It should complement requirements for the transparency of orders and transactions in respect of shares established in Directive 2004/39/EC of the European Parliament and of the Council<sup>(4)</sup>.
- (2) The High-Level Group on Financial Supervision in the EU chaired by Jacques de Larosière invited the Union to develop a more harmonised set of financial regulations. In the context of the future European supervision architecture, the European Council of 18 and 19 June 2009 stressed the need to establish a European single rule book applicable to all financial institutions in the internal market.
- (3) The new legislation should as a consequence consist of two different legal instruments, a Directive and this Regulation. Together, both legal instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets and data reporting services providers. This Regulation should therefore be read together with the Directive. The need to establish a single set of rules for all institutions in respect of certain requirements and to avoid potential regulatory arbitrage as well as to provide more legal certainty and less regulatory complexity for market participants warrants the use of a legal basis allowing for the creation of a Regulation. In order to remove the remaining obstacles to trade and significant distortions of competition resulting from divergences between national laws and to prevent any further likely obstacles to trade and significant distortions of competition from arising, it is therefore necessary to adopt a Regulation establishing

<sup>(1)</sup> OJ C 161, 7.6.2012, p. 3.

<sup>(2)</sup> OJ C 143, 22.5.2012, p. 74.

<sup>(3)</sup> Position of the European Parliament of 15 April 2014 (not yet published in the Official Journal) and decision of the Council of 13 May 2014.

<sup>(4)</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

uniform rules applicable in all Member States. This directly applicable legal act aims at contributing in a determining manner to the smooth functioning of the internal market and should, consequently, be based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union.

- (4) Directive 2004/39/EC established rules for making the trading in shares admitted to trading on a regulated market pre-trade and post-trade transparent and for reporting transactions in financial instruments admitted to trading on a regulated market to competent authorities. The directive needs to be recast in order to appropriately reflect developments in financial markets and to address weaknesses and close loopholes that were, *inter alia*, exposed in the financial market crisis.
- (5) Provisions in respect of trade and regulatory transparency requirements need to take the form of directly applicable law applied to all investment firms that should follow uniform rules in all Union markets, in order to provide for a uniform application of a single regulatory framework, to strengthen confidence in the transparency of markets across the Union, to reduce regulatory complexity and investment firms' compliance costs, especially for financial institutions operating on a cross-border basis, and to contribute to the elimination of distortions of competition. The adoption of a regulation ensuring direct applicability is best suited to accomplish those regulatory goals and ensure uniform conditions by preventing diverging national requirements as a result of the transposition of a directive.
- (6) It is important to ensure that trading in financial instruments is carried out as far as possible on organised venues and that all such venues are appropriately regulated. Under Directive 2004/39/EC, some trading systems developed which were not adequately captured by the regulatory regime. Any trading system in financial instruments, such as entities currently known as broker crossing networks, should in the future be properly regulated and be authorised under one of the types of multilateral trading venues or as a systematic internaliser under the conditions set out in this Regulation and in Directive 2014/65/EU<sup>(1)</sup>.
- (7) The definitions of regulated market and multilateral trading facility (MTF) should be clarified and remain closely aligned with each other to reflect the fact that they represent effectively the same organised trading functionality. The definitions should exclude bilateral systems where an investment firm enters into every trade on own account, even as a riskless counterparty interposed between the buyer and seller. Regulated markets and MTFs should not be allowed to execute client orders against proprietary capital. The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a 'technical' system for matching orders and should be able to operate other trading protocols including systems whereby users are able to trade against quotes they request from multiple providers. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Regulation and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF. The term 'buying and selling interests' is to be understood in a broad sense and includes orders, quotes and indications of interest.

One of the important requirements concerns the obligation that the interests be brought together in the system by means of non-discretionary rules set by the system operator. That requirement means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures, including procedures embodied in computer software. The term 'non-discretionary rules' means rules that leave the regulated market or the market operator or investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract which occurs where execution takes place under the system's rules or by means of the system's protocols or internal operating procedures.

- (8) In order to make Union financial markets more transparent and efficient and to level the playing field between various venues offering multilateral trading services it is necessary to introduce a new trading venue category of organised trading facility (OTF) for bonds, structured finance products, emissions allowances and derivatives and to ensure that it is appropriately regulated and applies non-discriminatory rules regarding access to the facility. That

<sup>(1)</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (See page 349 of this Official Journal).

new category is broadly defined so that now and in the future it should be able to capture all types of organised execution and arranging of trading which do not correspond to the functionalities or regulatory specifications of existing venues. Consequently, appropriate organisational requirements and transparency rules which support efficient price discovery need to be applied. The new category encompasses systems eligible for trading clearing-eligible and sufficiently liquid derivatives.

It should not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests, other entities aggregating or pooling potential buying or selling interests, electronic post-trade confirmation services, or portfolio compression, which reduces non-market risks in existing derivatives portfolios without changing the market risk of the portfolios. Portfolio compression may be provided by a range of firms which are not regulated as such by this Regulation or by Directive 2014/65/EU, such as central counterparties (CCPs), trade repositories as well as by investment firms or market operators. It is appropriate to clarify that where investment firms and market operators carry out portfolio compression certain provisions of this Regulation and of Directive 2014/65/EU are not applicable in relation to portfolio compression. Since central securities depositories (CSDs) will be subject to the same requirements as investment firms when providing certain investment services or performing certain investment activities, the provisions of this Regulation and of Directive 2014/65/EU should not be applicable to firms that are not regulated thereby when carrying out portfolio compression.

- (9) That new category OTF will complement the existing types of trading venues. While regulated markets and MTFs have non-discretionary rules for the execution of transactions, the operator of an OTF should carry out order execution on a discretionary basis subject, where applicable, to the pre-transparency requirements and best execution obligations. Consequently, conduct of business rules, best execution and client order handling obligations should apply to the transactions concluded on an OTF operated by an investment firm or a market operator. In addition, any market operator authorised to operate an OTF should comply with Chapter 1 of Directive 2014/65/EU regarding conditions and procedures for authorisation of investment firms. The investment firm or the market operator operating an OTF should be able to exercise discretion at two different levels: first when deciding to place an order on the OTF or to retract it again and second when deciding not to match a specific order with the orders available in the system at a given point in time, provided that that complies with specific instructions received from clients and with best execution obligations.

For the system that crosses client orders the operator should be able to decide if, when and how much of two or more orders it wants to match within the system. In accordance with Article 20(1), (2), (4) and (5) of Directive 2014/65/EU and without prejudice to Article 20(3) of Directive 2014/65/EU, the firm should be able to facilitate negotiation between clients as to bring together two or more potentially compatible trading interests in a transaction. At both discretionary levels the OTF operator must have regard to its obligations under Articles 18 and 27 of Directive 2014/65/EU. The market operator or investment firm operating an OTF should make clear to users of the venue how they will exercise discretion. Because an OTF constitutes a genuine trading platform, the platform operator should be neutral. Therefore, the investment firm or market operator operating the OTF should be subject to requirements in relation to non-discriminatory execution and neither the investment firm or market operator operating the OTF nor any entity that is part of the same group or legal person as the investment firm or market operator should be allowed to execute client orders in an OTF against its proprietary capital.

For the purpose of facilitating the execution of one or more client orders in bonds, structured finance products, emission allowances and derivatives that have not been declared subject to the clearing obligation in accordance with Article 5 of Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>(1)</sup>, an OTF operator is permitted to use matched principal trading within the meaning of Directive 2014/65/EU provided the client has consented to that process. In relation to sovereign debt instruments for which there is not a liquid market, an investment firm or market operator operating an OTF should be able to engage in dealing on own account other than matched principal trading. When matched principal trading is used all pre-trade and post-trade transparency requirements as well as best execution obligations must be complied with. The OTF operator or any entity that is part of the same group or legal person as the investment firm or market operator should not act as systematic internaliser in the OTF operated by it. Furthermore, the operator of an OTF should be subject to the same obligations as an MTF in relation to the sound management of potential conflicts of interest.

- (10) All organised trading should be conducted on regulated venues and be fully transparent, both pre and post trade. Appropriately calibrated transparency requirements therefore need to apply to all types of trading venues, and to all financial instruments traded thereon.

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

- (11) In order to ensure more trading takes place on regulated trading venues and systematic internalisers, a trading obligation for shares admitted to trading on a regulated market or traded on a trading venue should be introduced for investment firms in this Regulation. That trading obligation requires investment firms to undertake all trades including trades dealt on own account and trades dealt when executing client orders on a regulated market, an MTF, a systematic internaliser or an equivalent third-country trading venue. However an exclusion from that trading obligation should be provided if there is a legitimate reason. Those legitimate reasons are where trades are non-systematic, ad-hoc, irregular and infrequent, or are technical trades such as give-up trades which do not contribute to the price discovery process. Such an exclusion from that trading obligation should not be used to circumvent the restrictions introduced on the use of the reference price waiver and the negotiated price waiver or to operate a broker crossing network or other crossing system.

The option for trades to be done on a systematic internaliser is without prejudice to the systematic internaliser regime laid down in this Regulation. The intention is that if the investment firm itself meets the relevant criteria laid down in this Regulation to be deemed a systematic internaliser in that particular share, the trade may be dealt in that way; however, if it is not deemed a systematic internaliser in that particular share, the investment firm should still be able to undertake the trade on another systematic internaliser where that complies with its best execution obligations and the option is available to it. In addition, in order to ensure that multilateral trading with respect to shares, depositary receipts, exchange-traded funds (ETFs), certificates and other similar financial instruments is properly regulated, an investment firm that operates an internal matching system on a multilateral basis should be authorised as an MTF. It should be clarified that the best execution provisions set out in Directive 2014/65/EU should be applied in such a manner as not to impede the trading obligations under this Regulation.

- (12) Trading in depositary receipts, ETFs, certificates, similar financial instruments and shares other than those admitted to trading on a regulated market takes place in largely the same fashion, and fulfils a nearly identical economic purpose, as trading in shares admitted to trading on a regulated market. Transparency provisions applicable to shares admitted to trading on regulated markets should thus be extended to those financial instruments.
- (13) While, in principle, acknowledging the need for a regime of waivers from pre-trade transparency to support the efficient functioning of markets, the actual waiver provisions for shares applicable on the basis of Directive 2004/39/EC and of Commission Regulation (EC) No 1287/2006<sup>(1)</sup>, need to be scrutinised as to their continued appropriateness in terms of scope and conditions applicable. In order to ensure a uniform application of the waivers from pre-trade transparency in shares and eventually other similar financial instruments and non-equity products for specific market models and types and sizes of orders, the European Supervisory Authority (European Securities and Markets Authority), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>(2)</sup> ('ESMA'), should assess the compatibility of individual requests for applying a waiver with rules laid down in this Regulation and in delegated acts provided for in this Regulation. ESMA's assessment should take the form of an opinion in accordance with Article 29 of Regulation (EU) No 1095/2010. In addition, the already existing waivers for shares should be reviewed by ESMA within an appropriate timeframe and an assessment should be made, following the same procedure, as to whether they are still in compliance with the rules set out in this Regulation and in delegated acts provided for in this Regulation.
- (14) The financial crisis exposed specific weaknesses in the way information on trading opportunities and prices in financial instruments other than shares is available to market participants, namely in terms of timing, granularity, equal access, and reliability. Timely pre-trade and post-trade transparency requirements taking account of the different characteristics and market structures of specific types of financial instruments other than shares should thus be introduced and calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice trading systems. In order to provide a sound transparency framework for all relevant financial instruments, these should apply to bonds, structured finance products, emission allowances and derivatives which are traded on a trading venue. Therefore, exemptions from pre-trade transparency and adaptations of the requirements in relation to deferred publication should be available only in certain defined cases.

<sup>(1)</sup> Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 1).

<sup>(2)</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).

- (15) It is necessary to introduce an appropriate level of trade transparency in markets for bonds, structured finance products and derivatives in order to help the valuation of products as well as the efficiency of price formation. Structured finance products should, in particular, include asset backed securities as defined in Article 2(5) of Commission Regulation (EC) No 809/2004 (<sup>1</sup>), comprising among others collateralised debt obligations.
- (16) In order to ensure uniform applicable conditions between trading venues, the same pre-trade and post-trade transparency requirements should apply to the different types of venues. The transparency requirements should be calibrated for different types of financial instruments, including equities, bonds, and derivatives, taking into account the interests of investors and issuers, including government bond issuers, and market liquidity. The requirements should be calibrated for different types of trading, including order-book and quote-driven systems such as request for quote as well as hybrid and voice broking systems, and take account of transaction size, including turnover, and other relevant criteria.
- (17) In order to avoid any negative impact on the price formation process, it is necessary to introduce an appropriate volume cap mechanism for orders placed in systems which are based on a trading methodology by which the price is determined in accordance with a reference price and for certain negotiated transactions. That mechanism should have a double cap, whereby a volume cap is applied to each trading venue that uses those waivers so that only a certain percentage of trading can be done on each trading venue, and in addition an overall volume cap is applied which if exceeded would result in the suspension of use of those waivers across the Union. In relation to the negotiated transactions, it should only apply to those transactions that are made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the trading venue operating that system. It should exclude negotiated transactions in illiquid shares, depositary receipts, ETFs, certificates or other similar financial instruments, and those transactions that are subject to conditions other than the current market price as they do not contribute to the price formation process.
- (18) In order to ensure that trading carried out OTC does not jeopardise efficient price discovery or a transparent level playing field between means of trading, appropriate pre-trade transparency requirements should apply to investment firms dealing on own account in financial instruments OTC insofar as it is carried out in their capacity as systematic internalisers in relation to shares, depositary receipts, ETFs, certificates or other similar financial instruments for which there is a liquid market and bonds, structured finance products, emission allowances and derivatives which are traded on a trading venue and for which there is a liquid market.
- (19) An investment firm executing client orders against own proprietary capital should be deemed a systematic internaliser, unless the transactions are carried out outside a trading venue on an occasional, ad hoc and irregular basis. Thus, systematic internalisers should be defined as investment firms which, on an organised, frequent systematic and substantial basis, deal on own account by executing client orders outside a trading venue. The requirements for systematic internalisers in this Regulation should apply to an investment firm only in relation to each single financial instrument, for example on ISIN-code level, in which it is a systematic internaliser. In order to ensure an objective and effective application of the definition of systematic internaliser to investment firms, there should be a pre-determined threshold for systematic internalisation containing an exact specification of what is meant by frequent, systematic and substantial basis.
- (20) While an OTF is any system or facility in which multiple third-party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third-party buying and selling interests. For instance, a so-called single-dealer platform, where trading always takes place against a single investment firm, should be considered a systematic internaliser, were it to comply with the requirements included in this Regulation. However, a so-called multi-dealer platform, with multiple dealers interacting for the same financial instrument, should not be considered a systematic internaliser.
- (21) Systematic internalisers should be able to decide on the basis of their commercial policy and in an objective non-discriminatory way the clients to whom they give access to their quotes, distinguishing between categories of clients, and should also be entitled to take account of distinctions between clients, for example in relation to credit risk. Systematic internalisers should not be obliged to publish firm quotes, execute client orders and give access to

<sup>(1)</sup> Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (OJ L 149, 30.4.2004, p. 1).

their quotes in relation to equity transactions above standard market size and non-equity transactions above the size specific to the financial instrument. Systematic internalisers' compliance with their obligations should be checked by and information made available to competent authorities to enable them to do so.

- (22) It is not the intention of this Regulation to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, other than within a systematic internaliser.
- (23) Market data should be easily and readily available to users in a format as disaggregated as possible to allow investors, and data service providers serving their needs, to customise data solutions to the furthest possible degree. Therefore, pre-trade and post-trade transparency data should be made available to the public in an 'unbundled' fashion in order to reduce costs for market participants when purchasing data.
- (24) Directive 95/46/EC of the European Parliament and of the Council (<sup>(1)</sup>) and Regulation (EC) No 45/2001 of the European Parliament and of the Council (<sup>(2)</sup>) should be fully applicable to the exchange, transmission and processing of personal data for the purposes of this Regulation, particularly Title IV, by Member States and ESMA.
- (25) Considering the agreement reached by the parties to the G20 Pittsburgh summit on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate, a formal regulatory procedure should be defined for mandating trading between financial counterparties and large non-financial counterparties in all derivatives which have been considered to be clearing-eligible and which are sufficiently liquid to take place on a range of trading venues subject to comparable regulation and enabling participants to trade with multiple counterparties. The assessment of sufficient liquidity should take account of market characteristics at national level including elements such as the number and type of market participants in a given market, and of transaction characteristics, such as the size and frequency of transactions in that market.

A liquid market in a product class of derivatives will be characterised by a high number of active market participants, including a suitable mix of liquidity providers and liquidity takers, relative to the number of traded products, which execute trades frequently in those products in sizes below a size that is large in scale. Such market activity should be indicated by a high number of resting bids and offers in the relevant derivative leading to a narrow spread for a transaction of normal market size. The assessment of sufficient liquidity should recognize that the liquidity of a derivative can vary significantly according to market conditions and its life cycle.

- (26) Considering the agreement reached by the parties to the G20 in Pittsburgh on 25 September 2009 to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate on the one hand, and the relatively lower liquidity of various OTC derivatives on the other, it is appropriate to provide for a suitable range of eligible venues on which trading pursuant to that commitment can take place. All eligible venues should be subject to closely aligned regulatory requirements in terms of organisational and operational aspects, arrangements to mitigate conflicts of interest, surveillance of all trading activity, pre-trade and post-trade transparency calibrated by financial instrument and types of trading system, and for multiple third-party trading interests to be able to interact with one another. The possibility for operators of venues to arrange transactions pursuant to that commitment between multiple third parties in a discretionary fashion should however be provided for in order to improve the conditions for execution and liquidity.
- (27) The obligation to conclude transactions in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation on a regulated market, MTF, OTF or third country trading venue should not apply to the components of non-price forming post-trade risk reduction services which reduce non-market risks in derivatives portfolios including existing OTC derivatives portfolios in accordance with Regulation (EU) No 648/2012 without changing the market risk of the portfolios. In addition, while it is appropriate to make specific provision for portfolio compression, this Regulation is not intended to prevent the use of other post-trade risk reduction services.

<sup>(1)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

<sup>(2)</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

(28) The trading obligation established for those derivatives should allow for efficient competition between eligible trading venues. Therefore those trading venues should not be able to claim exclusive rights in relation to any derivatives subject to that trading obligation preventing other trading venues from offering trading in those financial instruments. For effective competition between trading venues for derivatives, it is essential that trading venues have non-discriminatory and transparent access to CCPs. Non-discriminatory access to a CCP should mean that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on its platform are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP, and non-discriminatory clearing fees.

(29) Competent authorities' powers should be complemented with an explicit mechanism for prohibiting or restricting the marketing, distribution and sale of any financial instrument or structured deposit giving rise to serious concerns regarding investor protection, orderly functioning and integrity of financial markets, or commodities markets, or the stability of the whole or part of the financial system, together with appropriate coordination and contingency powers for ESMA or, for structured deposits, the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council (<sup>(1)</sup>). The exercise of such powers by competent authorities and, in exceptional cases, by ESMA or EBA should be subject to the need to fulfil a number of specific conditions. Where those conditions are met, the competent authority or, in exceptional cases, ESMA or EBA should be able to impose a prohibition or restriction on a precautionary basis before a financial instrument or structured deposit has been marketed, distributed or sold to clients.

Those powers do not imply any requirement to introduce or apply a product approval or licensing by the competent authority, ESMA or EBA, and do not relieve investment firms of their responsibility to comply with the all relevant requirements laid down in this Regulation and in Directive 2014/65/EU. The orderly functioning and integrity of commodity markets should be included as a criterion for intervention by competent authorities in order to enable action to be taken to counteract possible negative externalities on commodities markets from activities on financial markets. This is true, in particular, for agricultural commodity markets the purpose of which is to ensure a secure supply of food for the population. In those cases, the measures should be coordinated with the authorities competent for the commodity markets concerned.

(30) Competent authorities should notify ESMA of the details of any of their requests to reduce a position in relation to a derivative contract, of any one-off limits, as well as of any *ex-ante* position limits in order to improve coordination and convergence in how those powers are applied. The essential details of any *ex-ante* position limits applied by a competent authority should be published on ESMA's website.

(31) ESMA should be able to request information from any person regarding their position in relation to a derivative contract, to request that position to be reduced, as well as to limit the ability of persons to undertake individual transactions in relation to commodity derivatives. ESMA should then notify relevant competent authorities of measures it proposes to undertake and should publish those measures.

(32) The details of transactions in financial instruments should be reported to competent authorities to enable them to detect and investigate potential cases of market abuse, to monitor the fair and orderly functioning of markets, as well as the activities of investment firms. The scope of that oversight includes all financial instruments which are traded on a trading venue and financial instruments where the underlying is a financial instrument traded on a trading venue or where the underlying is an index or basket composed of financial instruments traded on a trading venue. The obligation should apply whether or not such transactions in any of those financial instruments were carried out on a trading venue. In order to avoid an unnecessary administrative burden on investment firms, financial instruments that are not susceptible to market abuse should be excluded from the reporting obligation. The reports should use a legal entity identifier in line with the G-20 commitments. ESMA should report to the Commission on the functioning of such reporting to the competent authorities and the Commission should take steps to propose any changes where appropriate.

<sup>(1)</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).

- (33) The operator of a trading venue should provide its competent authority with relevant financial instrument reference data. Those notifications are to be transmitted by the competent authorities without delay to ESMA, which should publish them immediately on its website to enable ESMA and competent authorities to use, analyse and exchange transaction reports.
- (34) In order to serve their purpose as a tool for market monitoring, transaction reports should identify the person who has made the investment decision, as well as those responsible for its execution. In addition to the transparency regime provided for in Regulation (EU) No 236/2012 of the European Parliament and of the Council (<sup>(1)</sup>), the marking of short sales provides useful supplementary information to enable competent authorities to monitor levels of short selling. Competent authorities need to have full access to records at all stages in the order execution process, from the initial decision to trade, through to its execution. Therefore, investment firms should keep records of all their orders and all their transactions in financial instruments, and operators of platforms are required to keep records of all orders submitted to their systems. ESMA should coordinate the exchange of information among competent authorities to ensure that they have access to all records of transactions and orders, including those entered on platforms that operate outside their territory, in financial instruments under their supervision.
- (35) Double reporting of the same information should be avoided. Reports submitted to trade repositories registered or recognised in accordance with Regulation (EU) No 648/2012 for the relevant financial instruments which contain all the required information for transaction reporting purposes should not need to be reported to competent authorities, but should be transmitted to them by the trade repositories. Regulation (EU) No 648/2012 should be amended to that effect.
- (36) Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001, which should be fully applicable to the processing of personal data for the purposes of this Regulation.
- (37) Regulation (EU) No 648/2012 lays down the criteria according to which classes of OTC derivatives should be subject to the clearing obligation. It prevents competitive distortions by requiring non-discriminatory access to CCPs offering clearing of OTC derivatives to trading venues and non-discriminatory access to the trade feeds of trading venues to CCPs offering clearing of OTC derivatives. As OTC derivatives are defined as derivative contracts whose execution does not take place on a regulated market, there is a need to introduce similar requirements for regulated markets under this Regulation. Derivatives traded on regulated markets should also be centrally cleared.
- (38) In addition to requirements in Directive 2004/39/EC and in Directive 2014/65/EU that prevent Member States from unduly restricting access to post-trade infrastructure such as CCP and settlement arrangements, it is necessary that this Regulation removes various other commercial barriers that can be used to prevent competition in the clearing of financial instruments. To avoid any discriminatory practices, CCPs should accept to clear transactions executed in different trading venues, to the extent that those venues comply with the operational and technical requirements established by the CCP, including the risk management requirements. Access should be granted by a CCP if certain access criteria specified in regulatory technical standards are met. With regard to newly established CCPs that have been authorised or recognised for a period of less than three years at the point of entry into force of this Regulation, with respect to transferable securities and money market instruments, there should be the possibility for competent authorities to approve a transitional period of up to two-and-a-half years before they are exposed to full non-discriminatory access in relation to transferable securities and money market instruments. However, if a CCP chooses to avail of the transitional arrangement it should not be able to benefit from the access rights to a trading venue under this Regulation for the duration of the transitional arrangement. Furthermore, no trading venue with a close link to that CCP should be able to benefit from the access rights to a CCP under this Regulation for the duration of the transitional arrangement.

<sup>(1)</sup> Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

- (39) Regulation (EU) No 648/2012 lays down the conditions under which non-discriminatory access between CCPs and trading venues should be granted for OTC derivatives. Regulation (EU) No 648/2012 defines OTC derivatives as derivatives whose execution does not take place on a regulated market or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of Directive 2004/39/EC. In order to avoid any gaps or overlaps and to ensure consistency between Regulation (EU) No 648/2012 and this Regulation, the requirements set out in this Regulation on non-discriminatory access between CCPs and trading venues apply to derivatives traded on regulated markets or on a third-country market considered as equivalent to a regulated market in accordance with Directive 2014/65/EU and all non-derivative financial instruments.
- (40) Trading venues should be required to provide access including data feeds on a transparent and non-discriminatory basis to CCPs that wish to clear transactions executed on a trading venue. However, this should not necessitate the use of interoperability arrangements for clearing transactions in derivatives or create liquidity fragmentation in a way that would threaten the smooth and orderly functioning of markets. Access should only be denied by a trading venue if certain access criteria specified in regulatory technical standards are not met. With regard to exchange-traded derivatives, it would be disproportionate to require smaller trading venues, particularly those closely linked to CCPs, to comply with non-discriminatory access requirements immediately if they have not yet acquired the technological capability to engage on a level playing field with the majority of the post-trade infrastructure market. Therefore trading venues below the relevant threshold should have the option of exempting themselves, and therefore their associated CCPs, from non-discriminatory access requirements in respect of exchange-traded derivatives for a period of 30 months with the possibility of subsequent renewals. However, if a trading venue chooses to exempt itself, it should not be able to benefit from the access rights to a CCP under this Regulation for the duration of the exemption.

Furthermore, no CCP with a close link to that trading venue should be able to benefit from the access rights to a trading venue under this Regulation for the duration of the exemption. Regulation (EU) No 648/2012 identifies that where commercial and intellectual property rights relate to financial services related to derivative contracts, licenses should be available on proportionate, fair, reasonable and non-discriminatory terms. Therefore, access to licences of, and information relating to, benchmarks that are used to determine the value of financial instruments should be provided to CCPs and other trading venues on a proportionate, fair, reasonable and non-discriminatory basis and any license should be on reasonable commercial terms. Without prejudice to the application of competition rules, where any new benchmark is developed following the entry into force of this Regulation an obligation to licence should start 30 months after a financial instrument referencing that benchmark commenced trading or was admitted to trading. Access to licences is critical to facilitate access between trading venues and CCPs under Article 35 and 36 as otherwise licensing arrangements could still prevent access between trading venues and CCPs that they have requested access to.

The removal of barriers and discriminatory practices is intended to increase competition for clearing and trading of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in Union markets. The Commission should continue to closely monitor the evolution of post-trade infrastructure and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market, in particular where the refusal of access to infrastructure or to benchmarks contravenes Articles 101 or 102 TFEU. The licencing duties under this Regulation should be without prejudice to the general obligation of proprietary owners of benchmarks under Union competition law, and under Articles 101 and 102 TFEU in particular, concerning access to benchmarks that are indispensable to enter a new market. Approvals of competent authorities to not apply access rights for transitional periods are not authorisations or amendments of authorisations.

- (41) The provision of services by third-country firms in the Union is subject to national regimes and requirements. Those regimes are highly differentiated and the firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. It is appropriate to introduce a common regulatory framework at Union level. The regime should harmonise the existing fragmented framework, ensure certainty and uniform treatment of third-country firms accessing the Union, ensure that an assessment of effective equivalence has been carried out by the Commission in relation to the prudential and business conduct framework of third countries, and should provide for a comparable level of protection to clients in the Union receiving services by third-country firms.

In applying the regime the Commission and Member States should prioritise the areas covered by the G-20 commitments and agreements with the Union's largest trading partners and should have regard to the central role that the Union plays in worldwide financial markets and ensure that the application of third-country requirements does not prevent Union investors and issuers from investing in or obtaining funding from third countries or third-country investors and issuers from investing, raising capital or obtaining other financial services in Union markets unless that is necessary for objective and evidence-based prudential reasons. In carrying out the assessments, the Commission should have regard to the International Organisation of Securities Commission's (IOSCO) Objectives and Principles of Securities Regulation and its recommendations as amended and interpreted by IOSCO.

Where a decision cannot be made determining effective equivalence, the provision of services by third-country firms in the Union remains subject to national regimes. The Commission should initiate the equivalence assessment on its own initiative. Member States should be able to indicate their interest that a certain third-country or certain third countries are subject to the equivalence assessment carried out by the Commission, without such indications being binding on the Commission to initiate the equivalence process. The equivalence assessment should be outcome-based; it should assess to what extent the respective third-country regulatory and supervisory framework achieves similar and adequate regulatory effects and to what extent it meets the same objectives as Union law. When initiating those equivalence assessments, the Commission should be able to prioritise among third-country jurisdictions taking into account the materiality of the equivalence finding to Union firms and clients, the existence of supervisory and cooperation agreements between the third country and the Member States, the existence of an effective equivalent system for the recognition of investment firms authorised under foreign regimes as well as the interest and willingness of the third country to engage in the equivalence assessment process. The Commission should monitor any significant changes to the regulatory and supervisory framework of the third country and review the equivalence decisions where appropriate.

- (42) Under this Regulation, the provision of services without branches should be limited to eligible counterparties and professional clients per se. It should be subject to registration by ESMA and to supervision in the third country. Proper cooperation arrangements should be in place between ESMA and the competent authorities in the third country.
- (43) The provisions of this Regulation regulating the provision of services or undertaking of activities by third-country firms should not affect the possibility for persons established in the Union to receive investment services by a third-country firm at their own exclusive initiative or for Union investment firms or credit institutions to receive investment services or activities from a third-country firm at their own exclusive initiative or for a client to receive investment services from a third-country firm at their own exclusive initiative through the mediation of such a credit institution or investment firm. Where a third-country firm provides services at the own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. Where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.
- (44) With regard to the recognition of third-country firms, and in accordance with the Union's international obligations under the agreement establishing the World Trade Organisation, including the General Agreement on Trade in Services, decisions determining third-country regulatory and supervisory frameworks as equivalent to the regulatory and supervisory framework of the Union should be adopted only if the legal and supervisory framework of the third country provides for an effective equivalent system for the recognition of investment firms authorised under foreign legal regimes in accordance with, amongst others, the general regulatory goals and standards set out by the G-20 in September 2009 of improving transparency in the derivatives markets, mitigating systemic risk, and protecting against market abuse. Such a system should be considered equivalent if it ensures that the substantial result of the applicable regulatory framework is similar to Union requirements and should be considered effective if those rules are being applied in a consistent manner.
- (45) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading scheme, set up by Directive 2003/87/EC of the European Parliament and of the Council (<sup>(1)</sup>), and measures are being taken to strengthen the system of EUA registries and

<sup>(1)</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Regulation and Directive 2014/65/EU as well as of Regulation (EU) No 596/2014 of the European Parliament and the Council<sup>(1)</sup> and of Directive 2014/57/EU of the European Parliament and of the Council<sup>(2)</sup>, by classifying them as financial instruments.

- (46) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of TFEU. In particular, the delegated acts should be adopted in respect of the extension of the scope of certain provisions of this Regulation to third-country central banks, specific details concerning definitions, specific cost-related provisions related to the availability of market data, access to quotes, the sizes at or below which a firm shall enter into transactions with any other client to whom a quote is available, portfolio compression and the further determination of when there is a significant investor protection concern or a threat to investor protection, the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union may warrant ESMA, EBA or competent authorities' action, position management powers of ESMA, the extension of the transitional period under Article 35(5) of this Regulation for a certain period of time and in respect of the exclusion of exchange-traded derivatives from the scope of certain provisions of this Regulation for a certain period of time. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (47) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission relating to the adoption of the equivalence decision concerning the third-country legal and supervisory framework for the provision of services by third-country firms or third-country trading venues for the purpose of eligibility as trading venues for derivatives subject to the trading obligation and of access of third-country CCPs and third-country trading venues to trading venues and CCPs established in the Union. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>(3)</sup>.
- (48) Since the objectives of this Regulation, namely to establish uniform requirements relating to financial instruments in relation to disclosure of trade data, reporting of transactions to the competent authorities, trading of derivatives and shares on organised venues, non-discriminatory access to CCPs, trading venues and benchmarks, product intervention powers and powers on position management and position limits, provision of investment services or activities by third-country firms, cannot be sufficiently achieved by the Member States, because, although national competent authorities are better placed to monitor market developments, the overall impact of the problems related to trade transparency, transaction reporting, derivatives trading, and bans of products and practices can only be fully understood in a Union-wide context, but can rather, by reason of its scale and effects, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (49) No action taken by any competent authority or ESMA in the performance of their duties should directly or indirectly discriminate against any Member State or group of Member States as a venue for the provision of investment services and activities in any currency. No action taken by EBA in the performance of its duties under this Regulation should directly or indirectly discriminate against any Member State or group of Member States.
- (50) Technical standards in financial services should ensure adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory technical standards which do not involve policy choices, for submission to the Commission.

<sup>(1)</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 (See page 1 of this Official Journal).

<sup>(2)</sup> Directive 2014/57/EU of the European Parliament and of the Council of 15 May 2014 on criminal sanctions for market abuse (market abuse directive) (see page 179 of this Official Journal).

<sup>(3)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

- (51) The Commission should adopt the draft regulatory technical standards developed by ESMA regarding the precise characteristics of trade transparency requirements, regarding the monetary, foreign exchange and financial stability policy operations and the types of the certain transactions relevant under this Regulation, regarding the detailed conditions for waivers from pre-trade transparency, regarding deferred post-trade publication arrangements, regarding the obligation to make pre-trade and post-trade data available separately, regarding the criteria for the application of the pre-trade transparency obligations for systematic internalisers, regarding post-trade disclosure by investment firms, regarding the content and frequency of data requests for the provision of information for the purposes of transparency and other calculations, regarding transactions that do not contribute to the price discovery process, regarding the order data to be retained, regarding the content and specifications of transaction reports, regarding the content and specification of financial instrument reference data, regarding the types of contracts which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation for derivatives is necessary, regarding the requirements for systems and procedures to ensure that transactions in cleared derivatives are submitted and accepted for clearing, specifying types of indirect clearing service arrangements, regarding derivatives subject to an obligation to trade on organised trading venues, regarding non-discriminatory access to a CCP and to a trading venue, regarding non-discriminatory access to and obligation to licence benchmarks, and concerning the information that the applicant third-country firm should provide to ESMA in its application for registration. The Commission should adopt those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.
- (52) Article 95 of Directive 2014/65/EU provides for a transitional exemption for certain C6 energy derivative contracts. It is therefore necessary that the technical standards specifying the clearing obligation developed by ESMA in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012 take that into account and do not impose a clearing obligation on derivative contracts which would subsequently be subject to the transitional exemption for C6 energy derivative contracts.
- (53) The application of the requirements in this Regulation should be deferred in order to align applicability with the application of the transposed rules of the recast Directive and to establish all essential implementing measures. The entire regulatory package should then be applied from the same point in time. Only the application of the empowerments for implementing measures should not be deferred so that the necessary steps to draft and adopt those implementing measures can start as early as possible.
- (54) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data (Article 8), the freedom to conduct a business (Article 16), the right to consumer protection (Article 38), the right to an effective remedy and to a fair trial (Article 47), and the right not to be tried or punished twice for the same offence (Article 50), and has to be applied in accordance with those rights and principles.
- (55) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on 10 February 2012 (<sup>(1)</sup>),

HAVE ADOPTED THIS REGULATION:

## TITLE I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### Article 1

##### **Subject matter and scope**

1. This Regulation establishes uniform requirements in relation to the following:

- (a) disclosure of trade data to the public;
- (b) reporting of transactions to the competent authorities;

<sup>(1)</sup> OJ C 147, 25.5.2012, p. 1.

- (c) trading of derivatives on organised venues;
- (d) non-discriminatory access to clearing and non-discriminatory access to trading in benchmarks;
- (e) product intervention powers of competent authorities, ESMA and EBA and powers of ESMA on position management controls and position limits;
- (f) provision of investment services or activities by third-country firms following an applicable equivalence decision by the Commission with or without a branch.

2. This Regulation applies to investment firms, authorised under Directive 2014/65/EU and credit institutions authorised under Directive 2013/36/EU of the European Parliament and of the Council <sup>(1)</sup> when providing investment services and/or performing investment activities and to market operators including any trading venues they operate.

3. Title V of this Regulation also applies to all financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 and to all non-financial counterparties falling under Article 10(1)(b) of that Regulation.

4. Title VI of this Regulation also applies to CCPs and persons with proprietary rights to benchmarks.

5. Title VIII of this Regulation applies to third-country firms providing investment services or activities within the Union following an applicable equivalence decision by the Commission with or without a branch.

6. Articles 8, 10, 18 and 21 shall not apply to regulated markets, market operators and investment firms in respect of a transaction where the counterparty is a member of the European System of Central Banks (ESCB) and where that transaction is entered into in performance of monetary, foreign exchange and financial stability policy which that member of the ESCB is legally empowered to pursue and where that member has given prior notification to its counterparty that the transaction is exempt.

7. Paragraph 6 shall not apply in respect of transactions entered into by any member of the ESCB in performance of their investment operations.

8. ESMA shall, in close cooperation with the ESCB, develop draft regulatory technical standards to specify the monetary, foreign exchange and financial stability policy operations and the types of transactions to which paragraphs 6 and 7 apply.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

9. The Commission shall be empowered to adopt delegated acts in accordance with Article 50 to extend the scope of paragraph 6 to other central banks.

<sup>(1)</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).

To that end, the Commission shall, by 1 June 2015, submit a report to the European Parliament and to the Council assessing the treatment of transactions by third-country central banks which for the purposes of this paragraph includes the Bank for International Settlements. The report shall include an analysis of their statutory tasks and their trading volumes in the Union. The report shall:

- (a) identify provisions applicable in the relevant third countries regarding the regulatory disclosure of central bank transactions, including transactions undertaken by members of the ESCB in those third countries, and
- (b) assess the potential impact that regulatory disclosure requirements in the Union may have on third-country central bank transactions.

If the report concludes that the exemption provided for in paragraph 6 is necessary in respect of transactions where the counterparty is a third-country central bank carrying out monetary policy, foreign exchange and financial stability operations, the Commission shall provide that that exemption applies to that third-country central bank.

## Article 2

### Definitions

1. For the purposes of this Regulation, the following definitions apply:

- (1) 'investment firm' means an investment firm as defined in Article 4(1)(1) of Directive 2014/65/EU;
- (2) 'investment services and activities' means investment services and activities defined in Article 4(1)(2) of Directive 2014/65/EU;
- (3) 'ancillary services' means ancillary services as defined in Article 4(1)(3) of Directive 2014/65/EU;
- (4) 'execution of orders on behalf of clients' means execution on behalf of clients as defined in Article 4(1)(5) of Directive 2014/65/EU;
- (5) 'dealing on own account' means dealing on own account as defined in Article 4(1)(6) of Directive 2014/65/EU;
- (6) 'market maker' means a market maker as defined in Article 4(1)(7) of Directive 2014/65/EU;
- (7) 'client' means a client as defined in Article 4(1)(9) of Directive 2014/65/EU;
- (8) 'professional client' means a professional client as defined in Article 4(1)(10) of Directive 2014/65/EU;
- (9) 'financial instrument' means a financial instrument as defined in Article 4(1)(15) of Directive 2014/65/EU;
- (10) 'market operator' means a market operator as defined in Article 4(1)(18) of Directive 2014/65/EU;
- (11) 'multilateral system' means a multilateral system as defined in Article 4(1)(19) of Directive 2014/65/EU;
- (12) 'systematic internaliser' means a systematic internaliser as defined in Article 4(1)(20) of Directive 2014/65/EU;

- (13) 'regulated market' means a regulated market as defined in Article 4(1)(21) of Directive 2014/65/EU;
- (14) 'multilateral trading facility' or 'MTF' means a multilateral trading facility as defined in Article 4(1)(22) of Directive 2014/65/EU;
- (15) 'organised trading facility' or 'OTF' means an organised trading facility as defined in Article 4(1)(23) of Directive 2014/65/EU;
- (16) 'trading venue' means a trading venue as defined in Article 4(1)(24) of Directive 2014/65/EU;
- (17) 'liquid market' means:
- (a) for the purposes of Articles 9, 11, and 18, a market for a financial instrument or a class of financial instruments, where there are ready and willing buyers and sellers on a continuous basis, and where the market is assessed in accordance with the following criteria, taking into consideration the specific market structures of the particular financial instrument or of the particular class of financial instruments:
- (i) the average frequency and size of transactions over a range of market conditions, having regard to the nature and life cycle of products within the class of financial instrument;
- (ii) the number and type of market participants, including the ratio of market participants to traded financial instruments in a particular product;
- (iii) the average size of spreads, where available;
- (b) for the purposes of Articles 4, 5 and 14, a market for a financial instrument that is traded daily where the market is assessed according to the following criteria:
- (i) the free float;
- (ii) the average daily number of transactions in those financial instruments;
- (iii) the average daily turnover for those financial instruments;
- (18) 'competent authority' means a competent authority as defined in Article 2(1)(26) of Directive 2014/65/EU;
- (19) 'credit institution' means a credit institution as defined in Article 4(1)(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (<sup>(1)</sup>);
- (20) 'branch' means a branch as defined in Article 4(1)(30) of Directive 2014/65/EU;
- (21) 'close links' means close links as defined in Article 4(1)(35) of Directive 2014/65/EU;
- (22) 'management body' means a management body as defined in Article 4(1)(36) of Directive 2014/65/EU;

<sup>(1)</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).

- (23) 'structured deposit' means a structured deposit as defined in Article 4(1)(43) of Directive 2014/65/EU;
- (24) 'transferable securities' means transferable securities as defined in Article 4(1)(44) of Directive 2014/65/EU;
- (25) 'depositary receipts' means depositary receipts as defined in Article 4(1)(45) of Directive 2014/65/EU;
- (26) 'exchange-traded fund' or 'ETF' means an exchange-traded fund as defined in Article 4(1)(46) of Directive 2014/65/EU;
- (27) 'certificates' means those securities which are negotiable on the capital market and which in case of a repayment of investment by the issuer are ranked above shares but below unsecured bond instruments and other similar instruments;
- (28) 'structured finance products' means those securities created to securitise and transfer credit risk associated with a pool of financial assets entitling the security holder to receive regular payments that depend on the cash flow from the underlying assets;
- (29) 'derivatives' means those financial instruments defined in point (44)(c) of Article 4(1) of Directive 2014/65/EU; and referred to in Annex I, Section C (4) to (10) thereto;
- (30) 'commodity derivatives' means those financial instruments defined in point (44)(c) of Article 4(1) of Directive 2014/65/EU; which relate to a commodity or an underlying referred to in Section C(10) of Annex I to Directive 2014/65/EU; or in points (5), (6), (7) and (10) of Section C of Annex I thereto;
- (31) 'CCP' means a CCP within the meaning of Article 2(1) of Regulation (EU) No 648/2012;
- (32) 'exchange-traded derivative' means a derivative that is traded on a regulated market or on a third-country market considered to be equivalent to a regulated market in accordance with Article 28 of this Regulation, and as such does not fall within the definition of an OTC derivative as defined in Article 2(7) of Regulation (EU) No 648/2012;
- (33) 'actionable indication of interest' means a message from one member or participant to another within a trading system in relation to available trading interest that contains all necessary information to agree on a trade;
- (34) 'approved publication arrangement' or 'APA' means an approved publication arrangement as defined in Article 4(1)(52) of Directive 2014/65/EU;
- (35) 'consolidated tape provider' or 'CTP' means a consolidated tape provider as defined in Article 4(1)(53) of Directive 2014/65/EU;
- (36) 'approved reporting mechanism' or 'ARM' means an approved reporting mechanism as defined in Article 4(1)(54) of Directive 2014/65/EU;
- (37) 'home Member State' means a home Member State as defined in Article 4(1)(55) of Directive 2014/65/EU;
- (38) 'host Member State' means a host Member State as defined in Article 4(1)(56) of Directive 2014/65/EU;

(39) 'benchmark' means any rate, index or figure, made available to the public or published that is periodically or regularly determined by the application of a formula to, or on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates or other values, or surveys and by reference to which the amount payable under a financial instrument or the value of a financial instrument is determined.

(40) 'interoperability arrangement' means an interoperability arrangement as defined in Article 2(12) of Regulation (EU) No 648/2012;

(41) 'third-country financial institution' means an entity, the head office of which is established in a third country, that is authorised or licensed under the law of that third country to carry out any of the services or activities listed in Directive 2013/36/EU, Directive 2014/65/EU; Directive 2009/138/EC of the European Parliament and of the Council (¹), Directive 2009/65/EC of the European Parliament and of the Council (²), Directive 2003/41/EC of the European Parliament and of the Council (³) or Directive 2011/61/EU of the European Parliament and of the Council (⁴);

(42) 'third-country firm' means a third-country firm as defined in Article 4(1)(57) of Directive 2014/65/EU;

(43) 'wholesale energy product' means wholesale energy products as defined in Article 2(4) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council (⁵);

(44) 'agricultural commodity derivatives' means derivative contracts relating to products listed in Article 1 of, and Annex I, Parts I to XX and XXIV/1 to, Regulation (EU) No 1308/2013 of the European Parliament and of the Council (⁶);

(45) 'liquidity fragmentation' means a situation in which:

(a) participants in a trading venue are unable to conclude a transaction with one or more other participants in that venue because of the absence of clearing arrangements to which all participants have access; or

(b) a clearing member or its clients would be forced to hold their positions in a financial instrument in more than one CCP which would limit the potential for the netting of financial exposures;

(46) 'sovereign debt' means sovereign debt as defined in Article 4(1)(61) of Directive 2014/65/EU;

(47) 'portfolio compression' means a risk reduction service in which two or more counterparties wholly or partially terminate some or all of the derivatives submitted by those counterparties for inclusion in the portfolio compression and replace the terminated derivatives with another derivative whose combined notional value is less than the combined notional value of the terminated derivatives.

(¹) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

(²) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

(³) Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

(⁴) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

(⁵) Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

(⁶) Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 50 to specify certain technical elements of the definitions laid down in paragraph 1 to adjust them to market developments.

## TITLE II

### TRANSPARENCY FOR TRADING VENUES

#### CHAPTER 1

##### *Transparency for equity instruments*

###### Article 3

#### **Pre-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments**

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue. That requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make that information available to the public on a continuous basis during normal trading hours.

2. The transparency requirements referred to in paragraph 1 shall be calibrated for different types of trading systems including order-book, quote-driven, hybrid and periodic auction trading systems.

3. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in paragraph 1 to investment firms which are obliged to publish their quotes in shares, depositary receipts, ETFs, certificates and other similar financial instruments pursuant to Article 14.

###### Article 4

##### **Waivers for equity instruments**

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 3(1) for:

(a) systems matching orders based on a trading methodology by which the price of the financial instrument referred to in Article 3(1) is derived from the trading venue where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity, where that reference price is widely published and is regarded by market participants as a reliable reference price. The continued use of that waiver shall be subject to the conditions set out in Article 5.

(b) systems that formalise negotiated transactions which are:

(i) made within the current volume weighted spread reflected on the order book or the quotes of the market makers of the trading venue operating that system, subject to the conditions set out in Article 5;

(ii) in an illiquid share, depositary receipt, ETF, certificate or other similar financial instrument that does not fall within the meaning of a liquid market, and are dealt within a percentage of a suitable reference price, being a percentage and a reference price set in advance by the system operator; or

(iii) subject to conditions other than the current market price of that financial instrument;

(c) orders that are large in scale compared with normal market size;

(d) orders held in an order management facility of the trading venue pending disclosure.

2. The reference price referred to in paragraph 1(a) shall be established by obtaining:
  - (a) the midpoint within the current bid and offer prices of the trading venue where that financial instrument was first admitted to trading or the most relevant market in terms of liquidity; or
  - (b) when the price referred to in point (a) is not available, the opening or closing price of the relevant trading session.

Orders shall only reference the price referred to in point (b) outside the continuous trading phase of the relevant trading session.

3. Where trading venues operate systems which formalise negotiated transactions in accordance with paragraph 1(b)(i):
  - (a) those transactions shall be carried out in accordance with the rules of the trading venue;
  - (b) the trading venue shall ensure that arrangements, systems and procedures are in place to prevent and detect market abuse or attempted market abuse in relation to such negotiated transactions in accordance with Article 16 of Regulation (EU) No 596/2014;
  - (c) the trading venue shall establish, maintain and implement systems to detect any attempt to use the waiver to circumvent other requirements of this Regulation or Directive 2014/65/EU and to report attempts to the competent authority.

Where a competent authority grants a waiver in accordance with paragraph 1(b)(i) or (iii), that competent authority shall monitor the use of the waiver by the trading venue to ensure that the conditions for use of the waiver are respected.

4. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver and provide an explanation regarding its functioning, including the details of the trading venue where the reference price is established as referred to in paragraph 1(a). Notification of the intention to grant a waiver shall be made not less than four months before the waiver is intended to take effect. Within two months following receipt of the notification, ESMA shall issue a non-binding opinion to the competent authority in question assessing the compatibility of each waiver with the requirements established in paragraph 1 and specified in the regulatory technical standard adopted pursuant to paragraph 6. Where that competent authority grants a waiver and a competent authority of another Member State disagrees, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and shall submit an annual report to the Commission on how they are applied in practice.

5. A competent authority may, either on its own initiative or upon request by another competent authority, withdraw a waiver granted under paragraph 1 as specified under paragraph 6, if it observes that the waiver is being used in a way that deviates from its original purpose or if it believes that the waiver is being used to circumvent the requirements established in this Article.

Competent authorities shall notify ESMA and other competent authorities of such withdrawal providing full reasons for their decision.

6. ESMA shall develop draft regulatory technical standards to specify the following:

- (a) the range of bid and offer prices or designated market-maker quotes, and the depth of trading interest at those prices, to be made public for each class of financial instrument concerned in accordance with Article 3(1), taking into account the necessary calibration for different types of trading systems as referred to in Article 3(2);

- (b) the most relevant market in terms of liquidity of a financial instrument in accordance with paragraph 1(a);
- (c) the specific characteristics of a negotiated transaction in relation to the different ways the member or participant of a trading venue can execute such a transaction;
- (d) the negotiated transactions that do not contribute to price formation which avail of the waiver provided for under paragraph 1(b)(iii);
- (e) the size of orders that are large in scale and the type and the minimum size of orders held in an order management facility of a trading venue pending disclosure for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

7. Waivers granted by competent authorities in accordance with Article 29(2) and Article 44(2) of Directive 2004/39/EC and Articles 18, 19 and 20 of Regulation (EC) No 1287/2006 before 3 January 2017 shall be reviewed by ESMA by 3 January 2019. ESMA shall issue an opinion to the competent authority in question assessing the continued compatibility of each of those waivers with the requirements established in this Regulation and any delegated act and regulatory technical standard based on this Regulation.

## Article 5

### Volume Cap Mechanism

1. In order to ensure that the use of the waivers provided for in Article 4(1)(a) and 4(1)(b)(i) does not unduly harm price formation, trading under those waivers is restricted as follows:

- (a) the percentage of trading in a financial instrument carried out on a trading venue under those waivers shall be limited to 4 % of the total volume of trading in that financial instrument on all trading venues across the Union over the previous 12 months.
- (b) overall Union trading in a financial instrument carried out under those waivers shall be limited to 8 % of the total volume of trading in that financial instrument on all trading venues across the Union over the previous 12 months.

That volume cap mechanism shall not apply to negotiated transactions which are in a share, depositary receipt, ETF, certificate or other similar financial instrument for which there is not a liquid market as determined in accordance with Article 2(1)(17)(b) and are dealt within a percentage of a suitable reference price as referred to in Article 4(1)(b)(ii), or to negotiated transactions that are subject to conditions other than the current market price of that financial instrument as referred to in Article 4(1)(b)(iii).

2. When the percentage of trading in a financial instrument carried out on a trading venue under the waivers has exceeded the limit referred to in paragraph 1(a), the competent authority that authorised the use of those waivers by that venue shall within two working days suspend their use on that venue in that financial instrument based on the data published by ESMA referred to in paragraph 4, for a period of six months.

3. When the percentage of trading in a financial instrument carried out on all trading venues across the Union under those waivers has exceeded the limit referred to in paragraph 1(b), all competent authorities shall within two working days suspend the use of those waivers across the Union for a period of six months.

4. ESMA shall publish within five working days of the end of each calendar month, the total volume of Union trading per financial instrument in the previous 12 months, the percentage of trading in a financial instrument carried out across the Union under those waivers and on each trading venue in the previous 12 months, and the methodology that is used to derive those percentages.

5. In the event that the report referred to in paragraph 4 identifies any trading venue where trading in any financial instrument carried out under the waivers has exceeded 3,75 % of the total trading in the Union in that financial instrument, based on the previous 12 months' trading, ESMA shall publish an additional report within five working days of the 15th day of the calendar month in which the report referred to in paragraph 4 is published. That report shall contain the information specified in paragraph 4 in respect of those financial instruments where 3,75 % has been exceeded.

6. In the event that the report referred to in paragraph 4 identifies that overall Union trading in any financial instrument carried out under the waivers has exceeded 7,75 % of the total Union trading in the financial instrument, based on the previous 12 months' trading, ESMA shall publish an additional report within five working days of the 15th on the day of the calendar month in which the report referred to in paragraph 4 is published. That report shall contain the information specified in paragraph 4 in respect of those financial instruments where 7,75 % has been exceeded.

7. In order to ensure a reliable basis for monitoring the trading taking place under those waivers and for determining whether the limits referred to in paragraph 1 have been exceeded, operators of trading venues shall be obligated to have in place systems and procedures to:

- (a) enable the identification of all trades which have taken place on its venue under those waivers; and
- (b) ensure it does not exceed the permitted percentage of trading allowed under those waivers as referred to in paragraph 1(a) under any circumstances.

8. The period for the publication of trading data by ESMA, and for which trading in a financial instrument under those waivers is to be monitored shall start on 3 January 2016. Without prejudice to Article 4(5), competent authorities shall be empowered to suspend the use of those waivers from the date of application of this Regulation and thereafter on a monthly basis.

9. ESMA shall develop draft regulatory technical standards to specify the method, including the flagging of transactions, by which it collates, calculates and publishes the transaction data, as outlined in paragraph 4, in order to provide an accurate measurement of the total volume of trading per financial instrument and the percentages of trading that use those waivers across the Union and per trading venue.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 6

### **Post-trade transparency requirements for trading venues in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments**

1. Market operators and investment firms operating a trading venue shall make public the price, volume and time of the transactions executed in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on that trading venue. Market operators and investment firms operating a trading venue shall make details of all such transactions public as close to real-time as is technically possible.

2. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under paragraph 1 of this Article to investment firms which are obliged to publish the details of their transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments pursuant to Article 20.

## Article 7

### Authorisation of deferred publication

1. Competent authorities shall be able to authorise market operators and investment firms operating a trading venue to provide for deferred publication of the details of transactions based on their type or size.

In particular, the competent authorities may authorise the deferred publication in respect of transactions that are large in scale compared with the normal market size for that share, depositary receipt, ETF, certificate or other similar financial instrument or that class of share, depositary receipt, ETF, certificate or other similar financial instrument.

Market operators and investment firms operating a trading venue shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose those arrangements to market participants and the public. ESMA shall monitor the application of those arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are applied in practice.

Where a competent authority authorises deferred publication and a competent authority of another Member State disagrees with the deferral or disagrees with the effective application of the authorisation granted, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

2. ESMA shall develop draft regulatory technical standards to specify the following in such a way as to enable the publication of information required under Article 64 of Directive 2014/65/EU:

- (a) the details of transactions that investment firms, including systematic internalisers and market operators and investment firms operating a trading venue shall make available to the public for each class of financial instrument concerned in accordance with Article 6(1), including identifiers for the different types of transactions published under Article 6(1) and Article 20, distinguishing between those determined by factors linked primarily to the valuation of the financial instruments and those determined by other factors;
- (b) the time limit that would be deemed in compliance with the obligation to publish as close to real time as possible including when trades are executed outside ordinary trading hours.
- (c) the conditions for authorising investment firms, including systematic internalisers and market operators and investment firms operating a trading venue to provide for deferred publication of the details of transactions for each class of financial instruments concerned in accordance with paragraph 1 of this Article and with Article 20(1);
- (d) the criteria to be applied when deciding the transactions for which, due to their size or the type, including liquidity profile of the share, depositary receipt, ETF, certificate or other similar financial instrument involved, deferred publication is allowed for each class of financial instrument concerned.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## CHAPTER 2

***Transparency for non-equity instruments*****Article 8****Pre-trade transparency requirements for trading venues in respect of bonds, structured finance products, emission allowances and derivatives**

1. Market operators and investment firms operating a trading venue shall make public current bid and offer prices and the depth of trading interests at those prices which are advertised through their systems for bonds, and structured finance products, emission allowances and derivatives traded on a trading venue. That requirement shall also apply to actionable indication of interests. Market operators and investment firms operating a trading venue shall make that information available to the public on a continuous basis during normal trading hours. That publication obligation does not apply to those derivative transactions of non-financial counterparties which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

2. The transparency requirements referred to in paragraph 1 shall be calibrated for different types of trading systems, including order-book, quote-driven, hybrid, periodic auction trading and voice trading systems.

3. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information referred to in paragraph 1 to investment firms which are obliged to publish their quotes in bonds, structured finance products, emission allowances and derivatives pursuant to Article 18.

4. Market operators and investment firms operating a trading venue shall, where a waiver is granted in accordance with Article 9(1)(b), make public at least indicative pre-trade bid and offer prices which are close to the price of the trading interests advertised through their systems in bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make that information available to the public through appropriate electronic means on a continuous basis during normal trading hours. Those arrangements shall ensure that information is provided on reasonable commercial terms and on a non-discriminatory basis.

**Article 9*****Waivers for non-equity instruments***

1. Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for:

- (a) orders that are large in scale compared with normal market size and orders held in an order management facility of the trading venue pending disclosure;
- (b) actionable indications of interest in request-for-quote and voice trading systems that are above a size specific to the financial instrument, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors;
- (c) derivatives which are not subject to the trading obligation specified in Article 28 and other financial instruments for which there is not a liquid market.

2. Before granting a waiver in accordance with paragraph 1, competent authorities shall notify ESMA and other competent authorities of the intended use of each individual waiver and provide an explanation regarding their functioning. Notification of the intention to grant a waiver shall be made not less than four months before the waiver is intended to take effect. Within two months following receipt of the notification, ESMA shall issue an opinion to the competent authority in question assessing the compatibility of the waiver with the requirements established in paragraph 1 and specified in the regulatory technical standards adopted pursuant to paragraph 5. Where that competent authority grants a waiver and a competent authority of another Member State disagrees, that competent authority may refer the matter back to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010. ESMA shall monitor the application of the waivers and submit an annual report to the Commission on how they are applied in practice.

3. Competent authorities, may, either on their own initiative or upon request by other competent authorities, withdraw a waiver granted under paragraph 1 if they observe that the waiver is being used in a way that deviates from its original purpose or if they consider that the waiver is being used to circumvent the requirements established in this Article.

Competent authorities shall notify ESMA and other competent authorities of such withdrawal without delay and before it takes effect, providing full reasons for their decision.

4. The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below a specified threshold, temporarily suspend the obligations referred to in Article 8. The specified threshold shall be defined on the basis of objective criteria specific to the market for the financial instrument concerned. Notification of such temporary suspension shall be published on the website of the relevant competent authority.

The temporary suspension shall be valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. Where the temporary suspension is not renewed after that three-month period, it shall automatically lapse.

Before suspending or renewing the temporary suspension under this paragraph of the obligations referred to in Article 8, the relevant competent authority shall notify ESMA of its intention and provide an explanation. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified in accordance with the first and second subparagraphs.

5. ESMA shall develop draft regulatory technical standards to specify the following:

- (a) the parameters and methods for calculating the threshold of liquidity referred to in paragraph 4 in relation to the financial instrument. The parameters and methods for Member States to calculate the threshold shall be set in such a way that when the threshold is reached, it represents a significant decline in liquidity across all venues within the Union for the financial instrument concerned based on the criteria used under Article 2(1)(17);
- (b) the range of bid and offer prices or quotes and the depth of trading interests at those prices, or indicative pre-trade bid and offer prices which are close to the price of the trading interest, to be made public for each class of financial instrument concerned in accordance with Article 8(1) and (4), taking into account the necessary calibration for different types of trading systems as referred to in Article 8(2);
- (c) the size of orders that are large in scale and the type and the minimum size of orders held in an order management facility pending disclosure for which pre-trade disclosure may be waived under paragraph 1 for each class of financial instrument concerned;
- (d) the size specific to the financial instrument referred to in paragraph 1(b) and the definition of request-for-quote and voice trading systems for which pre-trade disclosure may be waived under paragraph 1;

When determining the size specific to the financial instrument that would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors, in accordance with paragraph 1(b), ESMA shall take the following factors into account:

- (i) whether, at such sizes, liquidity providers would be able to hedge their risks;
- (ii) where a market in the financial instrument, or a class of financial instruments, consists in part of retail investors, the average value of transactions undertaken by those investors;

- (e) the financial instruments or the classes of financial instruments for which there is not a liquid market where pre-trade disclosure may be waived under paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 10

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

1. Market operators and investment firms operating a trading venue shall make public the price, volume and time of the transactions executed in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue. Market operators and investment firms operating a trading venue shall make details of all such transactions public as close to real-time as is technically possible.
2. Market operators and investment firms operating a trading venue shall give access, on reasonable commercial terms and on a non-discriminatory basis, to the arrangements they employ for making public the information under paragraph 1 to investment firms which are obliged to publish the details of their transactions in bonds, structured finance products, emission allowances and derivatives pursuant to Article 21.

#### Article 11

##### **Authorisation of deferred publication**

1. Competent authorities shall be able to authorise market operators and investment firms operating a trading venue to provide for deferred publication of the details of transactions based on the size or type of the transaction.

In particular, the competent authorities may authorise the deferred publication in respect of transactions that:

- (a) are large in scale compared with the normal market size for that bond, structured finance product, emission allowance or derivative traded on a trading venue, or for that class of bond, structured finance product, emission allowance or derivative traded on a trading venue; or
- (b) are related to a bond, structured finance product, emission allowance or derivative traded on a trading venue, or a class of bond, structured finance product, emission allowance or derivative traded on a trading venue for which there is not a liquid market;
- (c) are above a size specific to that bond, structured finance product, emission allowance or derivative traded on a trading venue, or that class of bond, structured finance product, emission allowance or derivative traded on a trading venue, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors.

Market operators and investment firms operating a trading venue shall obtain the competent authority's prior approval of proposed arrangements for deferred trade-publication, and shall clearly disclose those arrangements to market participants and the public. ESMA shall monitor the application of those arrangements for deferred trade-publication and shall submit an annual report to the Commission on how they are used in practice.

2. The competent authority responsible for supervising one or more trading venues on which a class of bond, structured finance product, emission allowance or derivative is traded may, where the liquidity of that class of financial instrument falls below the threshold determined in accordance with the methodology as referred to in

Article 9(5)(a), temporarily suspend the obligations referred to in Article 10. That threshold shall be defined based on objective criteria specific to the market for the financial instrument concerned. Such temporary suspension shall be published on the website of the relevant competent authority.

The temporary suspension shall be valid for an initial period not exceeding three months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding three months at a time if the grounds for the temporary suspension continue to be applicable. Where the temporary suspension is not renewed after that three-month period, it shall automatically lapse.

Before suspending or renewing the temporary suspension of the obligations referred to in Article 10, the relevant competent authority shall notify ESMA of its intention and provide an explanation. ESMA shall issue an opinion to the competent authority as soon as practicable on whether in its view the suspension or the renewal of the temporary suspension is justified in accordance with the first and second subparagraphs.

3. Competent authorities may, in conjunction with an authorisation of deferred publication:

- (a) request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of deferral;
- (b) allow the omission of the publication of the volume of an individual transaction during an extended time period of deferral;
- (c) regarding non-equity instruments that are not sovereign debt, allow the publication of several transactions in an aggregated form during an extended time period of deferral;
- (d) regarding sovereign debt instruments, allow the publication of several transactions in an aggregated form for an indefinite period of time.

In relation to sovereign debt instruments, points (b) and (d) may be used either separately or consecutively whereby once the volume omission extended period lapses, the volumes could then be published in aggregated form.

In relation to all other financial instruments, when the deferral time period lapses, the outstanding details of the transaction and all the details of the transactions on an individual basis shall be published.

4. ESMA shall develop draft regulatory technical standards to specify the following in such a way as to enable the publication of information required under Article 64 of Directive 2014/65/EU:

- (a) the details of transactions that investment firms, including systematic internalisers, and market operators and investment firms operating a trading venue shall make available to the public for each class of financial instrument concerned in accordance with Article 10(1), including identifiers for the different types of transactions published under Article 10(1) and Article 21(1), distinguishing between those determined by factors linked primarily to the valuation of the financial instruments and those determined by other factors;
- (b) the time limit that would be deemed in compliance with the obligation to publish as close to real time as possible including when trades are executed outside ordinary trading hours;
- (c) the conditions for authorising investment firms, including systematic internalisers, and market operators and investment firms operating a trading venue, to provide for deferred publication of the details of transactions for each class of financial instrument concerned in accordance with paragraph 1 of this Article and with Article 21(4);

- (d) the criteria to be applied when determining the size or type of a transaction for which deferred publication and publication of limited details of a transaction, or publication of details of several transactions in an aggregated form, or omission of the publication of the volume of a transaction with particular reference to allowing an extended length of time of deferral for certain financial instruments depending on their liquidity, is allowed under paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

### CHAPTER 3

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

##### **Article 12**

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

1. Market operators and investment firms operating a trading venue shall make the information published in accordance with Articles 3, 4 and 6 to 11 available to the public by offering pre-trade and post-trade transparency data separately.
2. ESMA shall develop draft regulatory technical standards to specify the offering of pre-trade and post-trade transparency data, including the level of disaggregation of the data to be made available to the public as referred to in paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

##### **Article 13**

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

1. Market operators and investment firms operating a trading venue shall make the information published in accordance with Articles 3, 4 and 6 to 11 available to the public on a reasonable commercial basis and ensure non-discriminatory access to the information. Such information shall be made available free of charge 15 minutes after publication.
2. The Commission shall adopt delegated acts in accordance with Article 50 clarifying what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1.

### TITLE III

#### **TRANSPARENCY FOR SYSTEMATIC INTERNALISERS AND INVESTMENT FIRMS TRADING OTC**

##### **Article 14**

###### **Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments**

1. Investment firms shall make public firm quotes in respect of those shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue for which they are systematic internalisers and for which there is a liquid market.

Where there is not a liquid market for the financial instruments referred to in the first subparagraph, systematic internalisers shall disclose quotes to their clients upon request.

2. This Article and Articles 15, 16 and 17 shall apply to systematic internalisers when they deal in sizes up to standard market size. Systematic internalisers shall not be subject to this Article and Articles 15, 16 and 17 when they deal in sizes above standard market size.

3. Systematic internalisers may decide the size or sizes at which they will quote. The minimum quote size shall be at least the equivalent of 10 % of the standard market size of a share, depositary receipt, ETF, certificate or other similar financial instrument traded on a trading venue. For a particular share, depositary receipt, ETF, certificate or other similar financial instrument traded on a trading venue each quote shall include a firm bid and offer price or prices for a size or sizes which could be up to standard market size for the class of shares, depositary receipts, ETFs, certificates or other similar financial instruments to which the financial instrument belongs. The price or prices shall reflect the prevailing market conditions for that share, depositary receipt, ETF, certificate or other similar financial instrument.

4. Shares, depositary receipts, ETFs, certificates and other similar financial instruments shall be grouped in classes on the basis of the arithmetic average value of the orders executed in the market for that financial instrument. The standard market size for each class of shares, depositary receipts, ETFs, certificates and other similar financial instruments shall be a size representative of the arithmetic average value of the orders executed in the market for the financial instruments included in each class.

5. The market for each share, depositary receipt, ETF, certificate or other similar financial instrument shall be comprised of all orders executed in the Union in respect of that financial instrument excluding those that are large in scale compared to normal market size.

6. The competent authority of the most relevant market in terms of liquidity as defined in Article 26 for each share, depositary receipt, ETF, certificate and other similar financial instrument shall determine at least annually, on the basis of the arithmetic average value of the orders executed in the market in respect of that financial instrument, the class to which it belongs. That information shall be made public to all market participants and communicated to ESMA which shall publish the information on its website.

7. In order to ensure the efficient valuation of shares, depositary receipts, ETFs, certificates and other similar financial instruments and maximise the possibility of investment firms to obtain the best deal for their clients, ESMA shall develop draft regulatory technical standards to specify further the arrangements for the publication of a firm quote as referred to in paragraph 1, the determination of whether prices reflect prevailing market conditions as referred to in paragraph 3, and of the standard market size as referred to in paragraphs 2 and 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 15

### Execution of client orders

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

Member States shall require that firms that meet the definition of systematic internaliser notify their competent authority. Such notification shall be transmitted to ESMA. ESMA shall establish a list of all SIs in the Union.

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

2. Systematic internalisers shall, while complying with Article 27 of Directive 2014/65/EU, execute the orders they receive from their clients in relation to the shares, depositary receipts, ETFs, certificates and other similar financial instruments for which they are systematic internalisers at the quoted prices at the time of reception of the order.

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

3. Systematic internalisers may execute orders they receive from their professional clients at prices different than their quoted ones without having to comply with the requirements established in paragraph 2, in respect of transactions where execution in several securities is part of one transaction or in respect of orders that are subject to conditions other than the current market price.

4. Where a systematic internaliser quoting only one quote or whose highest quote is lower than the standard market size receives an order from a client of a size bigger than its quotation size, but lower than the standard market size, it may decide to execute that part of the order which exceeds its quotation size, provided that it is executed at the quoted price, except where otherwise permitted under the conditions laid down in paragraphs 2 and 3. Where the systematic internaliser is quoting in different sizes and receives an order between those sizes, which it chooses to execute, it shall execute the order at one of the quoted prices in compliance with Article 28 of Directive 2014/65/EU, except where otherwise permitted under the conditions of paragraphs 2 and 3 of this Article.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 50, clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in paragraph 1.

#### *Article 16*

#### **Obligations of competent authorities**

The competent authorities shall check the following:

(a) that investment firms regularly update bid and offer prices published in accordance with Article 14 and maintain prices which reflect the prevailing market conditions;

(b) that investment firms comply with the conditions for price improvement laid down in Article 15(2).

#### *Article 17*

#### **Access to quotes**

1. Systematic internalisers shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the clients to whom they give access to their quotes. To that end there shall be clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with clients on the basis of commercial considerations such as the client credit status, the counterparty risk and the final settlement of the transaction.

2. In order to limit the risk of exposure to multiple transactions from the same client, systematic internalisers shall be allowed to limit in a non-discriminatory way the number of transactions from the same client which they undertake to enter at the published conditions. They may, in a non-discriminatory way and in accordance with Article 28 of Directive 2014/65/EU, limit the total number of transactions from different clients at the same time provided that this is allowable only where the number and/or volume of orders sought by clients considerably exceeds the norm.

3. In order to ensure the efficient valuation of shares, depositary receipts, ETFs, certificates and other similar financial instruments and maximise the possibility for investment firms to obtain the best deal for their clients, the Commission shall adopt delegated acts in accordance with Article 50 specifying:

- (a) the criteria specifying when a quote is published on a regular and continuous basis and is easily accessible as referred to in Article 15(1) as well as the means by which investment firms may comply with their obligation to make public their quotes, which shall include the following possibilities:
  - (i) through the facilities of any regulated market which has admitted the financial instrument in question to trading;
  - (ii) through an APA;
  - (iii) through proprietary arrangements;
- (b) the criteria specifying those transactions where execution in several securities is part of one transaction or those orders that are subject to conditions other than current market price as referred to in Article 15(3);
- (c) the criteria specifying what can be considered as exceptional market conditions that allow for the withdrawal of quotes as well as the conditions for updating quotes as referred to in Article 15(1);
- (d) the criteria specifying when the number and/or volume of orders sought by clients considerably exceeds the norm as referred to in paragraph 2.
- (e) the criteria specifying when prices fall within a public range close to market conditions as referred to in Article 15(2).

#### Article 18

##### **Obligation for systematic internalisers to make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives**

1. Investment firms shall make public firm quotes in respect of bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which they are systematic internalisers and for which there is a liquid market when the following conditions are fulfilled:

- (a) they are prompted for a quote by a client of the systematic internaliser;
- (b) they agree to provide a quote.

2. In relation to bonds, structured finance products, emission allowances and derivatives traded on a trading venue for which there is not a liquid market, systematic internalisers shall disclose quotes to their clients on request if they agree to provide a quote. That obligation may be waived where the conditions specified in Article 9(1) are met.

3. Systematic internalisers may update their quotes at any time. They may withdraw their quotes under exceptional market conditions.

4. Member States shall require that firms that meet the definition of systematic internaliser notify their competent authority. Such notification shall be transmitted to ESMA. ESMA shall establish a list of all systematic internalisers in the Union.

5. Systematic internalisers shall make the firm quotes published in accordance with paragraph 1 available to their other clients. Notwithstanding, they shall be allowed to decide, on the basis of their commercial policy and in an objective non-discriminatory way, the clients to whom they give access to their quotes. To that end, systematic internalisers shall have in place clear standards for governing access to their quotes. Systematic internalisers may refuse to enter into or discontinue business relationships with clients on the basis of commercial considerations such as the client credit status, the counterparty risk and the final settlement of the transaction.

6. Systematic internalisers shall undertake to enter into transactions under the published conditions with any other client to whom the quote is made available in accordance with paragraph 5 when the quoted size is at or below the size specific to the financial instrument determined in accordance with Article 9(5)(d).

Systematic internalisers shall not be subject to the obligation to publish a firm quote pursuant to paragraph 1 for financial instruments that fall below the threshold of liquidity determined in accordance with Article 9(4).

7. Systematic internalisers shall be allowed to establish non-discriminatory and transparent limits on the number of transactions they undertake to enter into with clients pursuant to any given quote.

8. The quotes published pursuant to paragraph 1 and 5 and those at or below the size referred to in paragraph 6 shall be made public in a manner which is easily accessible to other market participants on a reasonable commercial basis.

9. The quoted price or prices shall be such as to ensure that the systematic internaliser complies with its obligations under Article 27 of Directive 2014/65/EU, where applicable, and shall reflect prevailing market conditions in relation to prices at which transactions are concluded for the same or similar financial instruments on a trading venue.

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

10. Systematic internalisers shall not be subject to this Article when they deal in sizes above the size specific to the financial instrument determined in accordance with Article 9(5)(d).

#### *Article 19*

#### **Monitoring by ESMA**

1. Competent authorities and ESMA shall monitor the application of Article 18 regarding the sizes at which quotes are made available to clients of the investment firm and to other market participants relative to other trading activity of the firm, and the degree to which the quotes reflect prevailing market conditions in relation to transactions in the same or similar financial instruments on a trading venue. By 3 January 2019, ESMA shall submit a report to the Commission on the application of Article 18. In the event of significant quoting and trading activity just beyond the threshold referred to in Article 18(6) or outside prevailing market conditions, ESMA shall submit a report to the Commission before that date.

2. The Commission shall adopt delegated acts in accordance with Article 50 specifying the sizes referred to in Article 18(6) at which a firm shall enter into transactions with any other client to whom the quote is made available. The size specific to the financial instrument shall be determined in accordance with the criteria set in Article 9(5)(d).

3. The Commission shall adopt delegated acts in accordance with Article 50 clarifying what constitutes a reasonable commercial basis to make quotes public as referred to in Article 18(8).

## Article 20

### **Post-trade disclosure by investment firms, including systematic internalisers, in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments**

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, shall make public the volume and price of those transactions and the time at which they were concluded. That information shall be made public through an APA.

2. The information which is made public in accordance with paragraph 1 of this Article and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 6, including the regulatory technical standards adopted in accordance with Article 7(2)(a). Where the measures adopted pursuant to Article 7 provide for deferred publication for certain categories of transaction in shares, depositary receipts, ETFs, certificates and other similar financial instruments traded on a trading venue, that possibility shall also apply to those transactions when undertaken outside trading venues.

3. ESMA shall develop draft regulatory technical standards to specify the following:

- (a) identifiers for the different types of transactions published under this Article, distinguishing between those determined by factors linked primarily to the valuation of the financial instruments and those determined by other factors;
- (b) the application of the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the financial instrument;
- (c) the party to a transaction that has to make the transaction public in accordance with paragraph 1 if both parties to the transaction are investment firms.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 21

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

1. Investment firms which, either on own account or on behalf of clients, conclude transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue shall make public the volume and price of those transactions and the time at which they were concluded. That information shall be made public through an APA.

2. Each individual transaction shall be made public once through a single APA.

3. The information which is made public in accordance with paragraph 1 and the time-limits within which it is published shall comply with the requirements adopted pursuant to Article 10, including the regulatory technical standards adopted in accordance with Article 11(4)(a) and (b).

4. Competent authorities shall be able to authorise investment firms to provide for deferred publication, or may request the publication of limited details of a transaction or details of several transactions in an aggregated form, or a combination thereof, during the time period of the deferral or may allow the omission of the publication of the volume

for individual transactions during an extended time period of deferral, or in the case of non-equity financial instruments that are not sovereign debt, may allow the publication of several transactions in an aggregated form during an extended time period of deferral, or in the case of sovereign debt instruments may allow the publication of several transactions in an aggregated form for an indefinite period of time, and may temporarily suspend the obligations referred to in paragraph 1 on the same conditions as laid down in Article 11.

Where the measures adopted pursuant to Article 11 provide for deferred publication and publication of limited details or details in an aggregated form, or a combination thereof, or for omission of the publication of the volume for certain categories of transactions in bonds, structured finance products, emission allowances and derivatives traded on a trading venue, that possibility shall also apply to those transactions when undertaken outside trading venues.

5. ESMA shall develop draft regulatory technical standards in such a way as to enable the publication of information required under Article 64 of Directive 2014/65/EU to specify the following:

- (a) the identifiers for the different types of transactions published in accordance with this Article, distinguishing between those determined by factors linked primarily to the valuation of the financial instruments and those determined by other factors;
- (b) the application of the obligation under paragraph 1 to transactions involving the use of those financial instruments for collateral, lending or other purposes where the exchange of financial instruments is determined by factors other than the current market valuation of the financial instrument;
- (c) the party to a transaction that has to make the transaction public in accordance with paragraph 1 if both parties to the transaction are investment firms.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 22

### Providing information for the purposes of transparency and other calculations

1. In order to carry out calculations for determining the requirements for the pre-trade and post-trade transparency and the trading obligation regimes imposed by Articles 3 to 11, Articles 14 to 21 and Article 32, which are applicable to financial instruments and for determining whether an investment firm is a systematic internaliser, competent authorities may require information from:

(a) trading venues;

(b) APAs; and

(c) CTPs.

2. Trading venues, APAs and CTPs shall store the necessary data for a sufficient period of time.

3. Competent authorities shall transmit to ESMA such information as ESMA requires to produce the reports referred to in Article 5(4), (5) and (6).

4. ESMA shall develop draft regulatory technical standards to specify the content and frequency of data requests and the formats and the timeframe in which trading venues, APAs and CTPs must respond to such requests in accordance with paragraph 1, the type of data that must be stored, and the minimum period of time for which trading venues, APAs and CTPs must store data in order to be able to respond to such requests in accordance with paragraph 2.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 23

##### **Trading obligation for investment firms**

1. An investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF or systematic internaliser, or a third-country trading venue assessed as equivalent in accordance with Article 25(4)(a) of Directive 2014/65/EU, as appropriate, unless their characteristics include that they:

- (a) are non-systematic, ad-hoc, irregular and infrequent; or
- (b) are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process.

2. An investment firm that operates an internal matching system which executes client orders in shares, depositary receipts, ETFs, certificates and other similar financial instruments on a multilateral basis must ensure it is authorised as an MTF under Directive 2014/65/EU and comply with all relevant provisions pertaining to such authorisations.

3. ESMA shall develop draft regulatory technical standards to specify the particular characteristics of those transactions in shares that do not contribute to the price discovery process as referred to in paragraph 1, taking into consideration cases such as:

- (a) non-addressable liquidity trades; or
- (b) where the exchange of such financial instruments is determined by factors other than the current market valuation of the financial instrument.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### TITLE IV

##### **TRANSACTION REPORTING**

#### Article 24

##### **Obligation to uphold integrity of markets**

Without prejudice to the allocation of responsibilities for enforcing Regulation (EU) No 596/2014, competent authorities coordinated by ESMA in accordance with Article 31 of Regulation (EU) No 1095/2010 shall monitor the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market.

*Article 25***Obligation to maintain records**

1. Investment firms shall keep at the disposal of the competent authority, for five years, the relevant data relating to all orders and all transactions in financial instruments which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of clients, the records shall contain all the information and details of the identity of the client, and the information required under Directive 2005/60/EC of the European Parliament and of the Council (<sup>(1)</sup>). ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.

2. The operator of a trading venue shall keep at the disposal of the competent authority, for at least five years, the relevant data relating to all orders in financial instruments which are advertised through their systems. The records shall contain the relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order and the details of which shall be reported in accordance with Article 26(1) and (3). ESMA shall perform a facilitation and coordination role in relation to the access by competent authorities to information under this paragraph.

3. ESMA shall develop draft regulatory technical standards to specify the details of the relevant order data required to be maintained under paragraph 2 of this Article that is not referred to in Article 26.

Those draft regulatory technical standards shall include the identification code of the member or participant which transmitted the order, the identification code of the order, the date and time the order was transmitted, the characteristics of the order, including the type of order, the limit price if applicable, the validity period, any specific order instructions, details of any modification, cancellation, partial or full execution of the order, the agency or principal capacity.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

*Article 26***Obligation to report transactions**

1. Investment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day.

The competent authorities shall, in accordance with Article 85 of Directive 2005/60/EC, establish the necessary arrangements in order to ensure that the competent authority of the most relevant market in terms of liquidity for those financial instruments also receives that information.

The competent authorities shall make available to ESMA, upon request, any information reported in accordance with this Article.

2. The obligation laid down in paragraph 1 shall apply to:

- (a) financial instruments which are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made;
- (b) financial instruments where the underlying is a financial instrument traded on a trading venue; and

<sup>(1)</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

- (c) financial instruments where the underlying is an index or a basket composed of financial instruments traded on a trading venue

The obligation shall apply to transactions in financial instruments referred to in points (a) to (c) irrespective of whether or not such transactions are carried out on the trading venue.

3. The reports shall, in particular, include details of the names and numbers of the financial instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, a designation to identify the applicable waiver under which the trade has taken place, means of identifying the investment firms concerned, and a designation to identify a short sale as defined in Article 2(1)(b) of Regulation (EU) No 236/2012 in respect of any shares and sovereign debt within the scope of Articles 12, 13 and 17 of that Regulation. For transactions not carried out on a trading venue, the reports shall include a designation identifying the types of transactions in accordance with the measures to be adopted pursuant to Article 20(3)(a) and Article 21(5)(a). For commodity derivatives, the reports shall indicate whether the transaction reduces risk in an objectively measurable way in accordance with Article 57 of Directive 2014/65/EU.

4. Investment firms which transmit orders shall include in the transmission of that order all the details as specified in paragraphs 1 and 3. Instead of including the mentioned details when transmitting orders, an investment firm may choose to report the transmitted order, if it is executed, as a transaction in accordance with the requirements under paragraph 1. In that case, the transaction report by the investment firm shall state that it pertains to a transmitted order.

5. The operator of a trading venue shall report details of transactions in financial instruments traded on its platform which are executed through its systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3.

6. In reporting the designation to identify the clients as required under paragraphs 3 and 4, investment firms shall use a legal entity identifier established to identify clients that are legal persons.

ESMA shall develop by 3 January 2016 guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 to ensure that the application of legal entity identifiers within the Union complies with international standards, in particular those established by the Financial Stability Board.

7. The reports shall be made to the competent authority either by the investment firm itself, an ARM acting on its behalf or by the trading venue through whose system the transaction was completed, in accordance with paragraphs 1, 3 and 9.

Investment firms shall have responsibility for the completeness, accuracy and timely submission of the reports which are submitted to the competent authority.

By way of derogation from that responsibility, where an investment firm reports details of those transactions through an ARM which is acting on its behalf or a trading venue, the investment firm shall not be responsible for failures in the completeness, accuracy or timely submission of the reports which are attributable to the ARM or trading venue. In those cases and subject to Article 66(4) of Directive 2014/65/EU the ARM or trading venue shall be responsible for those failures.

Investment firms must nevertheless take reasonable steps to verify the completeness, accuracy and timeliness of the transaction reports which were submitted on their behalf.

The home Member State shall require the trading venue, when making reports on behalf of the investment firm, to have sound security mechanisms in place designed to guarantee the security and authentication of the means of transfer of information, to minimise the risk of data corruption and unauthorised access and to prevent information leakage maintaining the confidentiality of the data at all times. The home Member State shall require the trading venue to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

Trade-matching or reporting systems, including trade repositories registered or recognised in accordance with Title VI of Regulation (EU) No 648/2012, may be approved by the competent authority as an ARM in order to transmit transaction reports to the competent authority in accordance with paragraphs 1, 3 and 9.

Where transactions have been reported to a trade repository in accordance with Article 9 of Regulation (EU) No 648/2012 which is approved as an ARM and where those reports contain the details required under paragraphs 1, 3 and 9 and are transmitted to the competent authority by the trade repository within the time limit set in paragraph 1, the obligation on the investment firm laid down in paragraph 1 shall be considered to have been complied with.

Where there are errors or omissions in the transaction reports, the ARM, investment firm or trading venue reporting the transaction shall correct the information and submit a corrected report to the competent authority.

8. When, in accordance with Article 35(8) of Directive 2014/65/EU, reports provided for under this Article are transmitted to the competent authority of the host Member State, it shall transmit that information to the competent authorities of the home Member State of the investment firm, unless the competent authorities of the home Member State decide that they do not want to receive that information.

9. ESMA shall develop draft regulatory technical standards to specify:

- (a) data standards and formats for the information to be reported in accordance with paragraphs 1 and 3, including the methods and arrangements for reporting financial transactions and the form and content of such reports;
- (b) the criteria for defining a relevant market in accordance with paragraph 1;
- (c) the references of the financial instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, the information and details of the identity of the client, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, a designation to identify the applicable waiver under which the trade has taken place, the means of identifying the investment firms concerned, the way in which the transaction was executed, data fields necessary for the processing and analysis of the transaction reports in accordance with paragraph 3; and
- (d) the designation to identify short sales of shares and sovereign debt as referred to in paragraph 3;
- (e) the relevant categories of financial instrument to be reported in accordance with paragraph 2;
- (f) the conditions upon which legal entity identifiers are developed, attributed and maintained, by Member States in accordance with paragraph 6, and the conditions under which those legal entity identifiers are used by investment firms so as to provide, pursuant to paragraphs 3, 4 and 5, for the designation to identify the clients in the transaction reports they are required to establish pursuant to paragraph 1;
- (g) the application of transaction reporting obligations to branches of investment firms;
- (h) what constitutes a transaction and execution of a transaction for the purposes of this Article.

- (i) when an investment firm is deemed to have transmitted an order for the purposes of paragraph 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

10. By 3 January 2019, ESMA shall submit a report to the Commission on the functioning of this Article, including its interaction with the related reporting obligations under Regulation (EU) No 648/2012, and whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enables monitoring of the activities of investment firms in accordance with Article 24 of this Regulation. The Commission may take steps to propose any changes, including providing for transactions to be transmitted only to a single system appointed by ESMA instead of to competent authorities. The Commission shall forward ESMA's report to the European Parliament and to the Council.

#### Article 27

##### **Obligation to supply financial instrument reference data**

1. With regard to financial instruments admitted to trading on regulated markets or traded on MTFs or OTFs, trading venues shall provide competent authorities with identifying reference data for the purposes of transaction reporting under Article 26.

With regard to other financial instruments covered by Article 26(2) traded on its system, each systematic internaliser shall provide its competent authority with reference data relating to those financial instruments.

Identifying reference data shall be made ready for submission to the competent authority in an electronic and standardised format before trading commences in the financial instrument that it refers to. The financial instrument reference data shall be updated whenever there are changes to the data with respect to a financial instrument. Those notifications are to be transmitted by competent authorities without delay to ESMA, which shall publish them immediately on its website. ESMA shall give competent authorities access to those reference data.

2. In order to allow competent authorities to monitor, pursuant to Article 26, the activities of investment firms to ensure that they act honestly, fairly and professionally and in a manner which promotes the integrity of the market, ESMA and the competent authorities shall establish the necessary arrangements in order to ensure that:

- (a) ESMA and the competent authorities effectively receive the financial instrument reference data pursuant to paragraph 1;
- (b) the quality of the data so received is appropriate for the purpose of transaction reporting under Article 26;
- (c) the financial instrument reference data received pursuant to paragraph 1 is efficiently exchanged between the relevant competent authorities.

3. ESMA shall develop draft regulatory technical standards to specify:

- (a) data standards and formats for the financial instrument reference data in accordance with paragraph 1, including the methods and arrangements for supplying the data and any update thereto to competent authorities and transmitting it to ESMA in accordance with paragraph 1, and the form and content of such data;
- (b) the technical measures that are necessary in relation to the arrangements to be made by ESMA and the competent authorities pursuant to paragraph 2.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## TITLE V

### **DERIVATIVES**

#### *Article 28*

##### **Obligation to trade on regulated markets, MTFs or OTFs**

1. Financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 and non-financial counterparties that meet the conditions referred to in Article 10(1)(b) thereof shall conclude transactions which are neither intragroup transactions as defined in Article 3 of that Regulation nor transactions covered by the transitional provisions in Article 89 of that Regulation with other such financial counterparties or other such non-financial counterparties that meet the conditions referred to in Article 10(1)(b) of Regulation (EU) No 648/2012 in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 32 and listed in the register referred to in Article 34 only on:

(a) regulated markets;

(b) MTFs;

(c) OTFs; or

(d) third-country trading venues, provided that the Commission has adopted a decision in accordance with paragraph 4 and provided that the third country provides for an effective equivalent system for the recognition of trading venues authorised under Directive 2014/65/EU to admit to trading or trade derivatives declared subject to a trading obligation in that third country on a non-exclusive basis.

2. The trading obligation shall also apply to counterparties referred to in paragraph 1 which enter into derivatives transactions pertaining to a class of derivatives that has been declared subject to the trading obligation with third-country financial institutions or other third-country entities that would be subject to the clearing obligation if they were established in the Union. The trading obligation shall also apply to third-country entities that would be subject to the clearing obligation if they were established in the Union, which enter into derivatives transactions pertaining to a class of derivatives that has been declared subject to the trading obligation, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

ESMA shall regularly monitor the activity in derivatives which have not been declared subject to the trading obligation as described in paragraph 1 in order to identify cases where a particular class of contracts may pose systemic risk and to prevent regulatory arbitrage between derivative transactions subject to the trading obligation and derivative transactions which are not subject to the trading obligation.

3. Derivatives declared subject to the trading obligation pursuant to paragraph 1 shall be eligible to be admitted to trading on a regulated market or to trade on any trading venue as referred to in paragraph 1 on a non-exclusive and non-discriminatory basis.

4. The Commission may, in accordance with the examination procedure referred to in Article 51(2) adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which are equivalent to the requirements for the trading venues referred to in paragraph 1(a), (b) or (c) of this Article, resulting from this Regulation, Directive 2014/65/EU, and Regulation (EU) No 596/2014, and which are subject to effective supervision and enforcement in that third country.

Those decisions shall be for the sole purpose of determining eligibility as a trading venue for derivatives subject to the trading obligation.

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

- (a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) trading venues have clear and transparent rules regarding admission of financial instruments to trading so that such financial instruments are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
- (c) issuers of financial instruments are subject to periodic and ongoing information requirements ensuring a high level of investor protection;
- (d) it ensures market transparency and integrity via rules addressing market abuse in the form of insider dealing and market manipulation;

A decision of the Commission under this paragraph may be limited to a category or categories of trading venues. In that case, a third-country trading venue is only included in paragraph 1(d) if it falls within a category covered by the Commission's decision.

5. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards to specify the types of contracts referred to in paragraph 2 which have a direct, substantial and foreseeable effect within the Union and the cases where the trading obligation is necessary or appropriate to prevent the evasion of any provision of this Regulation.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

Where possible and appropriate, the regulatory technical standards referred to in this paragraph shall be identical to those adopted under Article 4(4) of Regulation (EU) No 648/2012.

#### Article 29

##### **Clearing obligation for derivatives traded on regulated markets and timing of acceptance for clearing**

1. The operator of a regulated market shall ensure that all transactions in derivatives that are concluded on that regulated market are cleared by a CCP.

2. CCPs, trading venues and investment firms which act as clearing members in accordance with Article 2(14) of Regulation (EU) No 648/2012 shall have in place effective systems, procedures and arrangements in relation to cleared derivatives to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems.

In this paragraph, 'cleared derivatives' means

- (a) all derivatives which are to be cleared pursuant to the clearing obligation under paragraph 1 of this Article or pursuant to the clearing obligation under Article 4 of Regulation (EU) No 648/2012;

(b) all derivatives which are otherwise agreed by the relevant parties to be cleared.

3. ESMA shall develop draft regulatory technical standards to specify the minimum requirements for systems, procedures and arrangements, including the acceptance timeframes, under this Article taking into account the need to ensure proper management of operational or other risks.

ESMA shall have ongoing authority to develop further regulatory technical standards to update those in force if it considers that that is required as industry standards evolve.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 3 July 2015.

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

#### Article 30

##### **Indirect Clearing Arrangements**

1. Indirect clearing arrangements with regard to exchange-traded derivatives are permissible provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48 of Regulation (EU) No 648/2012.

2. ESMA shall develop draft regulatory technical standards to specify the types of indirect clearing service arrangements, where established, that meet the conditions referred to in paragraph 1, ensuring consistency with provisions established for OTC derivatives under Chapter II of Commission Delegated Regulation (EU) No 149/2013 (¹).

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 31

##### **Portfolio Compression**

1. When providing portfolio compression, investment firms and market operators shall not be subject to the best execution obligation in Article 27 of Directive 2014/65/EU, the transparency obligations in Articles 8, 10, 18 and 21 of this Regulation and the obligation in Article 1(6) of Directive 2014/65/EU. The termination or replacement of the component derivatives in the portfolio compression shall not be subject to Article 28 of this Regulation.

2. Investment firms and market operators providing portfolio compression shall make public through an APA the volumes of transactions subject to portfolio compressions and the time they were concluded within the time limits specified in Article 10.

3. Investment firms and market operators providing portfolio compressions shall keep complete and accurate records of all portfolio compressions which they organise or participate in. Those records shall be made available promptly to the relevant competent authority or ESMA upon request.

(¹) Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p. 11).

4. The Commission may adopt by means of delegated acts in accordance with Article 50, measures specifying the following:

- (a) the elements of portfolio compression,
- (b) the information to be published pursuant to paragraph 2,

in such a way as to make use as far as possible of any existing record keeping, reporting or publication requirements.

#### *Article 32*

#### **Trading obligation procedure**

1. ESMA shall develop draft regulatory technical standards to specify the following:

- (a) which of the class of derivatives declared subject to the clearing obligation in accordance with Article 5(2) and (4) of Regulation (EU) No 648/2012 or a relevant subset thereof shall be traded on the venues referred to in Article 28(1) of this Regulation;
- (b) the date or dates from which the trading obligation takes effect, including any phase-in and the categories of counterparties to which the obligation applies where such phase-in and such categories of counterparties have been provided for in regulatory technical standards in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012.

ESMA shall submit those draft regulatory technical standards to the Commission within six months after the adoption of the regulatory technical standards in accordance with Article 5(2) of Regulation (EU) No 648/2012 by the Commission.

Before submitting the draft regulatory technical standards to the Commission for adoption, ESMA shall conduct a public consultation and, where appropriate, may consult third-country competent authorities.

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

2. In order for the trading obligation to take effect:

- (a) the class of derivatives pursuant to paragraph 1(a) or a relevant subset thereof must be admitted to trading or traded on at least one trading venue as referred to in Article 28(1), and
- (b) there must be sufficient third-party buying and selling interest in the class of derivatives or a relevant subset thereof so that such a class of derivatives is considered sufficiently liquid to trade only on the venues referred to in Article 28(1).

3. In developing the draft regulatory technical standards referred to in paragraph 1, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid pursuant to the following criteria:

- (a) the average frequency and size of trades over a range of market conditions, having regard to the nature and lifecycle of products within the class of derivatives;
- (b) the number and type of active market participants including the ratio of market participants to products/contracts traded in a given product market;

- (c) the average size of the spreads.

In preparing those draft regulatory technical standards, ESMA shall take into consideration the anticipated impact that trading obligation might have on the liquidity of a class of derivatives or a relevant subset thereof and the commercial activities of end users which are not financial entities.

ESMA shall determine whether the class of derivatives or relevant subset thereof is only sufficiently liquid in transactions below a certain size.

4. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives or individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 28(1), but for which no CCP has yet received authorisation under Article 14 or 15 of Regulation (EU) No 648/2012 or which is not admitted to trading or traded on a trading venue referred to in Article 28(1).

Following the notification by ESMA referred to in the first subparagraph, the Commission may publish a call for development of proposals for the trading of those derivatives on the venues referred to in Article 28(1).

5. ESMA shall in accordance with paragraph 1, submit to the Commission draft regulatory technical standards to amend, suspend or revoke existing regulatory technical standards whenever there is a material change in the criteria set out in paragraph 2. Before doing so, ESMA may, where appropriate, consult the competent authorities of third countries.

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

6. ESMA shall develop draft regulatory technical standards to specify the criteria referred to in paragraph 2(b).

ESMA shall submit drafts for those regulatory technical standards to the Commission by 3 July 2015.

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

### *Article 33*

#### **Mechanism to avoid duplicative or conflicting rules**

1. The Commission shall be assisted by ESMA in monitoring and preparing reports, at least on an annual basis, to the European Parliament and to the Council on the international application of principles laid down in Articles 28 and 29, in particular with regard to potential duplicative or conflicting requirements on market participants, and recommend possible actions.

2. The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of the relevant third country:

- (a) are equivalent to the requirements resulting from Articles 28 and 29;
- (b) ensure protection of professional secrecy that is equivalent to that set out in this Regulation;
- (c) are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 51.

3. An implementing act on equivalence as referred to in paragraph 2 shall have the effect that counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligation contained in Articles 28 and 29 where at least one of the counterparties is established in that third country and the counterparties are in compliance with those legal, supervisory and enforcement arrangements of the relevant third country.

4. The Commission shall, in cooperation with ESMA, monitor the effective implementation by third countries, for which an implementing act on equivalence has been adopted, of the requirements equivalent to those contained in Articles 28 and 29 and regularly report, at least on an annual basis, to the European Parliament and to the Council.

Within 30 calendar days of the presentation of the report where the report reveals a significant defect or inconsistency in the application of the equivalent requirements by third-country authorities, the Commission may withdraw the recognition as equivalent of the third-country legal framework in question. Where an implementing act on equivalence is withdrawn, transactions by counterparties shall automatically be subject again to all requirements contained in Articles 28 and 29 of this Regulation.

#### *Article 34*

#### **Register of derivatives subject to the trading obligation**

ESMA shall publish and maintain on its website a register specifying, in an exhaustive and unequivocal manner, the derivatives that are subject to the obligation to trade on the venues referred to in Article 28(1), the venues where they are admitted to trading or traded, and the dates from which the obligation takes effect.

#### TITLE VI

#### **NON-DISCRIMINATORY CLEARING ACCESS FOR FINANCIAL INSTRUMENTS**

#### *Article 35*

#### **Non-discriminatory access to a CCP**

1. Without prejudice to Article 7 of Regulation (EU) No 648/2012, a CCP shall accept to clear financial instruments on a non-discriminatory and transparent basis, including as regards collateral requirements and fees relating to access, regardless of the trading venue on which a transaction is executed. This in particular shall ensure that a trading venue has the right to non-discriminatory treatment of contracts traded on that trading venue in terms of:

- (a) collateral requirements and netting of economically equivalent contracts, where the inclusion of such contracts in the close-out and other netting procedures of a CCP based on the applicable insolvency law would not endanger the smooth and orderly functioning, the validity or enforceability of such procedures; and
- (b) cross-margining with correlated contracts cleared by the same CCP under a risk model that complies with Article 41 of Regulation (EU) No 648/2012.

A CCP may require that the trading venue comply with the operational and technical requirements established by the CCP including the risk management requirements. The requirement in this paragraph does not apply to any derivative contract that is already subject to the access obligations under Article 7 of Regulation (EU) No 648/2012.

A CCP is not bound by this Article if it is connected by close links to a trading venue which has given notification under Article 36(5).

2. A request to access a CCP by a trading venue shall be formally submitted to a CCP, its relevant competent authority and the competent authority of the trading venue. The request shall specify to which types of financial instruments access is requested.

3. The CCP shall provide a written response to the trading venue within three months in the case of transferable securities and money market instruments, and within six months in the case of exchange-traded derivatives, either permitting access, under the condition that a relevant competent authority has granted access pursuant to paragraph 4, or denying access. The CCP may deny a request for access only under the conditions specified in paragraph 6(a). If a CCP denies access it shall provide full reasons in its response and inform its competent authority in writing of the decision. Where the trading venue is established in a different Member State to the CCP, the CCP shall also provide such notification and reasoning to the competent authority of the trading venue. The CCP shall make access possible within three months of providing a positive response to the access request.

4. The competent authority of the CCP or that of the trading venue shall grant a trading venue access to a CCP only where such access:

- (a) would not require an interoperability arrangement, in the case of derivatives that are not OTC derivatives pursuant to Article 2(7) of Regulation (EU) No 648/2012; or
- (b) would not threaten the smooth and orderly functioning of the markets, in particular due to liquidity fragmentation, or would not adversely affect systemic risk.

Nothing in point (a) of the first subparagraph shall prevent access being granted where the request referred to in paragraph 2 requires interoperability and the trading venue and all CCPs party to the proposed interoperability arrangement have consented to the arrangement and the risks to which the incumbent CCP is exposed to arising from inter-CCP positions are collateralised at a third party.

Where the need for an interoperability arrangement is the reason or is part of the reason for denying a request, the trading venue will advise the CCP and inform ESMA which other CCPs have access to the trading venue and ESMA will publish that information so that investment firms may choose to exercise their rights under Article 37 of Directive 2014/65/EU in respect of those CCPs in order to facilitate alternative access arrangements.

If a competent authority refuses access it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the other competent authority, the CCP and the trading venue including the evidence on which the decision is based.

5. As regards transferable securities and money market instruments, a CCP that has been newly established and authorised as a CCP as defined in Article 2(1) of Regulation (EU) No 648/2012 to clear under Article 17 of Regulation (EU) No 648/2012 or recognised under Article 25 of Regulation (EU) No 648/2012 or authorised under a pre-existing national authorisation regime for a period of less than three years on 2 July 2014 may, before 3 January 2017, apply to its competent authority for permission to avail itself of transitional arrangements. The competent authority may decide that this Article does not apply to the CCP in respect of transferable securities and money market instruments, for a transitional period until 3 July 2019.

Where such a transitional period is approved, the CCP cannot benefit from the access rights under Article 36 or this Article in respect of transferable securities and money market instruments for the duration of that transitional arrangement. The competent authority shall notify members of the college of competent authorities for the CCP and ESMA when a transitional period is approved. ESMA shall publish a list of all notifications that it receives.

Where a CCP which has been approved for the transitional arrangements under this paragraph is connected by close links to one or more trading venues, those trading venues shall not benefit from access rights under Article 36 or this Article in respect of transferable securities and money market instruments for the duration of the transitional arrangement.

A CCP which is authorised during the three year period prior to entry into force, but is formed by a merger or acquisition involving at least one CCP authorised prior to that period, shall not be permitted to apply for the transitional arrangements under this paragraph.

6. ESMA shall develop draft regulatory technical standards to specify:

- (a) the specific conditions under which an access request may be denied by a CCP, including the anticipated volume of transactions, the number and type of users, arrangements for managing operational risk and complexity or other factors creating significant undue risks;
- (b) the conditions under which access must be permitted by a CCP, including confidentiality of information provided regarding financial instruments during the development phase, the non-discriminatory and transparent basis as regards clearing fees, collateral requirements and operational requirements regarding margining;
- (c) the conditions under which granting access will threaten the smooth and orderly functioning of markets or would adversely affect systemic risk;
- (d) the procedure for making a notification under paragraph 5;
- (e) the conditions for non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 36

##### **Non-discriminatory access to a trading venue**

1. Without prejudice to Article 8 of Regulation (EU) No 648/2012, a trading venue shall provide trade feeds on a non-discriminatory and transparent basis, including as regards fees related to access, upon request to any CCP authorised or recognised by Regulation (EU) No 648/2012 that wishes to clear transactions in financial instruments that are concluded on that trading venue. That requirement does not apply to any derivative contract that is already subject to the access obligations under Article 8 of Regulation (EU) No 648/2012.

A trading venue is not bound by this Article if it is connected by close links to a CCP which has given notification that it is availing of the transitional arrangements under Article 35(5).

2. A request to access a trading venue by a CCP shall be formally submitted to a trading venue, its relevant competent authority and the competent authority of the CCP.

3. The trading venue shall provide a written response to the CCP within three months in the case of transferable securities and money market instruments, and within six months in the case of exchange-traded derivatives, either permitting access, under the condition that the relevant competent authority has granted access pursuant to paragraph 4, or denying access. The trading venue may deny access only under the conditions specified under paragraph 6(a). When access is denied the trading venue shall provide full reasons in its response and inform its competent authority in writing of the decision. Where the CCP is established in a different Member State to the trading venue, the trading venue shall also provide such notification and reasoning to the competent authority of the CCP. The trading venue shall make access possible within three months of providing a positive response to the access request.

4. The competent authority of the trading venue or that of the CCP shall grant a CCP access to a trading venue only where such access:

- (a) would not require an interoperability arrangement, in the case of derivatives that are not OTC derivatives pursuant to Article 2(7) of Regulation (EU) No 648/2012; or
- (b) would not threaten the smooth and orderly functioning of the markets, in particular due to liquidity fragmentation and the trading venue has put in place adequate mechanisms to prevent such fragmentation, or would not adversely affect systemic risk.

Nothing in point (a) of the first subparagraph shall prevent access being granted where the request referred to in paragraph 2 requires interoperability and the trading venue and all CCPs party to the proposed interoperability arrangement have consented to the arrangement and the risks to which the incumbent CCP is exposed to arising from inter-CCP positions are collateralised at a third party.

Where the need for an interoperability arrangement is the reason or is part of the reason for denying a request, the trading venue will advise the CCP and inform ESMA which other CCPs have access to the trading venue and ESMA will publish that information so that investment firms may choose to exercise their rights under Article 37 of Directive 2014/65/EU in respect of those CCPs in order to facilitate alternative access arrangements.

If a competent authority denies access it shall issue its decision within two months following receipt of the request referred to in paragraph 2 and provide full reasons to the other competent authority, the trading venue and the CCP including the evidence on which its decision is based.

5. As regards exchange-traded derivatives, a trading venue which falls below the relevant threshold in the calendar year preceding the entry into application of this Regulation, may, before the entry into application of this Regulation, notify ESMA and its competent authority that it does not wish to be bound by this Article for exchange-traded derivatives included within that threshold, for a period of thirty months from the application of this Regulation. A trading venue which remains below the relevant threshold in every year of that, or any further, thirty month period may, at the end of the period, notify ESMA and its competent authority that it wishes to continue to not be bound by this Article for further thirty months. Where notification is given the trading venue cannot benefit from the access rights under Article 35 or this Article for exchange-traded derivatives included within the relevant threshold, for the duration of the opt-out. ESMA shall publish a list of all notifications that it receives.

The relevant threshold for the opt-out is an annual notional amount traded of EUR 1 000 000 million. The notional amount shall be single-counted and shall include all transactions in exchange-traded derivatives concluded under the rules of the trading venue.

Where a trading venue is part of a group which is connected by close links, the threshold shall be calculated by adding the annual notional amount traded of all the trading venues in the group as a whole that are based in the Union.

Where a trading venue which has made a notification under this paragraph is connected by close links to one or more CCPs, those CCPs shall not benefit from access rights under Article 35 or this Article for exchange-traded derivatives within the relevant threshold, for the duration of the opt-out.

6. ESMA shall develop draft regulatory technical standards to specify:

- (a) the specific conditions under which an access request may be denied by a trading venue, including conditions based on the anticipated volume of transactions, the number of users, arrangements for managing operational risk and complexity or other factors creating significant undue risks;

- (b) the conditions under which access shall be granted, including confidentiality of information provided regarding financial instruments during the development phase and the non-discriminatory and transparent basis as regards fees related to access;
- (c) the conditions under which granting access will threaten the smooth and orderly functioning of the markets, or would adversely affect systemic risk;
- (d) the procedure for making a notification under paragraph 5, including further specifications for calculation of the notional amount and the method by which ESMA may verify the calculation of the volumes and approve the opt-out.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 37

##### **Non-discriminatory access to and obligation to licence benchmarks**

1. Where the value of any financial instrument is calculated by reference to a benchmark, a person with proprietary rights to the benchmark shall ensure that CCPs and trading venues are permitted, for the purposes of trading and clearing, non-discriminatory access to:

- (a) relevant price and data feeds and information on the composition, methodology and pricing of that benchmark for the purposes of clearing and trading; and
- (b) licences.

A licence including access to information shall be granted on a fair, reasonable and non-discriminatory basis within three months following the request by a CCP or a trading venue.

Access shall be given at a reasonable commercial price taking into account the price at which access to the benchmark is granted or the intellectual property rights are licensed on equivalent terms to another CCP, trading venues or any related persons for the purposes of clearing and trading. Different prices can be charged to different CCPs, trading venues or any related persons only where objectively justified having regard to reasonable commercial grounds such as the quantity, scope or field of use demanded.

2. Where a new benchmark is developed after 3 January 2017 the obligation to licence starts no later than 30 months after a financial instrument referencing that benchmark commenced trading or was admitted to trading. Where a person with proprietary rights to a new benchmark owns an existing benchmark, that person shall establish that compared to any such existing benchmark the new benchmark meets the following cumulative criteria:

- (a) the new benchmark is not a mere copy or adaptation of any such existing benchmark and the methodology, including the underlying data, of the new benchmark is meaningfully different from any such existing benchmark; and
- (b) the new benchmark is not a substitute for any such existing benchmark.

This paragraph shall be without prejudice to the application of competition rules and, in particular, Article 101 and 102 TFEU.

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

- (a) to prevent any other CCP or trading venue from obtaining access to such information or rights as referred to in paragraph 1; or
- (b) to prevent any other CCP or trading venue from obtaining access to such a licence, as referred to in paragraph 1.

4. ESMA shall develop draft regulatory technical standards to specify:

- (a) the information through licensing to be made available under paragraph 1(a) for the sole use of the CCP or trading venue;
- (b) other conditions under which access is granted, including confidentiality of information provided;
- (c) the standards guiding how a benchmark may be proven to be new in accordance with paragraph 2(a) and (b).

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 38

##### **Access for third-country CCPs and trading venues**

1. A trading venue established in a third country may request access to a CCP established in the Union only if the Commission has adopted a decision in accordance with Article 28(4) relating to that third country. A CCP established in a third country may request access to a trading venue in the Union subject to that CCP being recognised under Article 25 of Regulation (EU) No 648/2012. CCPs and trading venues established in third countries shall only be permitted to make use of the access rights in Articles 35 to 36 provided that the Commission has adopted a decision in accordance with paragraph 3 that the legal and supervisory framework of the third country is considered to provide for an effective equivalent system for permitting CCPs and trading venues authorised under foreign regimes access to CCPs and trading venues established in that third country.

2. CCPs and trading venues established in third countries may only request a licence and the access rights in accordance with Article 37 provided that the Commission has adopted a decision in accordance with paragraph 3 of this Article that the legal and supervisory framework of that third country is considered to provide for an effective equivalent system under which CCPs and trading venues authorised in foreign jurisdictions are permitted access on a fair reasonable and non-discriminatory basis to:

- (a) relevant price and data feeds and information of composition, methodology and pricing of benchmarks for the purposes of clearing and trading; and
- (b) licences,

from persons with proprietary rights to benchmarks established in that third country.

3. The Commission may, in accordance with the examination procedure referred to in Article 51, adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue and CCP authorised in that third country complies with legally binding requirements which are equivalent to the requirements referred to in paragraph 2 of this Article and which are subject to effective supervision and enforcement in that third country.

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

- (a) trading venues in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) it provides for an effective equivalent system for permitting CCPs and trading venues authorised under foreign regimes access to CCPs and trading venues established in that third country;
- (c) the legal and supervisory framework of that third country provides for an effective equivalent system under which CCPs and trading venues authorised in foreign jurisdictions are permitted access on a fair reasonable and non discriminatory basis to:
  - (i) relevant price and data feeds and information of composition, methodology and pricing of benchmarks for the purposes of clearing and trading; and
  - (ii) licences,

from persons with proprietary rights to benchmarks established in that third country.

## TITLE VII

### SUPERVISORY MEASURES ON PRODUCT INTERVENTION AND POSITIONS

#### CHAPTER 1

##### ***Product monitoring and intervention***

###### *Article 39*

##### **Market monitoring**

1. In accordance with Article 9(2) of Regulation (EU) No 1095/2010, ESMA shall monitor the market for financial instruments which are marketed, distributed or sold in the Union.

2. In accordance with Article 9(2) of Regulation (EU) No 1093/2010, EBA shall monitor the market for structured deposits which are marketed, distributed or sold in the Union.

3. Competent authorities shall monitor the market for financial instruments and structured deposits which are marketed, distributed or sold in or from their Member State.

###### *Article 40*

##### **ESMA temporary intervention powers**

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA may, where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

- (a) the marketing, distribution or sale of certain financial instruments or financial instruments with certain specified features; or

- (b) a type of financial activity or practice.

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

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

- (a) the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system in the Union;
- (b) regulatory requirements under Union law that are applicable to the relevant financial instrument or activity do not address the threat;
- (c) a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.

Where the conditions set out in the first subparagraph are fulfilled, ESMA may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument has been marketed, distributed or sold to clients.

3. When taking action under this Article, ESMA shall ensure that the action:

- (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action;
- (b) does not create a risk of regulatory arbitrage, and
- (c) has been taken after consulting the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where the measure relates to agricultural commodities derivatives.

Where a competent authority or competent authorities have taken a measure under Article 42, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 43.

4. Before deciding to take any action under this Article, ESMA shall notify competent authorities of the action it proposes.

5. ESMA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect.

6. ESMA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three-month period it shall expire.

7. Action adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority.

8. The Commission shall adopt delegated acts in accordance with Article 50 specifying criteria and factors to be taken into account by ESMA in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a).

Those criteria and factors shall include:

- (a) the degree of complexity of a financial instrument and the relation to the type of client to whom it is marketed and sold;
- (b) the size or the notional value of an issuance of financial instruments;
- (c) the degree of innovation of a financial instrument, an activity or a practice;
- (d) the leverage a financial instrument or practice provides.

#### *Article 41*

#### **EBA temporary intervention powers**

1. In accordance with Article 9(5) of Regulation (EU) No 1093/2010, EBA may where the conditions in paragraphs 2 and 3 are fulfilled, temporarily prohibit or restrict in the Union:

- (a) the marketing, distribution or sale of certain structured deposits or structured deposits with certain specified features; or
- (b) a type of financial activity or practice.

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

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

- (a) the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union;
- (b) regulatory requirements under Union law that are applicable to the relevant structured deposit or activity do not address the threat;
- (c) a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.

Where the conditions set out in the first subparagraph are fulfilled, EBA may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a structured deposit has been marketed, distributed or sold to clients.

3. When taking action under this Article, EBA shall ensure that the action:

- (a) does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to the benefits of the action; and

- (b) does not create a risk of regulatory arbitrage.

Where a competent authority or competent authorities have taken a measure under Article 42, EBA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 43.

4. Before deciding to take any action under this Article, EBA shall notify competent authorities of the action it proposes.

5. EBA shall publish on its website notice of any decision to take any action under this Article. The notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect.

6. EBA shall review a prohibition or restriction imposed under paragraph 1 at appropriate intervals and at least every three months. If the prohibition or restriction is not renewed after that three-month period it shall expire.

7. Action adopted by EBA under this Article shall prevail over any previous action taken by a competent authority.

8. The Commission shall adopt delegated acts in accordance with Article 50 to specify criteria and factors to be taken into account by EBA in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets and to the stability of the whole or part of the financial system of the Union referred to in paragraph 2(a).

Those criteria and factors shall include:

- (a) the degree of complexity of a structured deposit and the relation to the type of client to whom it is marketed and sold;
- (b) the size or the notional value of an issuance of structured deposits;
- (c) the degree of innovation of a structured deposit, an activity or a practice;
- (d) the leverage a structured deposit or practice provides.

#### Article 42

#### **Product intervention by competent authorities**

1. A competent authority may prohibit or restrict the following in or from that Member State:

- (a) the marketing, distribution or sale of certain financial instruments or structured deposits or financial instruments or structured deposits with certain specified features; or
- (b) a type of financial activity or practice.

2. A competent authority may take the action referred to in paragraph 1 if it is satisfied on reasonable grounds that:

- (a) either
  - (i) a financial instrument, structured deposit or activity or practice gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of whole or part of the financial system within at least one Member State; or
  - (ii) a derivative has a detrimental effect on the price formation mechanism in the underlying market;
- (b) existing regulatory requirements under Union law applicable to the financial instrument, structured deposit or activity or practice do not sufficiently address the risks referred to in point (a) and the issue would not be better addressed by improved supervision or enforcement of existing requirements;
- (c) the action is proportionate taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants who may hold, use or benefit from the financial instrument, structured deposit or activity or practice;
- (d) the competent authority has properly consulted competent authorities in other Member States that may be significantly affected by the action;
- (e) the action does not have a discriminatory effect on services or activities provided from another Member State; and
- (f) it has properly consulted public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, where a financial instrument or activity or practice poses a serious threat to the orderly functioning and integrity of the physical agricultural market.

Where the conditions set out in the first subparagraph are fulfilled, the competent authority may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument or structured deposit has been marketed, distributed or sold to clients.

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

3. The competent authority shall not impose a prohibition or restriction under this Article unless, not less than one month before the measure is intended to take effect, it has notified all other competent authorities and ESMA in writing or through another medium agreed between the authorities the details of:

- (a) the financial instrument or activity or practice to which the proposed action relates;
- (b) the precise nature of the proposed prohibition or restriction and when it is intended to take effect; and
- (c) the evidence upon which it has based its decision and upon which it is satisfied that each of the conditions in paragraph 2 are met.

4. In exceptional cases where the competent authority deems it necessary to take urgent action under this Article in order to prevent detriment arising from the financial instruments, structured deposits, practices or activities referred to in paragraph 1, the competent authority may take action on a provisional basis with no less than 24 hours' written notice, before the measure is intended to take effect, to all other competent authorities and ESMA or, for structured deposits, EBA, provided that all the criteria in this Article are met and that, in addition, it is clearly established that a one month notification period would not adequately address the specific concern or threat. The competent authority shall not take action on a provisional basis for a period exceeding three months.

5. The competent authority shall publish on its website notice of any decision to impose any prohibition or restriction referred to in paragraph 1. The notice shall specify details of the prohibition or restriction, a time after the publication of the notice from which the measures will take effect and the evidence upon which it is satisfied each of the conditions in paragraph 2 are met. The prohibition or restriction shall only apply in relation to actions taken after the publication of the notice.

6. The competent authority shall revoke a prohibition or restriction if the conditions in paragraph 2 no longer apply.

7. The Commission shall adopt delegated acts in accordance with Article 50 specifying criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the financial system within at least one Member State referred to in paragraph 2(a).

Those criteria and factors shall include:

- (a) the degree of complexity of a financial instrument or structured deposit and the relation to the type of client to whom it is marketed, distributed and sold;
- (b) the degree of innovation of a financial instrument or structured deposit, an activity or a practice;
- (c) the leverage a financial instrument or structured deposit or practice provides;
- (d) in relation to the orderly functioning and integrity of financial markets or commodity markets, the size or the notional value of an issuance of financial instruments or structured deposits.

#### *Article 43*

#### **Coordination by ESMA and EBA**

1. ESMA or, for structured deposits, EBA shall perform a facilitation and coordination role in relation to action taken by competent authorities under Article 42. In particular ESMA or, for structured deposits, EBA shall ensure that action taken by a competent authority is justified and proportionate and that where appropriate a consistent approach is taken by competent authorities.

2. After receiving notification under Article 42 of any action that is to be imposed under that Article, ESMA or, for structured deposits, EBA shall adopt an opinion on whether the prohibition or restriction is justified and proportionate. If ESMA or, for structured deposits, EBA considers that the taking of a measure by other competent authorities is necessary to address the risk, it shall state this in its opinion. The opinion shall be published on ESMA's or, for structured deposits, EBA website.

3. Where a competent authority proposes to take, or takes, action contrary to an opinion adopted by ESMA or EBA under paragraph 2 or declines to take action contrary to such an opinion, it shall immediately publish on its website a notice fully explaining its reasons for so doing.

#### **CHAPTER 2**

#### **Positions**

#### *Article 44*

#### **Coordination of national position management measures and position limits by ESMA**

1. ESMA shall perform a facilitation and coordination role in relation to measures taken by competent authorities pursuant to Article 69(2)(o) and (p) of Directive 2014/65/EU. In particular, ESMA shall ensure that a consistent approach is taken by competent authorities with regard to when those powers are exercised, the nature and scope of the measures imposed, and the duration and follow-up of any measures.

2. After receiving notification of any measure under Article 79(5) of Directive 2014/65/EU, ESMA shall record the measure and the reasons therefor. In relation to measures taken pursuant to Article 69(2)(o) or (p) of Directive 2014/65/EU, it shall maintain and publish on its website a database with summaries of the measures in force including details of the person concerned, the applicable financial instruments, any limits on the size of positions the persons can hold at all times, any exemptions thereto granted in accordance with Article 57 of Directive 2014/65/EU, and the reasons therefor.

#### Article 45

##### **Position management powers of ESMA**

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

- (a) request from any person all relevant information regarding the size and purpose of a position or exposure entered into via a derivative;
- (b) after analysing the information obtained in accordance with point (a), require any such person to reduce the size of or to eliminate the position or exposure in accordance with the delegated act referred to in paragraph 10(b);
- (c) as a last resort, limit the ability of a person from entering into a commodity derivative.

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

- (a) the measures listed in paragraph 1 address a threat to the orderly functioning and integrity of financial markets, including commodity derivative markets in accordance with the objectives listed in Article 57(1) of Directive 2014/65/EU and including in relation to delivery arrangements for physical commodities, or to the stability of the whole or part of the financial system in the Union;
- (b) a competent authority or competent authorities have not taken measures to address the threat or the measures taken do not sufficiently address the threat;

ESMA shall perform its assessment of the fulfilment of the conditions referred to in points (a) and (b) of the first subparagraph of this paragraph in accordance with the criteria and factors provided for in the delegated act referred to in paragraph 10(a) of this Article.

3. When taking measures referred to in paragraph 1 ESMA shall ensure that the measure:

- (a) significantly addresses the threat to the orderly functioning and integrity of financial markets, including commodity derivative markets in accordance with the objectives listed in Article 57(1) of Directive 2014/65/EU and including in relation to delivery arrangements for physical commodities, or to the stability of the whole or part of the financial system in the Union or significantly improve the ability of competent authorities to monitor the threat as measured in accordance with the criteria and factors provided for in the delegated act referred to in paragraph 10(a) of this Article;
- (b) does not create a risk of regulatory arbitrage as measured in accordance with paragraph 10(c) of this Article;
- (c) does not have any of the following detrimental effects on the efficiency of financial markets that is disproportionate to the benefits of the measure: reducing liquidity in those markets, restraining the conditions for reducing risks directly related to the commercial activity of a non-financial counterparty, or creating uncertainty for market participants.

ESMA shall consult the Agency for the Cooperation of Energy Regulators established under Regulation (EC) No 713/2009 of the European Parliament and of the Council (<sup>(1)</sup>) before taking any measures related to wholesale energy products.

ESMA shall consult the public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EC) No 1234/2007, before taking any measure related to agricultural commodity derivatives.

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

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

6. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in paragraph 1(c). The notice shall include details on the person concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum size of a position the person in question can enter into, and the reasons therefor.

7. A measure referred to in paragraph 1(c) shall take effect when the notice is published or at a time specified in the notice that is after its publication and shall only apply to a transaction entered into after the measure takes effect.

8. ESMA shall review its measures referred to in paragraph 1(c) at appropriate intervals and at least every three months. If a measure is not renewed after that three month period, it shall automatically expire. Paragraphs 2 to 8 shall also apply to a renewal of measures.

9. A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Article 69(2)(o) or (p) of Directive 2014/65/EU.

10. The Commission shall adopt in accordance with Article 50 delegated acts to specify criteria and factors to determine:

- (a) the existence of a threat to the orderly functioning and integrity of financial markets, including commodity derivative markets in accordance with the objectives listed in Article 57(1) of Directive 2014/65/EU and including in relation to delivery arrangements for physical commodities, or to the stability of the whole or part of the financial system in the Union as referred to in paragraph 2(a) taking account of the degree to which positions are used to hedge positions in physical commodities or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives;
- (b) the appropriate reduction of a position or exposure entered into via a derivative referred to in paragraph 1(b) of this Article;
- (c) the situations where a risk of regulatory arbitrage as referred to in paragraph 3(b) of this Article could arise.

Those criteria and factors shall take into account the regulatory technical standards referred to in Article 57(3) of Directive 2014/65/EU and shall differentiate between situations where ESMA takes action because a competent authority has failed to act and those where ESMA addresses an additional risk which the competent authority is not able to sufficiently address pursuant to Article 69(2)(j) or (o) of Directive 2014/65/EU.

<sup>(1)</sup> Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1).

## TITLE VIII

**PROVISION OF SERVICES AND PERFORMANCE OF ACTIVITIES BY THIRD-COUNTRY FIRMS FOLLOWING AN EQUIVALENCE DECISION WITH OR WITHOUT A BRANCH****Article 46****General provisions**

1. A third-country firm may provide investment services or perform investment activities with or without any ancillary services to eligible counterparties and to professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU established throughout the Union without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA in accordance with Article 47.

2. ESMA shall register a third-country firm that has applied for the provision of investment services or performance of activities throughout the Union in accordance with paragraph 1 only where the following conditions are met:

(a) the Commission has adopted a decision in accordance with Article 47(1);

(b) the firm is authorised in the jurisdiction where its head office is established to provide the investment services or activities to be provided in the Union and it is subject to effective supervision and enforcement ensuring a full compliance with the requirements applicable in that third country;

(c) cooperation arrangements have been established pursuant to Article 47(2).

3. Where a third-country firm is registered in accordance with this Article, Member States shall not impose any additional requirements on the third-country firm in respect of matters covered by this Regulation or by Directive 2014/65/EU and shall not treat third-country firms more favourably than Union firms.

4. The third-country firm referred to in paragraph 1 shall submit its application to ESMA after the adoption by the Commission of the decision referred to in Article 47 determining that the legal and supervisory framework of the third country in which the third-country firm is authorised is equivalent to the requirements described in Article 47(1).

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

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

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

Member States may allow third-country firms to provide investment services or perform investment activities together with ancillary services to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in their territories in accordance with national regimes in the absence of the Commission decision in accordance with Article 47(1) or where such decision is no longer in effect.

5. Third-country firms providing services in accordance with this Article shall inform clients established in the Union, before the provision of any investment services, that they are not allowed to provide services to clients other than eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU and that they are not subject to supervision in the Union. They shall indicate the name and the address of the competent authority responsible for supervision in the third country.

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

Member States shall ensure that where an eligible counterparty or professional client within the meaning of Section I of Annex II to Directive 2014/65/EU established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, this Article does not apply to the provision of that service or activity by the third-country firm to that person including a relationship specifically related to the provision of that service or activity. An initiative by such clients shall not entitle the third-country firm to market new categories of investment product or investment service to that individual.

6. Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.

7. ESMA shall develop draft regulatory technical standards to specify the information that the applicant third-country firm shall provide to ESMA in its application for registration in accordance with paragraph 4 and the format of information to be provided in accordance with paragraph 5.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### Article 47

##### **Equivalence decision**

1. The Commission may adopt a decision in accordance with the examination procedure referred to in Article 51(2) in relation to a third country stating that the legal and supervisory arrangements of that third country ensure that firms authorised in that third country comply with legally binding prudential and business conduct requirements which have equivalent effect to the requirements set out in this Regulation, in Directive 2013/36/EU and in Directive 2014/65/EU and in the implementing measures adopted under this Regulation and under those Directives and that the legal framework of that third country provides for an effective equivalent system for the recognition of investment firms authorised under third-country legal regimes.

The prudential and business conduct framework of a third country may be considered to have equivalent effect where that framework fulfils all the following conditions:

- (a) firms providing investment services and activities in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;
- (b) firms providing investment services and activities in that third country are subject to sufficient capital requirements and appropriate requirements applicable to shareholders and members of their management body;
- (c) firms providing investment services and activities are subject to adequate organisational requirements in the area of internal control functions;
- (d) firms providing investment services and activities are subject to appropriate conduct of business rules;
- (e) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation

2. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as effectively equivalent in accordance with paragraph 1. Such arrangements shall specify at least:

- (a) the mechanism for the exchange of information between ESMA and the competent authorities of third countries concerned, including access to all information regarding the non-Union firms authorised in third countries that is requested by ESMA;
- (b) the mechanism for prompt notification to ESMA where a third-country competent authority deems that a third-country firm that it is supervising and ESMA has registered in the register provided for in Article 48 infringes the conditions of its authorisation or other law to which it is obliged to adhere;
- (c) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

3. A third-country firm established in a country whose legal and supervisory framework has been recognised to be effectively equivalent in accordance with paragraph 1 and is authorised in accordance with Article 39 of Directive 2014/65/EU shall be able to provide the services and activities covered under the authorisation to eligible counterparties and professional clients within the meaning of Section I of Annex II to Directive 2014/65/EU in other Member States of the Union without the establishment of new branches. For that purpose, it shall comply with the information requirements for the cross-border provision of services and activities in Article 34 of Directive 2014/65/EU.

The branch shall remain subject to the supervision of the Member State where the branch is established in accordance with Article 39 of Directive 2014/65/EU. However, and without prejudice to the obligations to cooperate laid down in Directive 2014/65/EU, the competent authority of the Member State where the branch is established and the competent authority of the host Member State may establish proportionate cooperation agreements in order to ensure that the branch of the third-country firm providing investment services within the Union delivers the appropriate level of investor protection.

4. A third-country firm may no longer use the rights under Article 46(1) where the Commission adopts a decision in accordance with the examination procedure referred to in Article 51(2) withdrawing its decision under paragraph 1 of this Article in relation to that third country.

#### Article 48

##### **Register**

ESMA shall keep a register of the third-country firms allowed to provide investment services or perform investment activities in the Union in accordance with Article 46. The register shall be publicly accessible on the website of ESMA and shall contain information on the services or activities which the third-country firms are permitted to provide or perform and the reference of the competent authority responsible for their supervision in the third country.

#### Article 49

##### **Withdrawal of registration**

1. ESMA shall withdraw the registration of a third-country firm in the register established in accordance with Article 48 where:

- (a) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the third-country firm is acting in a manner which is clearly prejudicial to the interests of investors or the orderly functioning of markets; or
- (b) ESMA has well-founded reasons based on documented evidence to believe that, in the provision of investment services and activities in the Union, the third-country firm has seriously infringed the provisions applicable to it in the third country and on the basis of which the Commission has adopted the Decision in accordance with Article 47(1);

(c) ESMA has referred the matter to the competent authority of the third country and that third-country competent authority has not taken the appropriate measures needed to protect investors and the proper functioning of the markets in the Union or has failed to demonstrate that the third-country firm concerned complies with the requirements applicable to it in the third country; and

(d) ESMA has informed the third-country competent authority of its intention to withdraw the registration of the third-country firm at least 30 days before the withdrawal.

2. ESMA shall inform the Commission of any measure adopted in accordance with paragraph 1 without delay and shall publish its decision on its website.

3. The Commission shall assess whether the conditions under which a decision in accordance with Article 47(1) has been adopted continue to persist in relation to the third country concerned.

## TITLE IX

### DELEGATED AND IMPLEMENTING ACTS

#### CHAPTER 1

##### ***Delegated acts***

###### *Article 50*

##### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 1(9), Article 2(2), Article 13(2), Article 15(5), Article 17(3), Article 19(2) and (3), Article 31(4), Article 40(8), Article 41(8), Article 42(7), Article 45(10) and Article 52(10) and (12) shall be conferred for an indeterminate period of time from 2 July 2014.

3. The delegation of power referred to in Article 1(9), Article 2(2), Article 13(2), Article 15(5), Article 17(3), Article 19(2) and (3), Article 31(4), Article 40(8), Article 41(8), Article 42(7), Article 45(10) and Article 52(10) and (12) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 1(9), Article 2(2), Article 13(2), Article 15(5), Article 17(3), Article 19(2) and (3), Article 31(4), Article 40(8), Article 41(8), Article 42(7), Article 45(10) and Article 52(10) or (12) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.

## CHAPTER 2

**Implementing acts**

## Article 51

**Committee procedure**

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC (<sup>1</sup>). That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

## TITLE X

**FINAL PROVISIONS**

## Article 52

**Reports and review**

1. By 3 March 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the impact in practice of the transparency obligations established pursuant to Articles 3 to 13, in particular on the impact of the volume cap mechanism described in Article 5, including on the cost of trading for eligible counterparties and professional clients and on trading of shares of small and mid-cap companies, and its effectiveness in ensuring that the use of the relevant waivers does not harm price formation and how any appropriate mechanism for imposing sanctions for infringements of the volume cap might operate, and on the application and continued appropriateness of the waivers to pre-trade transparency obligations established pursuant to Article 4(2) and (3) and Article 9(2) to (5).

2. The report referred to in paragraph 1 shall include the impact on European equity markets of the use of the waiver under Article 4(1)(a) and (b)(i) and the volume cap mechanism under Article 5, with particular reference to:

(a) the level and trend of non-lit order book trading within the Union since the introduction of this Regulation;

(b) the impact on the pre-trade transparent quoted spreads;

(c) the impact on the depth of liquidity on lit order books;

(d) the impact on competition and on investors within the Union;

(e) the impact on trading of shares of small and mid-cap companies;

(f) developments at international level and discussions with third countries and international organisations.

3. If the report concludes that the use of the waiver under Article 4(1)(a) and (b)(i) is harmful to price formation or to trading of shares of small and mid-cap companies, the Commission shall, where appropriate, make proposals, including amendments to this Regulation, regarding the use of those waivers. Such proposals shall include an impact assessment of the proposed amendments, and shall take into account the objectives of this Regulation and the effects on market disruption and competition, and potential impacts on investors in the Union.

4. By 3 March 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the functioning of Article 26, including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in

(<sup>1</sup>) Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee (OJ L 191, 13.7.2001, p. 45).

accordance with Article 26(1). The Commission may make any appropriate proposals, including providing for transactions to be reported to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article for the purposes of this Regulation and of Directive 2014/65/EU and the detection of insider dealing and market abuse in accordance with Regulation (EU) No 596/2014.

5. By 3 March 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on appropriate solutions to reduce information asymmetries between market participants as well as tools for regulators to better monitor quotation activities on trading venues. That report shall at least assess the feasibility of developing a European best bid and offer system for consolidated quotes to fulfil those objectives.

6. By 3 March 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 25 and 28.

7. By 3 July 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the development in prices for pre-trade and post-trade transparency data from regulated markets, MTFs, OTFs, APAs and CTPs.

8. By 3 July 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council reviewing the interoperability provisions in Article 36 of this Regulation and of Article 8 of Regulation (EU) No 648/2012.

9. By 3 July 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the application of Articles 35 and 36 of this Regulation and of Articles 7 and 8 of Regulation (EU) No 648/2012.

By 3 July 2021, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the application of Article 37.

10. By 3 July 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the impact of Article 35 and 36 of this Regulation on newly established and authorised CCPs as referred to in Article 35(5) and trading venues connected to those CCPs by close links and whether the transitional arrangement provided for in Article 35(5) shall be extended, weighing the possible benefits to consumers of improving competition and the degree of choice available to market participants against the possible disproportionate effect of those provisions on newly established and authorised CCPs and the constraints of local market participants in accessing global CCPs and the smooth functioning of the market.

Subject to the conclusions of that report, the Commission may adopt a delegated act in accordance with Article 50 to extend the transitional period in accordance with Article 35(5) by a maximum of 30 months.

11. By 3 July 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on whether the threshold laid down in Article 36(5) remains appropriate and whether the opt out mechanism in respect of exchange-traded derivatives is to remain available.

12. By 3 July 2016, the Commission shall, based on a risk assessment carried out by ESMA in consultation with the ESRB, submit a report to the European Parliament and to the Council assessing the need to temporarily exclude exchange-traded derivatives from the scope of Article 35 and 36. That report shall take into account risks, if any, resulting from open access provisions regarding exchange-traded derivatives to the overall stability and orderly functioning of the financial markets throughout the Union.

Subject to the conclusions of that report, the Commission may adopt a delegated act in accordance with Article 50 to exclude exchange-traded derivatives from the scope of Articles 35 and 36 for up to thirty months following 3 January 2017.

### Article 53

#### **Amendment of Regulation (EU) No 648/2012**

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

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

'In the developing of the draft regulatory technical standards under this paragraph ESMA shall not prejudice the transitional provision relating to C6 energy derivative contracts as laid down in Article 95 of Directive 2014/65/EU (\*).

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(\*) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).;

(2) Article 7 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. A CCP that has been authorised to clear OTC derivative contracts shall accept clearing such contracts on a non-discriminatory and transparent basis, including as regards collateral requirements and fees related to access, regardless of the trading venue. This in particular shall ensure that a trading venue has the right to non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of:

- (a) collateral requirements and netting of economically equivalent contracts, where the inclusion of such contracts in the close-out and other netting procedures of a CCP based on the applicable insolvency law would not endanger the smooth and orderly functioning, the validity or enforceability of such procedures; and
- (b) cross-margining with correlated contracts cleared by the same CCP under a risk model that complies with Article 41.

A CCP may require that a trading venue comply with the operational and technical requirements established by the CCP, including the risk-management requirements.;

(b) the following paragraph is added:

'6. The conditions laid down in paragraph 1 regarding non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts and cross-margining with correlated contracts cleared by the same CCP shall be further specified by the technical standards adopted pursuant to Article 35(6)(e) of Regulation (EU) No 600/2014 (\*).;

(3) In Article 81(3), the following subparagraph is added:

'A trade repository shall transmit data to competent authorities in accordance with the requirements under Article 26 of Regulation (EU) No 600/2014 (\*).'

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(\*) 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)

*Article 54***Transitional provisions**

1. Third-country firms shall be able to continue to provide services and activities in Member States, in accordance with national regimes until three years after the adoption by the Commission of a decision in relation to the relevant third country in accordance with Article 47.

2. If the Commission assesses that there is not a 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 the entry into application of this Regulation, 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 2019. Where such a transitional period is approved, the CCP or trading venue cannot benefit from the access rights under Article 35 or 36, as regards exchange-traded derivatives for the duration of that transitional 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.

Where a CCP which has been approved for the transitional arrangements, is connected by close links to one or more trading venues, those trading venues shall not benefit from access rights under Article 35 or 36 for exchange-traded derivatives for the duration of that transitional period.

Where a trading venue, which has been approved for the transitional arrangements, is connected by close links to one or more CCPs, those CCPs shall not benefit from access rights under Article 35 or 36 for exchange-traded derivatives for the duration of that transitional period.

*Article 55***Entry into force and application**

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

This Regulation shall apply from 3 January 2017.

Notwithstanding the second paragraph, Article 1(8) and (9), Article 2(2), Article 5(6) and(9), Article 7(2), Article 9(5), Article 11(4), Article 12(2), Article 13(2), Article 14(7), Article 15(5), Article 17(3), Article 19(2) and (3), Article 20(3), Article 21(5), Article 22(4), Article 23(3), Article 25(3), Article 26(9), Article 27(3), Article 28(4), Article 28(5), Article 29(3), Article 30(2), Article 31(4), Article 32(1), (5) and(6), Article 33(2), Article 35(6), Article 36(6), Article 37(4), Article 38(3), Article 40(8), Article 41(8), Article 42(7), Article 45(10), Article 46(7), Article 47(1) and (4), Article 52(10) and (12) and Article 54(1) shall apply immediately following the entry into force of this Regulation.

Notwithstanding the second paragraph, Article 37(1), (2) and (3) shall apply from 3 January 2019.

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

Done at Brussels, 15 May 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

# DIRECTIVES

## DIRECTIVE 2014/49/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 April 2014

### on deposit guarantee schemes

(recast)

(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 53(1) 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 Central Bank (¹),

Acting in accordance with the ordinary legislative procedure (²),

Whereas:

- (1) Directive 94/19/EC of the European Parliament and of the Council (³) has been substantially amended (⁴). Since further amendments are to be made, that Directive should be recast in the interests of clarity.
- (2) In order to make it easier to take up and pursue the business of credit institutions, it is necessary to eliminate certain differences between the laws of the Member States as regards the rules on deposit guarantee schemes (DGSS) to which those credit institutions are subject.
- (3) This Directive constitutes an essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institutions, while increasing the stability of the banking system and the protection of depositors. In view of the costs of the failure of a credit institution to the economy as a whole and its adverse impact on financial stability and the confidence of depositors, it is desirable not only to make provision for reimbursing depositors but also to allow Member States sufficient flexibility to enable DGSSs to carry out measures to reduce the likelihood of future claims against DGSSs. Those measures should always comply with the State aid rules.
- (4) In order to take account of the growing integration in the internal market, it should be possible to merge the DGSSs of different Member States or to create separate cross-border schemes on a voluntary basis. Member States should ensure sufficient stability and a balanced composition of the new and the existing DGSSs. Adverse effects on financial stability should be avoided, for example where only credit institutions with a high-risk profile are transferred to a cross-border DGS.

(¹) OJ C 99, 31.3.2011, p. 1.

(²) Position of the European Parliament of 16 February 2012 (OJ C 249 E, 30.8.2013, p. 81) and Decision of the Council at first reading of 3 March 2014 (not yet published in the Official Journal). Position of the European Parliament of 16 April 2014 (not yet published in the Official Journal).

(³) Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ L 135, 31.5.1994, p. 5).

(⁴) See Annex III.

- (5) Directive 94/19/EC requires the Commission, if appropriate, to put forward proposals to amend that Directive. This Directive encompasses the harmonisation of the funding mechanisms of DGSs, the introduction of risk-based contributions and the harmonisation of the scope of products and depositors covered.
- (6) Directive 94/19/EC is based on the principle of minimum harmonisation. Consequently, a variety of DGSs with very distinct features currently exist in the Union. As a result of the common requirements laid down in this Directive, a uniform level of protection should be provided for depositors throughout the Union while ensuring the same level of stability of DGSs. At the same time, those common requirements are of the utmost importance in order to eliminate market distortions. This Directive therefore contributes to the completion of the internal market.
- (7) As a result of this Directive, depositors will benefit from significantly improved access to DGSs, thanks to a broadened and clarified scope of coverage, faster repayment periods, improved information and robust funding requirements. This will improve consumer confidence in financial stability throughout the internal market.
- (8) Member States should ensure that their DGSs have sound governance practices in place and that they produce an annual report on their activities.
- (9) In the event of closure of an insolvent credit institution, the depositors at any branches situated in a Member State other than that in which the credit institution has its head office should be protected by the same DGS as the credit institution's other depositors.
- (10) This Directive should not prevent Member States from including within its scope credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (<sup>(1)</sup>) which fall outside the scope of Directive 2013/36/EU of the European Parliament and of the Council (<sup>(2)</sup>) pursuant to Article 2(5) of that Directive. Member States should be able to decide that, for the purpose of this Directive, the central body and all credit institutions affiliated to that central body are treated as a single credit institution.
- (11) In principle, this Directive requires every credit institution to join a DGS. A Member State admitting branches of a credit institution having its head office in a third country should decide how to apply this Directive to such branches and should take account of the need to protect depositors and maintain the integrity of the financial system. Depositors at such branches should be fully aware of the guarantee arrangements which affect them.
- (12) It should be recognised that there are institutional protection schemes (IPS) which protect the credit institution itself and which, in particular, ensure its liquidity and solvency. Where such a scheme is separate from a DGS, its additional safeguard role should be taken into account when determining the contributions of its members to the DGS. The harmonised level of coverage provided for in this Directive should not affect schemes protecting the credit institution itself unless they repay depositors.
- (13) Each credit institution should be part of a DGS recognised under this Directive, thereby ensuring a high level of consumer protection and a level playing field between credit institutions, and preventing regulatory arbitrage. A DGS should be able to provide that protection at any time.
- (14) The key task of a DGS is to protect depositors against the consequences of the insolvency of a credit institution. DGSs should be able to provide that protection in various ways. DGSs should primarily be used to repay depositors pursuant to this Directive (the 'paybox' function).

(<sup>1</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).

(<sup>2</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).

- (15) DGSs should also assist in the financing of the resolution of credit institutions in accordance with Directive 2014/59/EU of the European Parliament and of the Council (1).
- (16) It should also be possible, where permitted under national law, for a DGS to go beyond a pure reimbursement function and to use the available financial means in order to prevent the failure of a credit institution with a view to avoiding the costs of reimbursing depositors and other adverse impacts. Those measures should, however, be carried out within a clearly defined framework and should in any event comply with State aid rules. DGSs should, inter alia, have appropriate systems and procedures in place for selecting and implementing such measures and monitoring affiliated risks. Implementing such measures should be subject to the imposition of conditions on the credit institution involving at least more stringent risk-monitoring and greater verification rights for the DGSs. The costs of the measures taken to prevent the failure of a credit institution should not exceed the costs of fulfilling the statutory or contractual mandates of the respective DGS with regard to protecting covered deposits at the credit institution or the institution itself.
- (17) DGSs should also be able to take the form of an IPS. The competent authorities should be able to recognise IPS as DGSs if they fulfil all criteria laid down in this Directive.
- (18) This Directive should not apply to contractual schemes or IPS that are not officially recognised as DGSs, except as regards the limited requirements on advertising and information of depositors in the case of the exclusion or withdrawal of a credit institution. In any event, contractual schemes and IPS are subject to State aid rules.
- (19) In the recent financial crisis, uncoordinated increases in coverage across the Union have in some cases led to depositors transferring money to credit institutions in countries where deposit guarantees were higher. Such uncoordinated increases have drained liquidity from credit institutions in times of stress. In times of stability it is possible that different coverage leads to depositors choosing the highest deposit protection rather than the deposit product best suited to them. It is possible that such different coverage results in competitive distortions in the internal market. It is therefore necessary to ensure a harmonised level of deposit protection by all recognised DGSs, regardless of where the deposits are located in the Union. However, for a limited time, it should be possible to cover certain deposits relating to the personal situation of depositors at a higher level.
- (20) The same coverage level should apply to all depositors regardless of whether a Member State's currency is the euro. Member States whose currency is not the euro should have the possibility to round off the amounts resulting from the conversion without compromising the equivalent protection of depositors.
- (21) On the one hand, the coverage level laid down in this Directive should not leave too great a proportion of deposits without protection in the interests both of consumer protection and of the stability of the financial system. On the other hand, the cost of funding DGSs should be taken into account. It is therefore reasonable to set the harmonised coverage level at EUR 100 000.
- (22) This Directive retains the principle of a harmonised limit per depositor rather than per deposit. It is therefore appropriate to take into consideration the deposits made by depositors who are not mentioned as holders of an account or who are not the sole holders of an account. The limit should be applied to each identifiable depositor. The principle that the limit be applied to each identifiable depositor should not apply to collective investment undertakings subject to special protection rules which do not apply to such deposits.
- (23) Directive 2009/14/EC of the European Parliament and of the Council (2) introduced a fixed coverage level of EUR 100 000, which has put some Member States in the situation of having to lower their coverage level, with risks of undermining depositor confidence. While harmonisation is essential in order to secure the level playing field and financial stability in the internal market, risks of undermining depositor confidence should be taken into account. Therefore, Member States should be able to apply a higher coverage level if they provided for a coverage

(1) 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 (see page 190 of this Official Journal).

(2) Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay (OJ L 68, 13.3.2009, p. 3).

level that was higher than the harmonised level before the application of Directive 2009/14/EC. Such higher coverage level should be limited in time and in scope and the Member States concerned should adjust the target level and contributions paid to their DGSs proportionately. Given that it is not possible to adjust the target level if the coverage level is unlimited, it is appropriate to limit the option to Member States which on 1 January 2008 applied a coverage level within a range of between EUR 100 000 and EUR 300 000. In order to limit the impact of diverging coverage levels, and taking into account that the Commission will review the implementation of this Directive by 31 December 2018, it is appropriate to allow for this option until that date.

- (24) DGSs should be permitted to set off liabilities of a depositor against that depositor's claims for repayment only if those liabilities are due on or before the date of unavailability. Such set off should not impede the capacity of DGSs to repay deposits within the deadline set by this Directive. Member States should not be prevented from taking appropriate measures concerning the rights of DGSs in a winding up or reorganisation procedure of a credit institution.
- (25) It should be possible to exclude from repayment deposits where, in accordance with national law, the funds deposited are not at the disposal of the depositor because the depositor and the credit institution have contractually agreed that the deposit would serve only to pay off a loan contracted for the purchase of a private immovable property. Such deposits should be offset against the outstanding amount of the loan.
- (26) Member States should ensure that the protection of deposits resulting from certain transactions, or serving certain social or other purposes, is higher than EUR 100 000 for a given period. Member States should decide on a temporary maximum coverage level for such deposits and, when doing so, they should take into account the significance of the protection for depositors and the living conditions in the Member States. In all such cases, the State aid rules should be complied with.
- (27) It is necessary to harmonise the methods of financing of DGSs. On the one hand, the cost of financing DGSs should, in principle, be borne by credit institutions themselves and, on the other, the financing capacity of DGSs should be proportionate to their liabilities. In order to ensure that depositors in all Member States enjoy a similarly high level of protection, the financing of DGSs should be harmonised at a high level with a uniform *ex-ante* financial target level for all DGSs.
- (28) However, in certain circumstances, credit institutions may operate in a highly concentrated market where most credit institutions are of such a size and degree of interconnection that they would be unlikely to be wound up under normal insolvency proceedings without endangering financial stability and would therefore be more likely to be subject to orderly resolution proceedings. In such circumstances, schemes could be subject to a lower target level.
- (29) Electronic money and funds received in exchange for electronic money should not, in accordance with Directive 2009/110/EC of the European Parliament and of the Council (<sup>1</sup>), be treated as a deposit and should not therefore fall within the scope of this Directive.
- (30) In order to limit deposit protection to the extent necessary to ensure legal certainty and transparency for depositors and to avoid transferring investment risks to DGSs, financial instruments should be excluded from the scope of coverage, except for existing savings products evidenced by a certificate of deposit made out to a named person.
- (31) Certain depositors should not be eligible for deposit protection, in particular public authorities or other financial institutions. Their limited number compared to all other depositors minimises the impact on financial stability in the case of a failure of a credit institution. Authorities also have much easier access to credit than citizens. However, Member States should be able to decide that the deposits of local authorities with an annual budget of up to EUR 500 000 are covered. Non-financial undertakings should in principle be covered, regardless of their size.

(<sup>1</sup>) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).

- (32) Depositors whose activities include money laundering within the meaning of Article 1(2) or (3) of Directive 2005/60/EC of the European Parliament and of the Council (<sup>(1)</sup>) should be excluded from repayment by a DGS.
- (33) The cost to credit institutions of participating in a DGS bears no relation to the cost that would result from a massive withdrawal of deposits not only from a credit institution in difficulty but also from healthy institutions, following a loss of depositor confidence in the soundness of the banking system.
- (34) It is necessary that the available financial means of DGSs amount to a certain target level and that extraordinary contributions may be collected. In any event, DGSs should have adequate alternative funding arrangements in place to enable them to obtain short-term funding to meet claims made against them. It should be possible for the available financial means of DGSs to include cash, deposits, payment commitments and low-risk assets, which can be liquidated within a short period of time. The amount of contributions to the DGS should take due account of the business cycle, the stability of the deposit-taking sector and existing liabilities of the DGS.
- (35) DGSs should invest in low-risk assets.
- (36) Contributions to DGSs should be based on the amount of covered deposits and the degree of risk incurred by the respective member. This would allow the risk profiles of individual credit institutions to be reflected, including their different business models. It should also lead to a fair calculation of contributions and provide incentives to operate under a less risky business model. In order to tailor contributions to market circumstances and risk profiles, DGSs should be able to use their own risk-based methods. In order to take account of particularly low-risk sectors which are regulated under national law, Member States should be allowed to provide for corresponding reductions in the contributions while respecting the target level for each DGS. In any event, calculation methods should be approved by competent authorities. The European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council (<sup>(2)</sup>) should issue guidelines for specifying methods for calculating contributions.
- (37) Deposit protection is an essential element in the completion of the internal market and an indispensable complement to the system of supervision of credit institutions on account of the solidarity it creates among all the institutions in a given financial market in the event of the failure of any of them. Therefore, Member States should be able to allow DGSs to lend money to each other on a voluntary basis.
- (38) The existing repayment period runs counter to the need to maintain depositor confidence and does not meet depositors' needs. The repayment period should therefore be reduced to seven working days.
- (39) In many cases, however, the necessary procedures for a short time limit for repayment do not yet exist. Member States should therefore be given the option, during a transitional period, to reduce the repayment period gradually to seven working days. The maximum repayment delay set out in this Directive should not prevent DGSs from making earlier repayments to depositors. In order to ensure that, during the transitional period, depositors do not encounter financial difficulties in the event of failure of their credit institution, depositors should, however, on request, be able to have access to an appropriate amount of their covered deposits to cover their cost of living. Such access should only be made on the basis of data provided by the credit institution. Given the different living costs between the Member States, that amount should be determined by the Member States.
- (40) The period necessary for the repayment of deposits should take into account cases where schemes have difficulty in determining the amount of repayment and the rights of the depositor, in particular if deposits arise from residential housing transactions or certain life events, if a depositor is not absolutely entitled to the sums held on an account, if the deposit is the subject of a legal dispute or competing claims to the sums held on the account or if the deposit is the subject of economic sanctions imposed by national governments or international bodies.

(<sup>1</sup>) Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

(<sup>2</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).

- (41) In order to secure repayment, DGSs should be entitled to subrogate into the rights of repaid depositors against a failed credit institution. Member States should be able to limit the time in which depositors whose deposits were not repaid, or not acknowledged within the deadline for repayment, can claim repayment of their deposits, in order to enable DGSs to exercise the rights into which it is subrogated by the date on which those rights are due to be registered in insolvency proceedings.
- (42) A DGS in a Member State where a credit institution has established branches should inform and repay depositors on behalf of the DGS in the Member State where the credit institution has been authorised. Safeguards are necessary to ensure that a DGS repaying depositors receives from the home DGS the necessary financial means and instructions prior to such repayment. The DGS that may be concerned should enter into agreements in advance in order to facilitate those tasks.
- (43) Information is an essential element in depositor protection. Therefore, depositors should be informed about their coverage and the responsible DGS on their statements of account. Intending depositors should be provided with the same information by way of a standardised information sheet, receipt of which they should be asked to acknowledge. The content of such information should be identical for all depositors. The unregulated use in advertising of references to the coverage level and the scope of a DGS could affect the stability of the banking system or depositor confidence. Therefore, references to DGSs in advertisements should be limited to short factual statements.
- (44) Directive 95/46/EC of the European Parliament and of the Council (<sup>(1)</sup>) applies to the processing of personal data carried out pursuant to this Directive. DGSs and relevant authorities should handle data relating to individual deposits with extreme care and should maintain a high standard of data protection in accordance with that Directive.
- (45) This Directive should not result in the Member States or their relevant authorities being made liable in respect of depositors if they have ensured that one or more schemes guaranteeing deposits or credit institutions themselves and ensuring the compensation or protection of depositors under the conditions prescribed in this Directive have been introduced and officially recognised.
- (46) Regulation (EU) No 1093/2010 has assigned a number of tasks concerning Directive 94/19/EC to EBA.
- (47) While respecting the supervision of DGSs by Member States, EBA should contribute to the achievement of the objective of making it easier for credit institutions to take up and pursue their activities while at the same time ensuring effective protection for depositors and minimising the risk to taxpayers. Member States should keep the Commission and EBA informed of the identity of their designated authority in view of the requirement for cooperation between EBA and the designated authorities provided for in this Directive.
- (48) There is a need to introduce guidelines in financial services to ensure a level playing field and adequate protection of depositors across the Union. Such guidelines should be issued for specifying the method for calculating risk-based contributions.
- (49) In order to ensure efficient and effective functioning of DGSs and a balanced consideration of their positions in different Member States, EBA should be able to settle disagreements between them with binding effect.
- (50) Given the divergences in administrative practices relating to DGSs in Member States, Member States should be free to decide which authority determines the unavailability of deposits.

<sup>(1)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

- (51) Competent authorities, designated authorities, resolution authorities, relevant administrative authorities and DGSs should cooperate with each other and exercise their powers in accordance with this Directive. They should cooperate from an early stage in the preparation and implementation of the resolution measures in order to set the amount by which the DGS is liable when the financial means are used to finance the resolution of credit institutions.
- (52) The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in order to adjust the coverage level for the total deposits of the same depositor as laid down in this Directive in line with inflation in the Union on the basis of changes in the consumer price index. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (53) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents <sup>(1)</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (54) Since the objective of this Directive, namely the harmonisation of rules concerning the functioning of DGSs, cannot be sufficiently achieved by the Member States, but can rather 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 Directive does not go beyond what is necessary in order to achieve that objective.
- (55) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared to the earlier directives. The obligation to transpose the provisions which are unchanged arises under the earlier directives.
- (56) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for the transposition into national law of the Directives set out in Annex II,

HAVE ADOPTED THIS DIRECTIVE:

## Article 1

### **Subject matter and scope**

1. This Directive lays down rules and procedures relating to the establishment and the functioning of deposit guarantee schemes (DGSs).
2. This Directive shall apply to:
  - (a) statutory DGSs;
  - (b) contractual DGSs that are officially recognised as DGSs in accordance with Article 4(2);
  - (c) institutional protection schemes that are officially recognised as DGSs in accordance with Article 4(2);
  - (d) credit institutions affiliated to the schemes referred to in points (a), (b) or (c) of this paragraph.

<sup>(1)</sup> Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents (OJ C 369, 17.12.2011, p. 14).

3. Without prejudice to Article 16(5) and (7), the following schemes shall not be subject to this Directive:

- (a) contractual schemes that are not officially recognised as DGSs, including schemes that offer an additional protection to the coverage level laid down in Article 6(1);
- (b) institutional protection schemes (IPS) that are not officially recognised as DGSs.

Member States shall ensure that schemes referred to in points (a) and (b) of the first subparagraph have in place adequate financial means or relevant financing arrangements to fulfil their obligations.

## *Article 2*

### **Definitions**

1. For the purposes of this Directive the following definitions apply:

- (1) 'deposit guarantee schemes' or 'DGSs' means schemes referred to in point (a), (b) or (c) of Article 1(2);
- (2) 'institutional protection schemes' or 'IPS' means institutional protection schemes as referred to in Article 113(7) of Regulation (EU) No 575/2013;
- (3) 'deposit' means a credit balance which results from funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution is required to repay under the legal and contractual conditions applicable, including a fixed-term deposit and a savings deposit, but excluding a credit balance where:
  - (a) its existence can only be proven by a financial instrument as defined in Article 4(17) of Directive 2004/39/EC of the European Parliament and of the Council (<sup>(1)</sup>), unless it is a savings product which is evidenced by a certificate of deposit made out to a named person and which exists in a Member State on 2 July 2014;
  - (b) its principal is not repayable at par;
  - (c) its principal is only repayable at par under a particular guarantee or agreement provided by the credit institution or a third party;
- (4) 'eligible deposits' means deposits that are not excluded from protection pursuant to Article 5;
- (5) 'covered deposits' means the part of eligible deposits that does not exceed the coverage level laid down in Article 6;
- (6) 'depositor' means the holder or, in the case of a joint account, each of the holders, of a deposit;
- (7) 'joint account' means an account opened in the name of two or more persons or over which two or more persons have rights that are exercised by means of the signature of one or more of those persons;

<sup>(1)</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

(8) 'unavailable deposit' means a deposit that is due and payable but that has not been paid by a credit institution under the legal or contractual conditions applicable thereto, where either:

(a) the relevant administrative authorities have determined that in their view the credit institution concerned appears to be unable for the time being, for reasons which are directly related to its financial circumstances, to repay the deposit and the institution has no current prospect of being able to do so; or

(b) a judicial authority has made a ruling for reasons which are directly related to the credit institution's financial circumstances and which has the effect of suspending the rights of depositors to make claims against it;

(9) 'credit institution' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;

(10) 'branch' means a place of business in a Member State which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions;

(11) 'target level' means the amount of available financial means which the DGS is required to reach in accordance with Article 10(2), expressed as a percentage of covered deposits of its members;

(12) 'available financial means' means cash, deposits and low-risk assets which can be liquidated within a period not exceeding that referred to in Article 8(1) and payment commitments up to the limit set out in Article 10(3);

(13) 'payment commitments' means payment commitments of a credit institution towards a DGS which are fully collateralised providing that the collateral:

(a) consists of low risk assets;

(b) is unencumbered by any third-party rights and is at the disposal of the DGS;

(14) 'low-risk assets' means items falling into the first or second category referred to in Table 1 of Article 336 of Regulation (EU) No 575/2013 or any assets which are considered to be similarly safe and liquid by the competent or designated authority;

(15) 'home Member State' means a home Member State as defined in point (43) of Article 4(1) of Regulation (EU) No 575/2013;

(16) 'host Member State' means a host Member State as defined in point (44) of Article 4(1) of Regulation (EU) No 575/2013;

(17) 'competent authority' means a national competent authority as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013;

(18) 'designated authority' means a body which administers a DGS pursuant to this Directive, or, where the operation of the DGS is administered by a private entity, a public authority designated by the Member State concerned for supervising that scheme pursuant to this Directive.

2. Where this Directive refers to Regulation (EU) No 1093/2010, a body which administers a DGS or, where the operation of the DGS is administered by a private entity, the public authority supervising that scheme, shall, for the purpose of that Regulation, be considered to be a competent authority as defined in Article 4(2) of that Regulation.

3. Shares in Irish or United Kingdom building societies apart from those of a capital nature covered in point (b) of Article 5(1) shall be treated as deposits.

### Article 3

#### **Relevant administrative authorities**

1. Member States shall identify the relevant administrative authority in their Member State for the purpose of point (8)(a) of Article 2(1).

2. Competent authorities, designated authorities, resolution authorities and relevant administrative authorities shall cooperate with each other and exercise their powers in accordance with this Directive.

The relevant administrative authority shall make the determination referred to in point (8)(a) of Article 2(1) as soon as possible and in any event no later than five working days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable.

### Article 4

#### **Official recognition, membership and supervision**

1. Each Member State shall ensure that within its territory one or more DGSs are introduced and officially recognised.

This shall not preclude the merger of DGSs of different Member States or the establishment of cross-border DGSs. Approval of such cross-border or merged DGSs shall be obtained from the Member States where the DGSs concerned are established.

2. A contractual scheme as referred to in point (b) of Article 1(2) of this Directive may be officially recognised as a DGS if it complies with this Directive.

An IPS may be officially recognised as a DGS if it fulfils the criteria laid down in Article 113(7) of Regulation (EU) No 575/2013 and complies with this Directive.

3. A credit institution authorised in a Member State pursuant to Article 8 of Directive 2013/36/EU shall not take deposits unless it is a member of a scheme officially recognised in its home Member State pursuant to paragraph 1 of this Article.

4. If a credit institution does not comply with the obligations incumbent on it as a member of a DGS, the competent authorities shall be notified immediately and, in cooperation with the DGS, shall promptly take all appropriate measures including if necessary the imposition of penalties to ensure that the credit institution complies with its obligations.

5. If the measures taken under paragraph 4 fail to secure compliance on the part of the credit institution, the DGS may, subject to national law and the express consent of the competent authorities, give not less than one month's notice of its intention to exclude the credit institution from membership of the DGS. Deposits made before the expiry of that notice period shall continue to be fully covered by the DGS. If, on expiry of that notice period, the credit institution has not complied with its obligations, the DGS shall exclude the credit institution.

6. Deposits held on the date on which a credit institution is excluded from membership of the DGS shall continue to be covered by that DGS.

7. The designated authorities shall supervise DGSs referred to in Article 1 on an ongoing basis as to their compliance with this Directive.

Cross-border DGSs shall be supervised by representatives of the designated authorities of the Member States where the affiliated credit institutions are authorised.

8. Member States shall ensure that a DGS, at any time and upon the DGS's request, receives from their members all information necessary to prepare for a repayment of depositors, including markings under Article 5(4).

9. DGSs shall ensure the confidentiality and the protection of the data pertaining to depositors' accounts. The processing of such data shall be carried out in accordance with Directive 95/46/EC.

10. Member States shall ensure that DGSs perform stress tests of their systems and that the DGSs are informed as soon as possible in the event that the competent authorities detect problems in a credit institution that are likely to give rise to the intervention of a DGS.

Such tests shall take place at least every three years and more frequently where appropriate. The first test shall take place by 3 July 2017.

Based on the results of the stress tests, EBA shall, at least every five years, conduct peer reviews pursuant to Article 30 of Regulation (EU) No 1093/2010 in order to examine the resilience of DGSs. DGSs shall be subject to the requirements of professional secrecy in accordance with Article 70 of that Regulation when exchanging information with EBA.

11. DGSs shall use the information necessary to perform stress tests of their systems only for the performance of those tests and shall keep such information no longer than is necessary for that purpose.

12. Member States shall ensure that their DGSs have in place sound and transparent governance practices. DGSs shall produce an annual report on their activities.

## Article 5

### **Eligibility of deposits**

1. The following shall be excluded from any repayment by a DGS:

(a) subject to Article 7(3) of this Directive, deposits made by other credit institutions on their own behalf and for their own account;

(b) own funds as defined in point (118) of Article 4(1) of Regulation (EU) No 575/2013;

(c) deposits arising out of transactions in connection with which there has been a criminal conviction for money laundering as defined in Article 1(2) of Directive 2005/60/EC;

(d) deposits by financial institutions as defined in point (26) of Article 4(1) of Regulation (EU) No 575/2013;

(e) deposits by investment firms as defined in point (1) of Article 4(1) of Directive 2004/39/EC;

(f) deposits the holder of which has never been identified pursuant to Article 9(1) of Directive 2005/60/EC, when they have become unavailable;

- (g) deposits by insurance undertakings and by reinsurance undertakings as referred to in Article 13(1) to (6) of Directive 2009/138/EC of the European Parliament and of the Council (<sup>(1)</sup>);
- (h) deposits by collective investment undertakings;
- (i) deposits by pension and retirement funds;
- (j) deposits by public authorities;
- (k) debt securities issued by a credit institution and liabilities arising out of own acceptances and promissory notes.

2. By way of derogation from paragraph 1 of this Article, Member States may ensure that the following are included up to the coverage level laid down in Article 6(1):

- (a) deposits held by personal pension schemes and occupational pension schemes of small or medium-sized enterprises;
- (b) deposits held by local authorities with an annual budget of up to EUR 500 000.

3. Member States may provide that deposits that may be released in accordance with national law only to pay off a loan on private immovable property whether made by the credit institution or another institution holding the deposit are excluded from repayment by a DGS.

4. Member States shall ensure that credit institutions mark eligible deposits in a way that allows an immediate identification of such deposits.

## Article 6

### Coverage level

1. Member States shall ensure that the coverage level for the aggregate deposits of each depositor is EUR 100 000 in the event of deposits being unavailable.

2. In addition to paragraph 1, Member States shall ensure that the following deposits are protected above EUR 100 000 for at least three months and no longer than 12 months after the amount has been credited or from the moment when such deposits become legally transferable:

- (a) deposits resulting from real estate transactions relating to private residential properties;
- (b) deposits that serve social purposes laid down in national law and are linked to particular life events of a depositor such as marriage, divorce, retirement, dismissal, redundancy, invalidity or death;
- (c) deposits that serve purposes laid down in national law and are based on the payment of insurance benefits or compensation for criminal injuries or wrongful conviction.

3. Paragraphs 1 and 2 shall not prevent Member States from maintaining or introducing schemes protecting old-age provision products and pensions, provided that such schemes do not only cover deposits but offer comprehensive coverage for all products and situations relevant in this regard.

<sup>(1)</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

4. Member States shall ensure that repayments are made in any of the following:

- (a) the currency of the Member State where the DGS is located;
- (b) the currency of the Member State where the account holder is resident;
- (c) euro;
- (d) the currency of the account;
- (e) the currency of the Member State where the account is located.

Depositors shall be informed of the currency of repayment.

If accounts were maintained in a currency different from that of the payout, the exchange rate used shall be that of the date on which the relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or when a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1).

5. Member States that convert into their national currency the amount referred to in paragraph 1 shall initially use in the conversion the exchange rate prevailing on 3 July 2015.

Member States may round off the amounts resulting from the conversion, provided that such rounding off does not exceed EUR 5 000.

Without prejudice to the second subparagraph, Member States shall adjust the coverage levels converted into another currency to the amount referred to in paragraph 1 of this Article every five years. Member States shall make an earlier adjustment of coverage levels, after consulting the Commission, following the occurrence of unforeseen events such as currency fluctuations.

6. The amount referred to in paragraph 1 shall be reviewed periodically by the Commission and at least once every five years. If appropriate, the Commission shall submit to the European Parliament and to the Council a proposal for a Directive to adjust the amount referred to in paragraph 1, taking account in particular of developments in the banking sector and the economic and monetary situation in the Union. The first review shall not take place before 3 July 2020 unless unforeseen events necessitate an earlier review.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 18 in order to adjust the amount referred to in paragraph 6 at least every five years, in accordance with inflation in the Union on the basis of changes in the harmonised index of consumer prices published by the Commission since the previous adjustment.

## Article 7

### Determination of the repayable amount

1. The limit referred to in Article 6(1) shall apply to the aggregate deposits placed with the same credit institution irrespective of the number of deposits, the currency and the location within the Union.

2. The share of each depositor in a joint account shall be taken into account in calculating the limit provided for in Article 6(1).

In the absence of special provisions, such an account shall be divided equally among the depositors.

Member States may provide that deposits in an account to which two or more persons are entitled as members of a business partnership, association or grouping of a similar nature, without legal personality, may be aggregated and treated as if made by a single depositor for the purpose of calculating the limit provided for in Article 6(1).

3. Where the depositor is not absolutely entitled to the sums held in an account, the person who is absolutely entitled shall be covered by the guarantee, provided that that person has been identified or is identifiable before the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling referred to in point (8)(b) of Article 2(1). Where several persons are absolutely entitled, the share of each under the arrangements subject to which the sums are managed shall be taken into account when the limit provided for in Article 6(1) is calculated.

4. The reference date for the calculation of the repayable amount shall be the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or when a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1). Liabilities of the depositor against the credit institution shall not be taken into account when calculating the repayable amount.

5. Member States may decide that the liabilities of the depositor to the credit institution are taken into account when calculating the repayable amount where they have fallen due on or before the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or when a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1) to the extent the set-off is possible under the statutory and contractual provisions governing the contract between the credit institution and the depositor.

Depositors shall be informed prior to the conclusion of the contract by the credit institution where their liabilities towards the credit institution are taken into account when calculating the repayable amount.

6. Member States shall ensure that DGSs may at any time request credit institutions to inform them about the aggregated amount of eligible deposits of every depositor.

7. Interest on deposits which has accrued until, but has not been credited at, the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1) shall be reimbursed by the DGS. The limit referred to in Article 6(1) shall not be exceeded.

8. Member States may decide that certain categories of deposits fulfilling a social purpose defined by national law, for which a third party has given a guarantee that complies with State aid rules, are not taken into account when aggregating the deposits held by the same depositor with the same credit institution as referred to in paragraph 1 of this Article. In such cases the third-party guarantee shall be limited to the coverage level laid down in Article 6(1).

9. Where credit institutions are allowed under national law to operate under different trademarks as defined in Article 2 of Directive 2008/95/EC of the European Parliament and of the Council (<sup>1</sup>), the Member State shall ensure that depositors are informed clearly that the credit institution operates under different trademarks and that the coverage level laid down in Article 6(1), (2) and (3) of this Directive applies to the aggregated deposits the depositor holds with the credit institution. That information shall be included in the depositor information referred to in Article 16 of, and Annex I to, this Directive.

## Article 8

### Repayment

1. DGSs shall ensure that the repayable amount is available within seven working days of the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1).

(<sup>1</sup>) Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ L 299, 8.11.2008, p. 25).

2. However, Member States may, for a transitional period until 31 December 2023, establish the following repayment periods of up to:

- (a) 20 working days until 31 December 2018;
- (b) 15 working days from 1 January 2019 until 31 December 2020;
- (c) 10 working days from 1 January 2021 until 31 December 2023.

3. Member States may decide that deposits referred to in Article 7(3) are subject to a longer repayment period, which does not exceed three months from the date on which a relevant administrative authority makes a determination as referred to in point (8)(a) of Article 2(1) or a judicial authority makes a ruling as referred to in point (8)(b) of Article 2(1).

4. During the transitional period until 31 December 2023, where DGSs cannot make the repayable amount available within seven working days they shall ensure that depositors have access to an appropriate amount of their covered deposits to cover the cost of living within five working days of a request.

DGSs shall only grant access to the appropriate amount as referred to in the first subparagraph on the basis of data provided by the DGS or the credit institution.

The appropriate amount as referred to in the first subparagraph shall be deducted from the repayable amount as referred to in Article 7.

5. Repayment as referred to in paragraphs 1 and 4 may be deferred where:

- (a) it is uncertain whether a person is entitled to receive repayment or the deposit is subject to legal dispute;
- (b) the deposit is subject to restrictive measures imposed by national governments or international bodies;
- (c) by way of derogation from paragraph 9 of this Article there has been no transaction relating to the deposit within the last 24 months (the account is dormant);
- (d) the amount to be repaid is deemed to be part of a temporary high balance as defined in Article 6(2); or
- (e) the amount to be repaid is to be paid out by the DGS of the host Member State in accordance with Article 14(2).

6. The repayable amount shall be made available without a request to a DGS being necessary. For that purpose, the credit institution shall transmit the necessary information on deposits and depositors as soon as requested by the DGS.

7. Any correspondence between the DGS and the depositor shall be drawn up:

- (a) in the official language of the Union institutions that is used by the credit institution holding the covered deposit when writing to the depositor; or
- (b) in the official language or languages of the Member State in which the covered deposit is located.

If a credit institution operates directly in another Member State without having established branches, the information shall be provided in the language that was chosen by the depositor when the account was opened.

8. Notwithstanding the time limit laid down in paragraph 1 of this Article, where a depositor or any person entitled to or interested in sums held in an account has been charged with an offence arising out of or in relation to money laundering as defined in Article 1(2) of Directive 2005/60/EC, the DGS may suspend any payment relating to the depositor concerned, pending the judgment of the court.

9. No repayment shall be made where there has been no transaction relating to the deposit within the last 24 months and the value of the deposit is lower than the administrative costs that would be incurred by the DGS in making such a repayment.

#### Article 9

##### **Claims against DGSs**

1. Member States shall ensure that the depositors' rights to compensation may be the subject of an action against the DGS.

2. Without prejudice to rights which it may have under national law, the DGS that makes payments under guarantee within a national framework shall have the right of subrogation to the rights of depositors in winding up or reorganisation proceedings for an amount equal to their payments made to depositors. Where a DGS makes payments in the context of resolution proceedings, including the application of resolution tools or the exercise of resolution powers in accordance with Article 11, the DGS shall have a claim against the relevant credit institution for an amount equal to its payments. That claim shall rank at the same level as covered deposits under national law governing normal insolvency proceedings as defined in Directive 2014/59/EU.

3. Member States may limit the time in which depositors whose deposits were not repaid or acknowledged by the DGS within the deadlines set out in Article 8(1) and (3) can claim the repayment of their deposits.

#### Article 10

##### **Financing of DGSs**

1. Member States shall ensure that DGSs have in place adequate systems to determine their potential liabilities. The available financial means of DGSs shall be proportionate to those liabilities.

DGSs shall raise the available financial means by contributions to be made by their members at least annually. This shall not prevent additional financing from other sources.

2. Member States shall ensure that, by 3 July 2024, the available financial means of a DGS shall at least reach a target level of 0,8 % of the amount of the covered deposits of its members.

Where the financing capacity falls short of the target level, the payment of contributions shall resume at least until the target level is reached again.

If, after the target level has been reached for the first time, the available financial means have been reduced to less than two-thirds of the target level, the regular contribution shall be set at a level allowing the target level to be reached within six years.

The regular contribution shall take due account of the phase of the business cycle, and the impact procyclical contributions may have when setting annual contributions in the context of this Article.

Member States may extend the initial period referred to in the first subparagraph for a maximum of four years if the DGS has made cumulative disbursements in excess of 0,8 % of covered deposits.

3. The available financial means to be taken into account in order to reach the target level may include payment commitments. The total share of payment commitments shall not exceed 30 % of the total amount of available financial means raised in accordance with this Article.

In order to ensure consistent application of this Directive, EBA shall issue guidelines on payment commitments.

4. Notwithstanding paragraph 1 of this Article, a Member State may, for the purpose of fulfilling its obligations thereunder, raise the available financial means through the mandatory contributions paid by credit institutions to existing schemes of mandatory contributions established by a Member State in its territory for the purpose of covering the costs related to systemic risk, failure, and resolution of institutions.

DGSs shall be entitled to an amount equal to the amount of such contributions up to the target level set out in paragraph 2 of this Article, which the Member State will make immediately available to those DGSs upon request, for use exclusively for the purposes provided for in Article 11.

DGSs are entitled to that amount only if the competent authority considers that they are unable to raise extraordinary contributions from their members. DGSs shall repay that amount through contributions from their members in accordance with Article 10(1) and (2).

5. Contributions to resolution financing arrangements under Title VII of Directive 2014/59/EU, including available financial means to be taken into account in order to reach the target level of the resolution financing arrangements under Article 102(1) of Directive 2014/59/EU, shall not count towards the target level.

6. By way of derogation from paragraph 2, Member States may, where justified and upon approval of the Commission, authorise a minimum target level lower than the target level specified in paragraph 2, provided that the following conditions are met:

- (a) the reduction is based on the assumption that it is unlikely that a significant share of available financial means will be used for measures to protect covered depositors, other than as provided for in Article 11(2) and (6); and
- (b) the banking sector in which the credit institutions affiliated to the DGS operate is highly concentrated with a large quantity of assets held by a small number of credit institutions or banking groups, subject to supervision on a consolidated basis which, given their size, are likely in case of failure to be subject to resolution proceedings.

That reduced target level shall not be lower than 0,5 % of covered deposits.

7. The available financial means of DGSs shall be invested in a low-risk and sufficiently diversified manner.

8. If the available financial means of a DGS are insufficient to repay depositors when deposits become unavailable, its members shall pay extraordinary contributions not exceeding 0,5 % of their covered deposits per calendar year. DGSs may in exceptional circumstances and with the consent of the competent authority require higher contributions.

The competent authority may defer, in whole or in part, a credit institution's payment of extraordinary *ex-post* contributions to the DGS if the contributions would jeopardise the liquidity or solvency of the credit institution. Such deferral shall not be granted for a longer period than six months but may be renewed upon the request of the credit institution. The contributions deferred pursuant to this paragraph shall be paid when such payment no longer jeopardises the liquidity or solvency of the credit institution.

9. Member States shall ensure that DGSs have in place adequate alternative funding arrangements to enable them to obtain short-term funding to meet claims against those DGSs.

10. Member States shall, by 31 March each year, inform EBA of the amount of covered deposits in their Member State and of the amount of the available financial means of their DGSs on 31 December of the preceding year.

## Article 11

### Use of funds

1. The financial means referred to in Article 10 shall be primarily used in order to repay depositors pursuant to this Directive.

2. The financial means of a DGS shall be used in order to finance the resolution of credit institutions in accordance with Article 109 of Directive 2014/59/EU. The resolution authority shall determine, after consulting the DGS, the amount by which the DGS is liable.

3. Member States may allow a DGS to use the available financial means for alternative measures in order to prevent the failure of a credit institution provided that the following conditions are met:

- (a) the resolution authority has not taken any resolution action under Article 32 of Directive 2014/59/EU;
- (b) the DGS has appropriate systems and procedures in place for selecting and implementing alternative measures and monitoring affiliated risks;
- (c) the costs of the measures do not exceed the costs of fulfilling the statutory or contractual mandate of the DGS;
- (d) the use of alternative measures by the DGS is linked to conditions imposed on the credit institution that is being supported, involving at least more stringent risk monitoring and greater verification rights for the DGS;
- (e) the use of alternative measures by the DGS is linked to commitments by the credit institution being supported with a view to securing access to covered deposits;
- (f) the ability of the affiliated credit institutions to pay the extraordinary contributions in accordance with paragraph 5 of this Article is confirmed in the assessment of the competent authority.

The DGS shall consult the resolution authority and the competent authority on the measures and the conditions imposed on the credit institution.

4. Alternative measures as referred to in paragraph 3 of this Article shall not be applied where the competent authority, after consulting the resolution authority, considers the conditions for resolution action under Article 27(1) of Directive 2014/59/EU to be met.

5. If available financial means are used in accordance with paragraph 3 of this Article, the affiliated credit institutions shall immediately provide the DGS with the means used for alternative measures, where necessary in the form of extraordinary contributions, where:

- (a) the need to reimburse depositors arises and the available financial means of the DGS amount to less than two-thirds of the target level;

(b) the available financial means fall below 25 % of the target level.

6. Member States may decide that the available financial means may also be used to finance measures to preserve the access of depositors to covered deposits, including transfer of assets and liabilities and deposit book transfer, in the context of national insolvency proceedings, provided that the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned.

#### *Article 12*

#### **Borrowing between DGSs**

1. Members States may allow DGSs to lend to other DGSs within the Union on a voluntary basis, provided that the following conditions are met:

(a) the borrowing DGS is not able to fulfil its obligations under Article 9(1) because of a lack of available financial means as referred to in Article 10;

(b) the borrowing DGS has made recourse to extraordinary contributions referred in Article 10(8);

(c) the borrowing DGS undertakes the legal commitment that the borrowed funds will be used in order to pay claims under Article 9(1);

(d) the borrowing DGS is not currently subject to an obligation to repay a loan to other DGSs under this Article;

(e) the borrowing DGS states the amount of money requested;

(f) the total amount lent does not exceed 0,5 % of covered deposits of the borrowing DGS;

(g) the borrowing DGS informs EBA without delay and states the reasons why the conditions set out in this paragraph are fulfilled and the amount of money requested.

2. The loan shall be subject to the following conditions:

(a) the borrowing DGS must repay the loan within five years. It may repay the loan in annual instalments. Interest shall be due only at the time of repayment;

(b) the interest rate set must be at least equivalent to the marginal lending facility rate of the European Central Bank during the credit period;

(c) the lending DGS must inform EBA of the initial interest rate and the duration of the loan.

3. Member States shall ensure that the contributions levied by the borrowing DGS are sufficient to reimburse the amount borrowed and to re-establish the target level as soon as possible.

#### *Article 13*

#### **Calculation of contributions to DGSs**

1. The contributions to DGSs referred to in Article 10 shall be based on the amount of covered deposits and the degree of risk incurred by the respective member.

Member States may provide for lower contributions for low-risk sectors which are regulated under national law.

Member States may decide that members of an IPS pay lower contributions to the DGS.

Member States may allow the central body and all credit institutions permanently affiliated to the central body as referred to in Article 10(1) of Regulation (EU) No 575/2013 to be subject as a whole to the risk weight determined for the central body and its affiliated institutions on a consolidated basis.

Member States may decide that credit institutions pay a minimum contribution, irrespective of the amount of their covered deposits.

2. DGSs may use their own risk-based methods for determining and calculating the risk-based contributions by their members. The calculation of contributions shall be proportional to the risk of the members and shall take due account of the risk profiles of the various business models. Those methods may also take into account the asset side of the balance sheet and risk indicators, such as capital adequacy, asset quality and liquidity.

Each method shall be approved by the competent authority in cooperation with the designated authority. EBA shall be informed about the methods approved.

3. In order to ensure consistent application of this Directive, EBA shall, by 3 July 2015, issue guidelines pursuant to Article 16 of Regulation (EU) No 1093/2010 to specify methods for calculating the contributions to DGSs in accordance with paragraphs 1 and 2 of this Article.

In particular, it shall include a calculation formula, specific indicators, risk classes for members, thresholds for risk weights assigned to specific risk classes, and other necessary elements.

By 3 July 2017 and at least every five years thereafter, EBA shall conduct a review of the guidelines on risk-based or alternative own-risk-based methods applied by DGSs.

#### Article 14

#### Cooperation within the Union

1. DGSs shall cover the depositors at branches set up by their member credit institutions in other Member States.

2. Depositors at branches set up by credit institutions in another Member State shall be repaid by a DGS in the host Member State on behalf of the DGS in the home Member State. The DGS of the host Member State shall make repayments in accordance with the instructions of the DGS of the home Member State. The DGS of the host Member State shall not bear any liability with regard to acts done in accordance with the instructions given by DGS of the home Member State. The DGS of the home Member State shall provide the necessary funding prior to payout and shall compensate the DGS of the host Member State for the costs incurred.

The DGS of the host Member State shall also inform the depositors concerned on behalf of the DGS of the home Member State and shall be entitled to receive correspondence from those depositors on behalf of the DGS of the home Member State.

3. If a credit institution ceases to be member of a DGS and joins another DGS, the contributions paid during the 12 months preceding the end of the membership, with the exception of the extraordinary contributions under Article 10(8), shall be transferred to the other DGS. This shall not apply if a credit institution has been excluded from a DGS pursuant to Article 4(5).

If some of the activities of a credit institution are transferred to another Member State and thus become subject to another DGS, the contributions of that credit institution paid during the 12 months preceding the transfer, with the exception of the extraordinary contributions in accordance with Article 10(8), shall be transferred to the other DGS in proportion to the amount of covered deposits transferred.

4. Member States shall ensure that DGS of the home Member State exchange information referred to under Article 4(7) or (8) and (10) with those in host Member States. The restrictions set out in that Article shall apply.

If a credit institution intends to transfer from one DGS to another in accordance with this Directive, it shall give at least six months' notice of its intention to do so. During that period, the credit institution shall remain under the obligation to contribute to its original DGS in accordance with Article 10 both in terms of *ex-ante* and *ex-post* financing.

5. In order to facilitate an effective cooperation between DGSs, with particular regard to this Article and to Article 12, the DGSs, or, where appropriate, the designated authorities, shall have written cooperation agreements in place. Such agreements shall take into account the requirements laid down in Article 4(9).

The designated authority shall notify EBA of the existence and the content of such agreements and EBA may issue opinions in accordance with Article 34 of Regulation (EU) No 1093/2010. If designated authorities or DGSs cannot reach an agreement or if there is a dispute about the interpretation of an agreement, either party may refer the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010 and EBA shall act in accordance with that Article.

The absence of such agreements shall not affect the claims of depositors under Article 9(1) or of credit institutions under paragraph 3 of this Article.

6. Member States shall ensure that appropriate procedures are in place to enable DGSs to share information and communicate effectively with other DGSs, their affiliated credit institutions and the relevant competent and designated authorities within their own jurisdictions and with other agencies on a cross-border basis, where appropriate.

7. EBA and the competent and designated authorities shall cooperate with each other and exercise their powers in accordance with the provisions of this Directive and with Regulation (EU) No 1093/2010.

Member States shall inform the Commission and EBA of the identity of their designated authority by 3 July 2015.

8. EBA shall cooperate with the European Systemic Risk Board (ESRB), established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council (<sup>(1)</sup>) on systemic risk analysis concerning DGSs.

## Article 15

### Branches of credit institutions established in third countries

1. Member States shall check that branches established in their territory by a credit institution which has its head office outside the Union have protection equivalent to that prescribed in this Directive.

If protection is not equivalent, Member States may, subject to Article 47(1) of Directive 2013/36/EU, stipulate that branches established by a credit institution which has its head office outside the Union must join a DGS in operation within their territories.

When performing the check provided for in the first subparagraph of this paragraph, Member states shall at least check that depositors benefit from the same coverage level and scope of protection as provided for in this Directive.

<sup>(1)</sup> Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

2. Each branch established by a credit institution which has its head office outside the Union and which is not a member of a DGS operating in a Member State shall provide all relevant information concerning the guarantee arrangements for the deposits of actual and intending depositors at that branch.

3. The information referred to in paragraph 2 shall be made available in the language that was agreed by the depositor and the credit institution when the account was opened or in the official language or languages of the Member State in which the branch is established in the manner prescribed by national law and shall be clear and comprehensible.

#### Article 16

##### **Depositor information**

1. Member States shall ensure that credit institutions make available to actual and intending depositors the information necessary for the identification of the DGSs of which the institution and its branches are members within the Union. Member States shall ensure that credit institutions inform actual and intending depositors of the applicable exclusions from DGS protection.

2. Before entering into a contract on deposit-taking, depositors shall be provided with the information referred to in paragraph 1. They shall acknowledge the receipt of that information. The template set out in Annex I shall be used for that purpose.

3. Confirmation that the deposits are eligible deposits shall be provided to depositors on their statements of account including a reference to the information sheet set out in Annex I. The website of the relevant DGS shall be indicated on the information sheet. The information sheet set out in Annex I shall be provided to the depositor at least annually.

The website of the DGS shall contain the necessary information for depositors, in particular information concerning the provisions regarding the process for and conditions of deposit guarantees as envisaged under this Directive.

4. The information provided for in paragraph 1 shall be made available in the manner prescribed by national law in the language that was agreed by the depositor and the credit institution when the account was opened or in the official language or languages of the Member State in which the branch is established.

5. Member States shall limit the use in advertising of the information referred to in paragraphs 1, 2 and 3 to a factual reference to the DGS guaranteeing the product to which the advertisement refers and to any additional information required by national law.

Such information may extend to the factual description of the functioning of the DGS but shall not contain a reference to unlimited coverage of deposits.

6. In the case of a merger, conversion of subsidiaries into branches or similar operations, depositors shall be informed at least one month before the operation takes legal effect unless the competent authority allows a shorter deadline on the grounds of commercial secrecy or financial stability.

Depositors shall be given a three-month period following notification of the merger or conversion or similar operation to withdraw or transfer to another credit institution, without incurring any penalty, their eligible deposits including all accrued interest and benefits in so far as they exceed the coverage level pursuant to Article 6 at the time of the operation.

7. Member States shall ensure that if a credit institution withdraws or is excluded from a DGS, the credit institution shall inform its depositors within one month of such withdrawal or exclusion.

8. If a depositor uses internet banking, the information required to be disclosed by this Directive may be communicated by electronic means. Where the depositor so requests, it shall be communicated on paper.

### Article 17

#### List of authorised credit institutions

1. Member States shall ensure that when notifying EBA of authorisations in accordance with Article 20(1) of Directive 2013/36/EU, competent authorities shall indicate of which DGS each credit institution is a member.
2. When publishing and updating the list of authorised credit institutions in accordance with Article 20(2) of Directive 2013/36/EU, EBA shall indicate of which DGS each credit institution is a member.

### Article 18

#### Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 6(7) shall be conferred on the Commission for an indeterminate period of time.
3. The delegation of power referred to in Article 6(7) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 6(7) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.

### Article 19

#### Transitional provisions

1. Where certain deposits or categories of deposits or other instruments cease to be covered wholly or partially by DGSs after the transposition of this Directive or Directive 2009/14/EC into national law, Member States may allow deposits and other instruments which have an initial maturity date to be covered until their initial maturity date if they were paid in or issued before 2 July 2014.
2. Member States shall ensure that depositors are informed about the deposits or categories of deposits or other instruments which will no longer be covered by a DGS from 3 July 2015.
3. Until the target level has been reached for the first time, Member States may apply the thresholds in Article 11(5) in relation to the available financial means.
4. By way of derogation from Article 6(1), Member States which, on 1 January 2008, provided for a coverage level of between EUR 100 000 and EUR 300 000, may reapply that higher coverage level until 31 December 2018. In that case, the target level and the contributions of the credit institutions shall be adjusted accordingly.
5. By 3 July 2019, the Commission shall submit a report, and, if appropriate, a legislative proposal to the European Parliament and the Council setting out how DGSs operating in the Union may cooperate through a European scheme to prevent risks arising from cross-border activities and protect deposits from such risks.

6. By 3 July 2019, the Commission, supported by EBA, shall submit to the European Parliament and to the Council a report on the progress towards the implementation of this Directive. That report should, in particular, address:

- (a) the target level on the basis of covered deposits, with an assessment of the appropriateness of the percentage set, taking into account the failure of credit institutions in the Union in the past;
- (b) the impact of alternative measures used in accordance with Article 11(3) on the protection of the depositors and consistency with the orderly winding up proceedings in the banking sector;
- (c) the impact on the diversity of banking models;
- (d) the adequacy of the current coverage level for depositors; and
- (e) whether the matters referred to in this subparagraph have been dealt with in a manner that maintains the protection of depositors.

By 3 July 2019, EBA shall report to the Commission on calculation models and their relevance to the commercial risk of the members. When reporting, EBA shall take due account of the risk profiles of the various business models.

#### *Article 20*

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 4, points (d) to (k) of Article 5(1), Article 5(2), (3) and (4) Article 6(2) to (7), Article 7(4) to (9), Article 8(1), (2), (3), (5), (6), (7) and (9) Article 9(2) and (3), Articles 10 to 16, 18 and 19 and Annex I by 3 July 2015. They shall forthwith communicate to the Commission the text of those measures.

Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with Article 8(4) by 31 May 2016.

If, after a thorough examination, appropriate authorities establish that a DGS is not yet in a position to comply with Article 13 by 3 July 2015, the relevant laws, regulations and administrative provisions shall be brought into force by 31 May 2016.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 21*

##### **Repeal**

Directive 94/19/EC as amended by the Directives listed in Annex II is repealed with effect from 4 July 2019 without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and the dates of application of the Directives set out in Annex II.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

*Article 22*

**Entry into force**

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

Points (a), (b) and (c) of Article 5(1), Article 6(1), Article 7(1), (2) and (3), Article 8(8), Article 9(1) and Article 17 shall apply from 4 July 2015.

*Article 23*

**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 16 April 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

## ANNEX I

## DEPOSITOR INFORMATION TEMPLATE

## Basic information about the protection of deposit

Deposits in [insert name of credit institution] are protected by:	[insert the name of the relevant DGS] <sup>(1)</sup>
Limit of protection:	EUR 100 000 per depositor per credit institution <sup>(2)</sup> [replace by adequate amount if currency not EUR]  [where applicable:] The following trademarks are part of your credit institution [insert all trademarks which operate under the same licence]
If you have more deposits at the same credit institution:	All your deposits at the same credit institution are 'aggregated' and the total is subject to the limit of EUR 100 000 [replace by adequate amount if currency not EUR] <sup>(2)</sup>
If you have a joint account with other person(s):	The limit of EUR 100 000 [replace by adequate amount if currency not EUR] applies to each depositor separately <sup>(3)</sup>
Reimbursement period in case of credit institution's failure:	7 working days <sup>(4)</sup> [replace by another deadline if applicable]
Currency of reimbursement:	euro [replace by another currency where applicable]
Contact:	[insert the contact data of the relevant DGS (address, telephone, e-mail, etc.)]
More information:	[insert the website of the relevant DGS]
Acknowledgement of receipt by the depositor:	

## Additional information (all or some of the below)

## (1) Scheme responsible for the protection of your deposit

[Only where applicable:] Your deposit is covered by a contractual scheme officially recognised as a Deposit Guarantee Scheme. If insolvency of your credit institution should occur, your deposits would be repaid up to EUR 100 000 [replace by adequate amount if currency not EUR].

[Only where applicable:] Your credit institution is part of an Institutional Protection Scheme officially recognised as a Deposit Guarantee Scheme. This means that all institutions that are members of this scheme mutually support each other in order to avoid insolvency. If insolvency should occur, your deposits would be repaid up to EUR 100 000 [replace by adequate amount if currency not EUR].

[Only where applicable:] Your deposit is covered by a statutory Deposit Guarantee Scheme and a contractual Deposit Guarantee Scheme. If insolvency of your credit institution should occur, your deposits would in any case be repaid up to EUR 100 000 [replace by adequate amount if currency not EUR].

[Only where applicable:] Your deposit is covered by a statutory Deposit Guarantee Scheme. In addition, your credit institution is part of an Institutional Protection Scheme in which all members mutually support each other in order to avoid insolvency. If insolvency should occur, your deposits would be repaid up to EUR 100 000 [replace by adequate amount if currency not EUR] by the Deposit Guarantee Scheme.

## (2) General limit of protection

If a deposit is unavailable because a credit institution is unable to meet its financial obligations, depositors are repaid by a Deposit Guarantee Scheme. This repayment covers at maximum EUR 100 000 [replace by adequate amount if currency not EUR] per credit institution. This means that all deposits at the same credit institution are added up in order to determine the coverage level. If, for instance a depositor holds a savings account with EUR 90 000 and a current account with EUR 20 000, he or she will only be repaid EUR 100 000.

[Only where applicable:] This method will also be applied if a credit institution operates under different trademarks. The [insert name of the account-holding credit institution] also trades under [insert all other trademarks of the same credit institution]. This means that all deposits with one or more of these trademarks are in total covered up to EUR 100 000.

(<sup>3</sup>) Limit of protection for joint accounts

In case of joint accounts, the limit of EUR 100 000 applies to each depositor.

[Only where applicable:] However, deposits in an account to which two or more persons are entitled as members of a business partnership, association or grouping of a similar nature, without legal personality, are aggregated and treated as if made by a single depositor for the purpose of calculating the limit of EUR 100 000 [replace by adequate amount if currency not EUR].

In some cases [insert cases defined in national law] deposits are protected above EUR 100 000 [replace by adequate amount if currency not EUR]. More information can be obtained under [insert the website of the relevant DGS].

(<sup>4</sup>) Reimbursement

The responsible Deposit Guarantee Scheme is [insert name and address, telephone, e-mail and website]. It will repay your deposits (up to EUR 100 000 [replace by adequate amount if currency not EUR]) within [insert repayment period as is required by national law] at the latest, from [31 December 2023] within [7 working days].

[Add information on emergency/interim payout if repayable amount(s) are not available within 7 working days.]

If you have not been repaid within these deadlines, you should contact the Deposit Guarantee Scheme since the time to claim reimbursement may be barred after a certain time limit. Further information can be obtained under [insert website of the responsible DGS].

Other important information

In general, all retail depositors and businesses are covered by Deposit Guarantee Schemes. Exceptions for certain deposits are stated on the website of the responsible Deposit Guarantee Scheme. Your credit institution will also inform you on request whether certain products are covered or not. If deposits are covered, the credit institution shall also confirm this on the statement of account.

## ANNEX II

## PART A

**Repealed Directives together with their successive amendments (referred to in Article 21)**

Directive 94/19/EC of the European Parliament and of the Council

Directive 2009/14/EC of the European Parliament and of the Council

## PART B

**Deadlines for transposition (referred to in Article 21)**

Directive	Deadline for transposition
94/19/EC	1.7.1995
2009/14/EC	30.6.2009
2009/14/EC (second paragraph of point 3(i) of Article 1, Article 7(1a) and (3) and Article 10(1) of Directive 94/19/EC as amended by Directive 2009/14/EC)	31.12.2010

## ANNEX III

## CORRELATION TABLE

Directive 94/19/EC	Directive 2009/14/EC	This Directive
—	—	Article 1
Article 1(1)		Article 2(1)(1)
Article 1(2)		Article 2(1)(3)
Article 1(3)	Article 1(1)	Article 2(1)(4)
Article 1(4)		Article 2(1)(7)
Article 1(5)		Article 2(1)(8)
Article 1(1)		Article 2(1)(9)
Article 3(1)		Article 2(1)(10)
Article 3(1)		Article 2(1)(11) to (18)
Article 3(1)		Article 2(2)
Article 3(2)		Article 2(3)
Article 3(3)		Article 3
Article 2		Article 4(1)
Article 7(2), Annex I(1)		Article 4(2)
Article 7(2), Annex I(10)		Article 4(3)
Article 7(2), Annex I(2)		Article 4(4)
Article 7(2), Annex I(5)		Article 4(5) and (6)
Article 7(2), Annex I(6)		Article 4(9)
Article 7(2), Annex I(3), (4)		Article 4(10) and (11)
Article 7(2), Annex I(12)		Article 5(1)(a), (b) and (c)
		Article 5(1)(d)
		Article 5(1)(e)
		Article 5(1)(f)
		Article 5(1)(g)
		Article 5(1)(h)
		Article 5(1)(i)
		Article 5(1)(j)
		Article 5(1)(k)

Directive 94/19/EC	Directive 2009/14/EC	This Directive
Article 7(1)	Article 1(3)(a)	Article 6(1) Article 6(2) and (3) Article 6(4) Article 6(5)
Article 7(5)	Article 1(3)(a) Article 1(3)(d)	Article 6(6) Article 6(7)
Article 8		Article 7(1), (2) and (3) Article 7(4) to (9)
Article 10(1)	Article 1(6)(a)	Article 8(1) Article 8(2) to (6)
Article 10(4)		Article 8(7)
Article 10(5)		Article 8(8) Article 8(9)
Article 7(6)		Article 9(1)
Article 11		Article 9(2) Article 9(3) Articles 10-13
Article 4(1)		Article 14(1) Article 14(2) to (8)
Article 6		Article 15
Article 9(1)	Article 1(5)	Article 16(1), (2) and (3)
Article 9(2)		Article 16(4) Article 16(5)
Article 13	Article 1(4)	Article 17 Article 18

**DIRECTIVE 2014/57/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 16 April 2014  
on criminal sanctions for market abuse (market abuse directive)**

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 83(2) 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 Central Bank (¹),

Having regard to the opinion of the European Economic and Social Committee (²),

Acting in accordance with the ordinary legislative procedure (³),

Whereas:

(1) An integrated and efficient financial market and stronger investor confidence requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities, derivatives and benchmarks.

(2) Directive 2003/6/EC of the European Parliament and the Council (⁴) completed and updated the Union's legal framework to protect market integrity. It also required Member States to ensure that competent authorities have the power to detect and investigate market abuse. Without prejudice to the right of Member States to impose criminal sanctions, Directive 2003/6/EC also required Member States to ensure that the appropriate administrative measures can be taken or administrative sanctions can be imposed against the persons responsible for violations of the national rules implementing that Directive.

(3) The report of 25 February 2009 by the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière (the 'de Larosière Group'), recommended that a sound prudential and conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes. To that end, the de Larosière Group considered that supervisory authorities must be equipped with sufficient powers to act and that there should also be equal, strong and deterrent sanctions regimes against all financial crimes, sanctions which should be enforced effectively, in order to preserve market integrity. The de Larosière Group concluded that Member States' sanctioning regimes are in general weak and heterogeneous.

(¹) OJ C 161, 7.6.2012, p. 3.

(²) OJ C 181, 21.6.2012, p. 64.

(³) Position of the European Parliament of 4 February 2014 (not yet published in the Official Journal) and decision of the Council of 14 April 2014.

(⁴) Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ L 96, 12.4.2003, p. 16).

- (4) A well-functioning legislative framework in relation to market abuse requires effective enforcement. An evaluation of the national regimes for administrative sanctions under Directive 2003/6/EC showed that not all national competent authorities had a full set of powers at their disposal to ensure that they could respond to market abuse with the appropriate sanction. In particular, not all Member States provided for pecuniary administrative sanctions for insider dealing and market manipulation, and the level of sanctions varied widely among Member States. A new legislative act is therefore needed to ensure common minimum rules across the Union.
- (5) The adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse.
- (6) It is essential that compliance with the rules on market abuse be strengthened by the availability of criminal sanctions which demonstrate a stronger form of social disapproval compared to administrative penalties. Establishing criminal offences for at least serious forms of market abuse sets clear boundaries for types of behaviour that are considered to be particularly unacceptable and sends a message to the public and to potential offenders that competent authorities take such behaviour very seriously.
- (7) Not all Member States have provided for criminal sanctions for some forms of serious breaches of national law implementing Directive 2003/6/EC. Different approaches by Member States undermine the uniformity of conditions of operation in the internal market and may provide an incentive for persons to carry out market abuse in Member States which do not provide for criminal sanctions for those offences. In addition, there has, to date, been no Union-wide understanding of conduct that is considered to constitute a serious breach of the rules on market abuse. Therefore, minimum rules should be established with regard to the definition of criminal offences committed by natural persons, liability of legal persons and the relevant sanctions. Common minimum rules would also make it possible to use more effective methods of investigation and enable more effective cooperation within and between Member States. In the light of the financial crisis, it is evident that market manipulation has a potential for widespread damage on the lives of millions of people. The Libor scandal, which concerned a serious case of benchmark manipulation, demonstrated that relevant problems and loopholes impact gravely on market confidence and may result in significant losses to investors and distortions of the real economy. The absence of common criminal sanction regimes across the Union creates opportunities for perpetrators of market abuse to take advantage of lighter regimes in some Member States. The imposition of criminal sanctions for market abuse will have an increased deterrent effect on potential offenders.
- (8) The introduction by all Member States of criminal sanctions for at least serious market abuse offences is therefore essential to ensure the effective implementation of Union policy on fighting market abuse.
- (9) In order for the scope of this Directive to be aligned with that of Regulation (EU) No 596/2014 of the European Parliament and of the Council (<sup>(1)</sup>), trading in own shares in buy-back programmes and trading in securities or associated instruments for the stabilisation of securities; transactions, orders or behaviour in pursuit of monetary, exchange-rate or public debt management policy; activities concerning emission allowances undertaken in pursuit of the Union's climate policy; and activities undertaken in pursuit of the Union's Common Agricultural Policy and the Union's Common Fisheries Policy, should be exempt from this Directive.
- (10) Member States should be required to provide at least for serious cases of insider dealing, market manipulation and unlawful disclosure of inside information to constitute criminal offences when committed with intent.
- (11) For the purposes of this Directive, insider dealing and unlawful disclosure of inside information should be deemed to be serious in cases such as those where the impact on the integrity of the market, the actual or potential profit derived or loss avoided, the level of damage caused to the market, or the overall value of the financial instruments traded is high. Other circumstances that might be taken into account are, for instance, where an offence has been committed within the framework of a criminal organisation or where the person has committed such an offence before.

<sup>(1)</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 (see page 1 of this Official Journal).

- (12) For the purposes of this Directive, market manipulation should be deemed to be serious in cases such as those where the impact on the integrity of the market, the actual or potential profit derived or loss avoided, the level of damage caused to the market, the level of alteration of the value of the financial instrument or spot commodity contract, or the amount of funds originally used is high or where the manipulation is committed by a person employed or working in the financial sector or in a supervisory or regulatory authority.
- (13) Due to the adverse effects of attempted insider dealing and attempted market manipulation on the integrity of the financial markets and on investor confidence in those markets, those forms of behaviour should also be punishable as a criminal offence.
- (14) This Directive should oblige Member States to provide in their national law for criminal penalties in respect of insider dealing, market manipulation and unlawful disclosure of inside information to which this Directive applies. This Directive should not create obligations regarding the application of such penalties or any other available system of law enforcement, to individual cases.
- (15) This Directive should also require Member States to ensure that inciting, aiding and abetting the criminal offences are also punishable.
- (16) In order for the sanctions for the offences referred to in this Directive to be effective and dissuasive, a minimum level for the maximum term of imprisonment should be set in this Directive.
- (17) This Directive should be applied taking into account the legal framework established by Regulation (EU) No 596/2014 and its implementing measures.
- (18) In order to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in Regulation (EU) No 596/2014, Member States should extend liability for the offences provided for in this Directive to legal persons through the imposition of criminal or non-criminal sanctions or other measures which are effective, proportionate and dissuasive, for example those provided for in Regulation (EU) No 596/2014. Such sanctions or other measures may include the publication of a final decision on a sanction, including the identity of the liable legal person, taking into account fundamental rights, the principle of proportionality and the risks to the stability of financial markets and ongoing investigations. Member States should, where appropriate and where national law provides for criminal liability of legal persons, extend such criminal liability, in accordance with national law, to the offences provided for in this Directive. This Directive should not prevent Member States from publishing final decisions on liability or sanctions.
- (19) Member States should take necessary measures to ensure that law enforcement, judicial authorities and other competent authorities responsible for investigating or prosecuting the offences provided for in this Directive have the ability to use effective investigative tools. Taking into account, inter alia, the principle of proportionality, the use of such tools in accordance with national law should be commensurate with the nature and seriousness of the offences under investigation.
- (20) As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for market abuse.
- (21) Member States may, for example, provide that market manipulation committed recklessly or by serious negligence constitutes a criminal offence.
- (22) The obligations in this Directive to provide for penalties on natural persons and sanctions on legal persons in their national law do not exempt Member States from the obligation to provide in national law for administrative sanctions and other measures for breaches provided for in Regulation (EU) No 596/2014 unless Member States have decided, in accordance with Regulation (EU) No 596/2014, to provide only for criminal sanctions for such breaches in their national law.

- (23) The scope of this Directive is determined in such a way as to complement, and ensure the effective implementation of, Regulation (EU) No 596/2014. Whereas offences should be punishable under this Directive when committed intentionally and at least in serious cases, sanctions for breaches of Regulation (EU) No 596/2014 do not require that intent is proven or that they are qualified as serious. In the application of national law transposing this Directive, Member States should ensure that the imposition of criminal sanctions for offences in accordance with this Directive and of administrative sanctions in accordance with the Regulation (EU) No 596/2014 does not lead to a breach of the principle of *ne bis in idem*.
- (24) Without prejudice to the general rules of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case, the imposition of sanctions should be proportionate, taking into account the profits made or losses avoided by the persons held liable as well as the damage resulting from the offence to other persons and, where applicable, to the functioning of markets or the wider economy.
- (25) Since the objective of this Directive, namely to ensure the availability of criminal sanctions for at least serious market abuse across the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of this Directive, 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 (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (26) Increasing cross-border activities require efficient and effective cooperation between national authorities which are competent for the investigation and prosecution of market abuse offences. The organisation and competences of those national authorities in the different Member States should not hinder their cooperation.
- (27) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union (the Charter) as recognised in the TEU. Specifically, it should be applied with due respect for the right to protection of personal data (Article 8), the freedom of expression and information (Article 11), the freedom to conduct a business (Article 16), the right to an effective remedy and to a fair trial (Article 47), the presumption of innocence and right of defence (Article 48), the principles of legality and proportionality of criminal offences and penalties (Article 49), and the right not to be tried or punished twice in criminal proceedings for the same offence (Article 50).
- (28) In implementing this Directive, Member States should ensure procedural rights of suspected or accused persons in criminal proceedings. Their obligations under this Directive are without prejudice to their obligations under Union law on procedural rights in criminal proceedings. Nothing in this Directive is intended to restrict the freedom of press or the freedom of expression in the media in so far as they are guaranteed in the Union and in the Member States, in particular under Article 11 of the Charter and other relevant provisions. This should be emphasised in particular as regards disclosure of inside information in accordance with the provisions on such disclosure in this Directive.
- (29) Without prejudice to Article 4 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the Treaty on the Functioning of the European Union (TFEU), the United Kingdom will not participate in the adoption of this Directive and is therefore not bound by or be subject to its application.
- (30) In accordance with Articles 1, 2, 3 and 4 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified its wish to take part in the adoption and application of this Directive.
- (31) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application.

(32) The European Data Protection Supervisor delivered an opinion on 10 February 2012 (¹),

HAVE ADOPTED THIS DIRECTIVE;

## Article 1

### Subject matter and scope

1. This Directive establishes minimum rules for criminal sanctions for insider dealing, for unlawful disclosure of inside information and for market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets.

2. This Directive applies to the following:

- (a) financial instruments admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
- (b) financial instruments traded on a multilateral trading facility (MTF), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;
- (c) financial instruments traded on an organised trading facility (OTF);
- (d) financial instruments not covered by point (a), (b) or (c), the price or value of which depends on, or has an effect on, the price or value of a financial instrument referred to in those points, including, but not limited to, credit default swaps and contracts for difference.

This Directive also applies to behaviour or transactions, including bids, relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products based thereon, including when auctioned products are not financial instruments, pursuant to Commission Regulation (EU) No 1031/2010 (²). Without prejudice to any specific provisions referring to bids submitted in the context of an auction, any provisions in this Directive referring to orders to trade shall apply to such bids.

3. This Directive does not apply to:

- (a) trading in own shares in buy-back programmes, where such trading is carried out in accordance with Article 5(1), (2) and (3) of Regulation (EU) No 596/2014;
- (b) trading in securities or associated instruments as referred to in points (a) and (b) of Article 3(2) of Regulation (EU) No 596/2014 for the stabilisation of securities, where such trading is carried out in accordance with Article 5(4) and (5) of that Regulation;
- (c) transactions, orders or behaviours carried out in pursuit of monetary, exchange rate or public debt management policy in accordance with Article 6(1) of Regulation (EU) No 596/2014, transactions order or behaviours carried out in accordance with Article 6(2) thereof, activities in pursuit of the Union's climate policy in accordance with Article 6(3) thereof, or activities in pursuit of the Union's Common Agricultural Policy or of the Union's Common Fisheries Policy in accordance with Article 6(4) thereof;

4. Article 5 also applies to:

- (a) spot commodity contracts that are not wholesale energy products, where the transaction, order or behaviour has an effect on the price or value of a financial instrument referred to in paragraph 2 of this Article;

(¹) OJ C 177, 20.6.2012, p. 1.

(²) Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community (OJ L 302, 18.11.2010, p. 1).

(b) types of financial instruments, including derivative contracts or derivative instruments for the transfer of credit risk, where the transaction, order, bid or behaviour has an effect on the price or value of a spot commodity contract where the price or value depends on the price or value of those financial instruments;

(c) behaviour in relation to benchmarks.

5. This Directive applies to any transaction, order or behaviour concerning any financial instrument as referred to in paragraphs 2 and 4, irrespective of whether or not such transaction, order or behaviour takes place on a trading venue.

## Article 2

### Definitions

For the purposes of this Directive, the following definitions apply:

- (1) 'financial instrument' means a financial instrument as defined in point (15) of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council (¹);
- (2) 'spot commodity contract' means a spot commodity contract as defined in point (15) of Article 3(1) of Regulation (EU) No 596/2014;
- (3) 'buy-back programme' means trading in own shares in accordance with Articles 21 to 27 of Directive 2012/30/EU of the European Parliament and of the Council (²);
- (4) 'inside information' means information within the meaning of Article 7(1) to (4) of Regulation (EU) No 596/2014;
- (5) 'emission allowance' means an emission allowance as described in point (11) of Section C of Annex I of Directive 2014/65/EU;
- (6) 'benchmark' means a benchmark as defined in point (29) of Article 3(1) of Regulation (EU) No 596/2014;
- (7) 'accepted market practice' means a specific market practice that is accepted by the competent authority of a Member State in accordance with Article 13 of Regulation (EU) No 596/2014;
- (8) 'stabilisation' means stabilisation as defined in Article 3(2)(d) of Regulation (EU) No 596/2014;
- (9) 'regulated market' means a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU;
- (10) 'multilateral trading facility' or 'MTF' means a multilateral trading facility as defined in point (22) of Article 4(1) of Directive 2014/65/EU;
- (11) 'organised trading facility' or 'OTF' means an organised trading facility as defined in point (23) of Article 4(1) of Directive 2014/65/EU;
- (12) 'trading venue' means a trading venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU;

(¹) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2011/61/EU and Directive 2002/92/EC (see page 349 of this Official Journal).

(²) Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

(13) 'wholesale energy product' means a wholesale energy product as defined in point (4) of Article 2 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council (<sup>(1)</sup>);

(14) 'issuer' means an issuer as defined in point (21) of Article 3(1) of Regulation (EU) No 596/2014.

### Article 3

#### **Insider dealing, recommending or inducing another person to engage in insider dealing**

1. Member States shall take the necessary measures to ensure that insider dealing, recommending or inducing another person to engage in insider dealing as referred to in paragraphs 2 to 8, constitute criminal offences at least in serious cases and when committed intentionally.

2. For the purposes of this Directive, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.

3. This Article applies to any person who possesses inside information as a result of:

- (a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
- (b) having a holding in the capital of the issuer or emission allowance market participant;
- (c) having access to the information through the exercise of an employment, profession or duties; or
- (d) being involved in criminal activities.

This Article also applies to any person who has obtained inside information under circumstances other than those referred to in the first subparagraph where that person knows that it is inside information.

4. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information shall also be considered to be insider dealing.

5. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010, the use of inside information referred to in paragraph 4 of this Article shall also comprise submitting, modifying or withdrawing a bid by a person for its own account or for the account of a third party.

6. For the purposes of this Directive, recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and:

- (a) recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal; or
- (b) recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates, or induces that person to make such a cancellation or amendment.

<sup>(1)</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

7. The use of the recommendations or inducements referred to in paragraph 6 amounts to insider dealing where the person using the recommendation or inducement knows that it is based upon inside information.

8. For the purposes of this Article, it shall not be deemed from the mere fact that a person is or has been in possession of inside information that that person has used that information and has thus engaged in insider dealing on the basis of an acquisition or disposal, where its behaviour qualifies as legitimate behaviour under Article 9 of Regulation (EU) No 596/2014.

#### *Article 4*

##### **Unlawful disclosure of inside information**

1. Member States shall take the necessary measures to ensure that unlawful disclosure of inside information as referred to in paragraphs 2 to 5 constitutes a criminal offence at least in serious cases and when committed intentionally.

2. For the purposes of this Directive, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties, including where the disclosure qualifies as a market sounding made in compliance with Article 11(1) to (8) of Regulation (EU) No 596/2014.

3. This Article applies to any person in the situations or circumstances referred to in Article 3(3).

4. For the purposes of this Directive, the onward disclosure of recommendations or inducements referred to in Article 3(6) amounts to unlawful disclosure of inside information under this Article where the person disclosing the recommendation or inducement knows that it was based on inside information.

5. This Article shall be applied in accordance with the need to protect the freedom of the press and the freedom of expression.

#### *Article 5*

##### **Market manipulation**

1. Member States shall take the necessary measures to ensure that market manipulation as referred to in paragraph 2 constitutes a criminal offence at least in serious cases and when committed intentionally.

2. For the purposes of this Directive, market manipulation shall comprise the following activities:

(a) entering into a transaction, placing an order to trade or any other behaviour which:

(i) gives false or misleading signals as to the supply of, demand for, or price of, a financial instrument or a related spot commodity contract; or

(ii) secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level;

unless the reasons for so doing of the person who entered into the transactions or issued the orders to trade are legitimate, and those transactions or orders to trade are in conformity with accepted market practices on the trading venue concerned;

(b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects the price of one or several financial instruments or a related spot commodity contract, which employs a fictitious device or any other form of deception or contrivance;

- (c) disseminating information through the media, including the internet, or by any other means, which gives false or misleading signals as to the supply of, demand for, or price of a financial instrument, or a related spot commodity contract, or secures the price of one or several financial instruments or a related spot commodity contract at an abnormal or artificial level, where the persons who made the dissemination derive for themselves or for another person an advantage or profit from the dissemination of the information in question; or
- (d) transmitting false or misleading information or providing false or misleading inputs or any other behaviour which manipulates the calculation of a benchmark.

#### Article 6

##### **Inciting, aiding and abetting, and attempt**

1. Member States shall take the necessary measures to ensure that inciting, aiding and abetting the offences referred to in Article 3(2) to (5) and Articles 4 and 5 is punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that the attempt to commit any of the offences referred to in Article 3(2) to (5) and (7) and Article 5 is punishable as a criminal offence.
3. Article 3(8) applies *mutatis mutandis*.

#### Article 7

##### **Criminal penalties for natural persons**

1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 6 are punishable by effective, proportionate and dissuasive criminal penalties.
2. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 5 are punishable by a maximum term of imprisonment of at least four years.
3. Member States shall take the necessary measures to ensure that the offence referred to in Article 4 is punishable by a maximum term of imprisonment of at least two years.

#### Article 8

##### **Liability of legal persons**

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 3 to 6 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person based on:
  - (a) a power of representation of the legal person;
  - (b) an authority to take decisions on behalf of the legal person; or
  - (c) an authority to exercise control within the legal person.
2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of an offence referred to in Articles 3 to 6 for the benefit of the legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, inciters or accessories in the offences referred to in Articles 3 to 6.

*Article 9***Sanctions for legal persons**

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 8 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) judicial winding-up;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

*Article 10***Jurisdiction**

1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 6 where the offence has been committed:

- (a) in whole or in part within their territory; or
- (b) by one of their nationals, at least in cases where the act is an offence where it was committed.

2. A Member State shall inform the Commission where it decides to establish further jurisdiction over the offences referred to in Articles 3 to 6 committed outside its territory where:

- (a) the offender is an habitual resident in its territory; or
- (b) the offence is committed for the benefit of a legal person established in its territory.

*Article 11***Training**

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors, police, judicial and those competent authorities' staff involved in criminal proceedings and investigations to provide appropriate training with respect to the objectives of this Directive.

*Article 12***Report**

By 4 July 2018, the Commission shall report to the European Parliament and to the Council on the functioning of this Directive and, if necessary, on the need to amend it, including with regard to the interpretation of serious cases as referred to in Article 3(1), Article 4(1) and Article 5(1), the level of sanctions provided for by Member States and the extent to which the optional elements referred to in this Directive have been adopted.

The Commission's report shall, if appropriate, be accompanied by a legislative proposal.

*Article 13***Transposition**

1. Member States shall adopt and publish, by 3 July 2016, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

They shall apply those measures from 3 July 2016 subject to the entry into force of Regulation (EU) No 596/2014.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 14***Entry into force**

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

*Article 15***Addressees**

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 16 April 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

**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**

(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 Central Bank (¹),

Having regard to the opinion of the European Economic and Social Committee (²),

Acting in accordance with the ordinary legislative procedure (³),

Whereas:

- (1) The financial crisis has shown that there is a significant lack of adequate tools at Union level to deal effectively with unsound or failing credit institutions and investment firms ('institutions'). Such tools are needed, in particular, to prevent insolvency or, when insolvency occurs, to minimise negative repercussions by preserving the systemically important functions of the institution concerned. During the crisis, those challenges were a major factor that forced Member States to save institutions using taxpayers' money. The objective of a credible recovery and resolution framework is to obviate the need for such action to the greatest extent possible.
- (2) The financial crisis was of systemic dimension in the sense that it affected the access to funding of a large proportion of credit institutions. To avoid failure, with consequences for the overall economy, such a crisis necessitates measures aiming to secure access to funding under equivalent conditions for all credit institutions that are otherwise solvent. Such measures involve liquidity support from central banks and guarantees from Member States for securities issued by solvent credit institutions.
- (3) Union financial markets are highly integrated and interconnected with many institutions operating extensively beyond national borders. The failure of a cross-border institution is likely to affect the stability of financial markets in the different Member States in which it operates. The inability of Member States to seize control of a failing institution and resolve it in a way that effectively prevents broader systemic damage can undermine Member States' mutual trust and the credibility of the internal market in the field of financial services. The stability of financial markets is, therefore, an essential condition for the establishment and functioning of the internal market.

(¹) OJ C 39, 12.2.2013, p. 1.

(²) OJ C 44, 15.2.2013, p. 68.

(³) Position of the European Parliament of 15 April 2014 (not yet published in the Official Journal) and the decision of the Council of 6 May 2014.

- (4) There is currently no harmonisation of the procedures for resolving institutions at Union level. Some Member States apply to institutions the same procedures that they apply to other insolvent enterprises, which in certain cases have been adapted for institutions. There are considerable substantial and procedural differences between the laws, regulations and administrative provisions which govern the insolvency of institutions in the Member States. In addition, the financial crisis has exposed the fact that general corporate insolvency procedures may not always be appropriate for institutions as they may not always ensure sufficient speed of intervention, the continuation of the critical functions of institutions and the preservation of financial stability.
- (5) A regime is therefore needed to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system. The regime should ensure that shareholders bear losses first and that creditors bear losses after shareholders, provided that no creditor incurs greater losses than it would have incurred if the institution had been wound up under normal insolvency proceedings in accordance with the no creditor worse off principle as specified in this Directive. New powers should enable authorities, for example, to maintain uninterrupted access to deposits and payment transactions, sell viable portions of the institution where appropriate, and apportion losses in a manner that is fair and predictable. Those objectives should help avoid destabilising financial markets and minimise the costs for taxpayers.
- (6) The ongoing review of the regulatory framework, in particular the strengthening of capital and liquidity buffers and better tools for macro-prudential policies, should reduce the likelihood of future crises and enhance the resilience of institutions to economic stress, whether caused by systemic disturbances or by events specific to the individual institution. It is not possible, however, to devise a regulatory and supervisory framework that can prevent those institutions from ever getting into difficulties. Member States should therefore be prepared and have adequate recovery and resolution tools to handle situations involving both systemic crises and failures of individual institutions. Such tools should include mechanisms that allow authorities to deal effectively with institutions that are failing or likely to fail.
- (7) The exercise of such powers and the measures taken should take into account the circumstances in which the failure occurs. If the problem arises in an individual institution and the rest of the financial system is not affected, authorities should be able to exercise their resolution powers without much concern for contagion effects. In a fragile environment, on the other hand, greater care should be exercised to avoid destabilising financial markets.
- (8) Resolution of an institution which maintains it as a going concern may, as a last resort, involve government financial stabilisation tools, including temporary public ownership. It is therefore essential to structure the resolution powers and the financing arrangements for resolution in such a way that taxpayers are the beneficiaries of any surplus that may result from the restructuring of an institution that is put back on a safe footing by the authorities. Responsibility and assumption of risk should be accompanied by reward.
- (9) Some Member States have already enacted legislative changes that introduce mechanisms to resolve failing institutions; others have indicated their intention to introduce such mechanisms if they are not adopted at Union level. The absence of common conditions, powers and processes for the resolution of institutions is likely to constitute a barrier to the smooth operation of the internal market and hinder cooperation between national authorities when dealing with failing cross-border groups of institutions. 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 institutions. Those differences in resolution regimes may affect the funding costs of institutions differently across Member States and potentially create competitive distortions between institutions. Effective resolution regimes in all Member States are necessary to ensure that institutions cannot be restricted in the exercise of the internal market rights of establishment by the financial capacity of their home Member State to manage their failure.
- (10) Those obstacles should be eliminated and rules should be adopted in order to ensure that the internal market provisions are not undermined. To that end, rules governing the resolution of institutions should be made subject to common minimum harmonisation rules.

- (11) 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 spectrum of institutions, the resolution regime should apply to institutions subject to the prudential requirements laid down in Regulation (EU) No 575/2013 of the European Parliament and of the Council (<sup>1</sup>) and Directive 2013/36/EU of the European Parliament and of the Council (<sup>2</sup>). The regime should also apply to financial holding companies, mixed financial holding companies provided for in Directive 2002/87/EC of the European Parliament and of the Council (<sup>3</sup>), mixed-activity holding companies and financial institutions, when the latter are subsidiaries of an institution or of a financial holding company, a mixed financial holding company or a mixed-activity holding company and are covered by the supervision of the parent undertaking on a consolidated basis. The crisis has demonstrated that the insolvency of an entity affiliated to a group can rapidly impact the solvency of the whole group and, thus, even have its own systemic implications. Authorities should therefore possess effective means of action with respect to those entities in order to prevent contagion and produce a consistent resolution scheme for the group as a whole, as the insolvency of an entity affiliated to a group could rapidly impact the solvency of the whole group.
- (12) To ensure consistency in the regulatory framework, central counterparties, as defined in Regulation (EU) No 648/2012 of the European Parliament and of the Council (<sup>4</sup>) and central securities depositories as defined in Regulation of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories (CSDs) and amending Directive 98/26/EC could be covered by a separate legislative initiative establishing a recovery and resolution framework for those entities.
- (13) The use of resolution tools and powers provided for in this Directive may disrupt the rights of shareholders and creditors. In particular, the power of the authorities to transfer the shares or all or part of the assets of an institution to a private purchaser without the consent of shareholders affects the property rights of shareholders. In addition, the power to decide which liabilities to transfer out of a failing institution based upon the objectives of ensuring the continuity of services and avoiding adverse effects on financial stability may affect the equal treatment of creditors. Accordingly, resolution action should be taken only where necessary in the public interest and any interference with rights of shareholders and creditors which results from resolution action should be compatible with the Charter of Fundamental Rights of the European Union (the Charter). In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and proportionate to the risks being addressed and should be neither directly nor indirectly discriminatory on the grounds of nationality.
- (14) Authorities should take into account the nature of an institution's business, shareholding structure, legal form, risk profile, size, legal status and interconnectedness to other institutions or to the financial system in general, the scope and complexity of its activities, whether it is a member of an institutional protection scheme or other cooperative mutual solidarity systems, whether it exercises any investment services or activities and 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 institutions, on funding conditions, or on the wider economy in the context of recovery and resolution plans and when using the different powers and tools at their disposal, making sure that the regime is applied in an appropriate and proportionate way and that the administrative burden relating to the recovery and resolution plan preparation obligations is minimised. Whereas the contents and information specified in this Directive and in Annexes A, B and C establish a minimum standard for institutions with evident systemic relevance, authorities are permitted to apply different or significantly reduced recovery and resolution planning and information requirements on an institution-specific basis, and at a lower frequency for updates than one year. For a small institution of little interconnectedness and complexity, a recovery plan could be reduced to some basic information on its structure, triggers for recovery actions and recovery options. If an institution could

(<sup>1</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).

(<sup>2</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).

(<sup>3</sup>) Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(<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, 7.2.2012, p. 1).

be permitted to go insolvent, then the resolution plan could be reduced. Further, the regime should be applied so that the stability of financial markets is not jeopardised. In particular, in situations characterised by broader problems or even doubts about the resilience of many institutions, it is essential that authorities consider the risk of contagion from the actions taken in relation to any individual institution.

- (15) In order to ensure the required speed of action, to guarantee independence from economic actors and to avoid conflicts of interest, Member States should appoint public administrative authorities or authorities entrusted with public administrative powers to perform the functions and tasks in relation to resolution pursuant to this Directive. Member States should ensure that appropriate resources are allocated to those resolution authorities. The designation of public authorities should not exclude delegation under the responsibility of a resolution authority. However, it is not necessary to prescribe the type of authority or authorities that Member States should appoint as a resolution authority. While harmonisation of that aspect may facilitate coordination, it would considerably interfere with the constitutional and administrative systems of Member States. A sufficient degree of coordination can still be achieved with a less intrusive requirement: all the national authorities involved in the resolution of institutions should be represented in resolution colleges, where coordination at cross-border or Union level should take place. Member States should therefore be free to choose which authorities should be responsible for applying the resolution tools and exercising the powers laid down in this Directive. Where a Member State designates the authority responsible for the prudential supervision of institutions (competent authority) as a resolution authority, adequate structural arrangements should be put in place to separate the supervisory and resolution functions. That separation should not prevent the resolution function from having access to any information available to the supervisory function.
- (16) In light of the consequences that the failure of an institution may have on the financial system and the economy of a Member State as well as the possible need to use public funds to resolve a crisis, the Ministries of Finance or other relevant ministries in the Member States should be closely involved, at an early stage, in the process of crisis management and resolution.
- (17) Effective resolution of institutions or group entities operating across the Union requires cooperation among competent authorities and resolution authorities within supervisory and resolution colleges at all the stages covered by this Directive, from the preparation of recovery and resolution plans to the actual resolution of an institution. In the event of disagreement between national authorities on decisions to be taken in accordance with this Directive with regard to institutions, the European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>(1)</sup> should, where specified in this Directive, as a last resort, play a mediation role. In certain cases, this Directive provides for binding mediation by EBA in accordance with Article 19 of Regulation (EU) No 1093/2010. Such binding mediation does not prevent non-binding mediation in accordance with Article 31 of Regulation (EU) No 1093/2010 in other cases.
- (18) In the resolution of institutions or groups operating across the Union, the decisions taken should also aim to preserve financial stability and minimise economic and social effects in the Member States where the institution or group operates.
- (19) In order to deal in an efficient manner with failing institutions, authorities should have the power to impose preparatory and preventative measures.
- (20) Given the extension of EBA's responsibilities and tasks as laid down in this Directive, the European Parliament, the Council and the Commission should ensure that adequate human and financial resources are made available without delay. For that purpose, the procedure for the establishment, implementation and control of its budget as referred to in Articles 63 and 64 of Regulation (EU) No 1093/2010 should take due account of those tasks. The European Parliament and the Council should ensure that the best standards of efficiency are met.

<sup>(1)</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).

- (21) It is essential that institutions prepare and regularly update recovery plans that set out measures to be taken by those institutions for the restoration of their financial position following a significant deterioration. Such plans should be detailed and based on realistic assumptions applicable in a range of robust and severe scenarios. The requirement to prepare a recovery plan should, however, be applied proportionately, reflecting the systemic importance of the institution or the group and its interconnectedness, including through mutual guarantee schemes. Accordingly, the required content should take into account the nature of the institution's sources of funding, including mutually guaranteed funding or liabilities, and the degree to which group support would be credibly available. Institutions should be required to submit their plans to competent authorities for a complete assessment, including whether the plans are comprehensive and could feasibly restore an institution's viability, in a timely manner, even in periods of severe financial stress.
- (22) Recovery plans should include possible measures which could be taken by the management of the institution where the conditions for early intervention are met.
- (23) In determining whether a private sector action could prevent the failure of an institution within a reasonable timeframe, the relevant authority should take into account the effectiveness of early intervention measures undertaken within the timeframe predetermined by the competent authority. In the case of group recovery plans, the potential impact of the recovery measures on all the Member States where the group operates should be taken into account while drawing up the plans.
- (24) Where an institution does not present an adequate recovery plan, competent authorities should be empowered to require that institution to take measures necessary to redress the material deficiencies of the plan. That requirement may affect the freedom to conduct a business as guaranteed by Article 16 of the Charter. The limitation of that fundamental right is however necessary to meet the objectives of financial stability. More specifically, such a limitation is necessary in order to strengthen the business of institutions and avoid institutions growing excessively or taking excessive risks without being able to tackle setbacks and losses and to restore their capital base. The limitation is proportionate because it permits preventative action to the extent that it is necessary to address the deficiencies and therefore complies with Article 52 of the Charter.
- (25) Resolution planning is an essential component of effective resolution. Authorities should have all the information necessary in order to identify and ensure the continuance of critical functions. The content of a resolution plan should, however, be proportionate to the systemic importance of the institution or group.
- (26) Because of the institution's privileged knowledge of its own functioning and any problems arising from it, resolution plans should be drawn up by resolution authorities on the basis of, *inter alia*, the information provided by the institutions concerned.
- (27) In order to comply with the principle of proportionality and to avoid excessive administrative burden, the possibility for competent authorities and, where relevant, resolution authorities, to waive the requirements relating to the preparation of the recovery and resolution plans on a case-by-case basis should be allowed in the limited cases specified in this Directive. Such cases comprise institutions affiliated to a central body and wholly or partially exempt from prudential requirements in national law in accordance with Article 21 of Directive 2013/36/EU and institutions which belong to an institutional protection scheme in accordance with Article 113(7) of Regulation (EU) No 575/2013. In each case the granting of a waiver should be subject to the conditions specified in this Directive.
- (28) Having regard to the capital structure of institutions affiliated to a central body, for the purposes of this Directive, those institutions should not be obliged to each draw up separate recovery or resolution plans solely on the grounds that the central body to which they are affiliated is under the direct supervision of the European Central Bank.

- (29) Resolution authorities, on the basis of the assessment of resolvability by the relevant resolution authorities, should have the power to require changes to the structure and organisation of institutions 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 the resolvability of the entities concerned. Due to the potentially systemic nature of all institutions, it is crucial, in order to maintain financial stability, that authorities have the possibility to resolve any institution. In order to respect the right to conduct business laid down in Article 16 of the Charter, the authorities' discretion should be limited to what is necessary in order to simplify the structure and operations of the institution solely to improve its resolvability. In addition, any measure imposed for such purposes should be consistent with Union law. Measures should be neither directly nor indirectly discriminatory on the grounds of nationality, and should be justified by the overriding reason of being conducted in the public interest in financial stability. Furthermore, action should not go beyond the minimum necessary to attain the objectives sought. When determining the measures to be taken, resolution authorities should take into account the warnings and recommendations of the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council (¹).
- (30) Measures proposed to address or remove impediments to the resolvability of an institution or a group should not prevent institutions from exercising the right of establishment conferred on them by the Treaty on the Functioning of the European Union (TFEU).
- (31) Recovery and resolution plans should not assume access to extraordinary public financial support or expose taxpayers to the risk of loss.
- (32) The group treatment for recovery and resolution planning provided for in this Directive should apply to all groups of institutions supervised on a consolidated basis, including groups whose undertakings are linked by a relationship within the meaning of Article 22(7) of Directive 2013/34/EU of the European Parliament and of the Council (²). The recovery and resolution plans should take into account the financial, technical and business structure of the relevant group. If individual recovery and resolution plans for institutions that are a part of a group are prepared, the relevant authorities should aim to achieve, to the extent possible, consistency with recovery and resolution plans for the rest of the group.
- (33) It should be the general rule that the group recovery and resolution plans are prepared for the group as a whole and identify measures in relation to a parent institution as well as all individual subsidiaries that are part of a group. The relevant authorities, acting within the resolution college, should make every effort to reach a joint decision on the assessment and adoption of those plans. However, in specific cases where an individual recovery or resolution plan has been drawn up, the scope of the group recovery plan assessed by the consolidating supervisor or the group resolution plan decided by the group-level resolution authority should not cover those group entities for which the individual plans have been assessed or prepared by the relevant authorities.
- (34) In the case of group resolution plans, the potential impact of the resolution measures in all the Member States where the group operates should be specifically taken into account in the drawing up of group resolution plans. The resolution authorities of the Member States where the group has subsidiaries should be involved in the drawing up of the plan.
- (35) Recovery and resolution plans should include procedures for informing and consulting employee representatives throughout the recovery and resolution processes where appropriate. Where applicable, collective agreements, or other arrangements provided for by social partners, as well as national and Union law on the involvement of trade unions and workers' representatives in company restructuring processes, should be complied with in that regard.

(¹) Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

(²) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

- (36) Given the sensitivity of the information contained in them, confidential information in the recovery and resolution plans should be subject to the confidentiality provisions as laid down in this Directive.
- (37) The 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 the former, in order to permanently keep every relevant resolution authority fully informed.
- (38) The provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted by a number of provisions laid down in national law in some Member States. Those provisions are designed to protect the creditors and shareholders of each entity. Those provisions, however, do not take into account the interdependency of the entities of the same group. It is, therefore, appropriate to set out under which conditions financial support may be transferred among entities of a cross-border group of institutions with a view to ensuring the financial stability of the group as a whole without jeopardising the liquidity or solvency of the group entity providing the support. Financial support between group entities should be voluntary and should be subject to appropriate safeguards. It is appropriate that the exercise of the right of establishment is not directly or indirectly made conditional by Member States to the existence of an agreement to provide financial support. The provisions regarding intra-group financial support in this Directive do not affect contractual or statutory liability arrangements between institutions which protect the participating institutions through cross-guarantees and equivalent arrangements. Where a competent authority restricts or prohibits intragroup financial support and where the group recovery plan makes reference to intragroup financial support, such a prohibition or restriction should be considered to be a material change for the purpose of reviewing the recovery plan.
- (39) During the recovery and early intervention phases laid down in this Directive, shareholders should retain full responsibility and control of the institution except when a temporary administrator has been appointed by the competent authority. They should no longer retain such a responsibility once the institution has been put under resolution.
- (40) In order to preserve financial stability, it is important that competent authorities are able to remedy the deterioration of an institution's financial and economic situation before that institution reaches a point at which authorities have no other alternative than to resolve it. To that end, competent authorities should be granted early intervention powers, including the power to appoint a temporary administrator, either to replace or to temporarily work with the management body and senior management of an institution. The task of the temporary administrator should be to exercise any powers conferred on it with a view to promoting solutions to redress the financial situation of the institution. The appointment of the temporary administrator should not unduly interfere with rights of the shareholders or owners or procedural obligations established under Union or national company law and should respect international obligations of the Union or Member States, relating to investment protection. The early intervention powers should include those already provided for in Directive 2013/36/EU for circumstances other than those considered to be early intervention as well as other situations considered to be necessary to restore the financial soundness of an institution.
- (41) The resolution framework should provide for timely entry into resolution before a financial institution is balance-sheet insolvent and before all equity has been fully wiped out. Resolution should be initiated when a competent authority, after consulting a resolution authority, determines that an institution is failing or likely to fail and alternative measures as specified in this Directive would prevent such a failure within a reasonable timeframe. Exceptionally, Member States may provide that, in addition to the competent authority, the determination that the institution is failing or likely to fail can be made also by the resolution authority, after consulting the competent authority. The fact that an institution does not meet the requirements for authorisation should not justify per-se the entry into resolution, especially if the institution is still or likely to still be viable. An institution 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 the assets of the institution are or are likely in the near future to be less than its liabilities, when the institution is or is likely in the near future to be unable to pay its debts as they fall due, or when the institution requires extraordinary public financial support except in the particular circumstances laid down in this Directive. The need for emergency liquidity assistance from a central bank should not, per se, be a condition that sufficiently demonstrates that an institution is or will be, in the near future, unable to pay its liabilities as they fall due.

If that facility were guaranteed by a State, an institution accessing such a facility would be subject to the State aid framework. In order to preserve financial stability, in particular in the case of a systemic liquidity shortage, State guarantees on liquidity facilities provided by central banks or State guarantees of newly issued liabilities to remedy a serious disturbance in the economy of a Member State should not trigger the resolution framework provided that a number of conditions are met. In particular, the State guarantee measures should be approved under the State aid framework and should not be part of a larger aid package, and the use of the guarantee measures should be strictly limited in time. Member States guarantees for equity claims should be prohibited. When providing a guarantee for newly issued liabilities other than equity, a Member State should ensure that the guarantee is sufficiently remunerated by the institution. Furthermore, the provision of extraordinary public financial support should not trigger resolution where, as a precautionary measure, a Member State takes an equity stake in an institution, including an institution which is publicly owned, which complies with its capital requirements. This may be the case, for example, where an institution is required to raise new capital due to the outcome of a scenario-based stress test or of the equivalent exercise conducted by macroprudential authorities which includes a requirement that is set to maintain financial stability in the context of a systemic crisis, but the institution is unable to raise capital privately in markets. An institution should not be considered to be failing or likely to fail solely on the basis that extraordinary public financial support was provided before the entry into force of this Directive. Finally, access to liquidity facilities including emergency liquidity assistance by central banks may constitute State aid pursuant to the State aid framework.

- (42) In the event of resolution of a group with cross-border activity, any resolution action should take into account the potential impact of the resolution in all the Member States where the institution or the group operates.
- (43) The powers of resolution authorities should also apply to holding companies where both the holding company is failing or likely to fail and a subsidiary institution, whether in the Union or in a third country, is failing or likely to fail. In addition, notwithstanding the fact that a holding company might not be failing or likely to fail, the powers of resolution authorities should apply to the holding company where one or more subsidiary institutions meet the conditions for resolution, or a third-country institution meets the conditions for resolution in that third country and the application of the resolution tools and powers in relation to the holding company is necessary for the resolution of one or more of its subsidiaries or for the resolution of the group as a whole.
- (44) Where an institution is failing or likely to fail, national resolution authorities should have at their disposal a minimum harmonised set of resolution tools and powers. Their exercise should be subject to common conditions, objectives, and general principles. Once the resolution authority has taken the decision to put the institution under resolution, normal insolvency proceedings should be excluded except if they need to be combined with the use of the resolution tools and at the initiative of the resolution authority. Member States should be able to confer on the resolution authorities powers and tools in addition to those conferred on them under this Directive. The use of those additional tools and powers, however, should be consistent with the resolution principles and objectives as laid down in this Directive. In particular, the use of such tools or powers should not impinge on the effective resolution of cross-border groups.
- (45) In order to avoid moral hazard, any failing institution should be able to exit the market, irrespective of its size and interconnectedness, without causing systemic disruption. A failing institution should in principle be liquidated under normal insolvency proceedings. However, liquidation under normal insolvency proceedings might jeopardise financial stability, interrupt the provision of critical functions, and affect the protection of depositors. In such a case it is highly likely that there would be a public interest in placing the institution under resolution and applying resolution tools rather than resorting to normal insolvency proceedings. The objectives of resolution should therefore be to ensure the continuity of critical functions, to avoid adverse effects on financial stability, to protect public funds by minimising reliance on extraordinary public financial support to failing institutions and to protect covered depositors, investors, client funds and client assets.
- (46) The winding up of a failing institution through normal insolvency proceedings should always be considered before resolution tools are applied. A failing institution should be maintained through the use of resolution tools as a going concern with the use, to the extent possible, of private funds. That may be achieved either through sale to or merger with a private sector purchaser, or after having written down the liabilities of the institution, or after having converted its debt to equity, in order to effect a recapitalisation.

- (47) When applying resolutions tools and exercising resolution powers, resolution authorities should take all appropriate measures to ensure that resolution action is taken in accordance with principles including that shareholders and creditors bear an appropriate share of the losses, that the management should in principle be replaced, that the costs of the resolution of the institution are minimised and that creditors of the same class are treated in an equitable manner. In particular, where creditors within the same class are treated differently in the context of resolution action, such distinctions should be justified in the public interest and should be neither directly nor indirectly discriminatory on the grounds of nationality. When the use of the resolution tools involves the granting of State aid, interventions should have to be assessed in accordance with the relevant State aid provisions. State aid may be involved, *inter alia*, where resolution funds or deposit guarantee funds intervene to assist in the resolution of failing institutions.
- (48) When applying resolution tools and exercising resolution powers, resolution authorities should inform and consult employee representatives where appropriate. Where applicable, collective agreements, or other arrangements provided for by social partners, should be fully taken into account in that regard.
- (49) The limitations on the rights of shareholders and creditors should be in accordance with Article 52 of the Charter. The resolution tools should therefore be applied only to those institutions that are failing or likely to fail, and only when it is necessary to pursue the objective of financial stability in the general interest. In particular, resolution tools should be applied where the institution cannot be wound up under normal insolvency proceedings without destabilising the financial system and the measures are necessary in order to ensure the rapid transfer and continuation of systemically important functions and where there is no reasonable prospect for any alternative private solution, including any increase of capital by the existing shareholders or by any third party sufficient to restore the full viability of the institution. In addition, when applying resolutions tools and exercising resolution powers, the principle of proportionality and the particularities of the legal form of an institution should be taken into account.
- (50) Interference with property rights should not be disproportionate. Affected shareholders and creditors should not incur greater losses than those which they would have incurred if the institution had been wound up at the time that the resolution decision is taken. In the event of a partial transfer of assets of an institution under resolution to a private purchaser or to a bridge bank, the residual part of the institution under resolution should be wound up under normal insolvency proceedings. In order to protect shareholders and creditors who are left in the winding up proceedings of the institution, they should be entitled to receive in payment of, or compensation for, their claims in the winding up proceedings not less than what it is estimated they would have recovered if the whole institution had been wound up under normal insolvency proceedings.
- (51) For the purpose of protecting the right of shareholders and creditors, clear obligations should be laid down concerning the valuation of the assets and liabilities of the institution under resolution and, where required under this Directive, valuation of the treatment that shareholders and creditors would have received if the institution had been wound up under normal insolvency proceedings. It should be possible to commence a valuation already in the early intervention phase. Before any resolution action is taken, a fair and realistic valuation of the assets and liabilities of the institution should be carried out. Such a valuation should be subject to a right of appeal only together with the resolution decision. In addition, where required under this Directive, an *ex-post* comparison between the treatment that shareholders and creditors have actually been afforded and the treatment they would have received under normal insolvency proceedings should be carried out after resolution tools have been applied. If it is determined that shareholders and creditors have received, in payment of, or compensation for, their claims, the equivalent of less than the amount that they would have received under normal insolvency proceedings, they should be entitled to the payment of the difference where required under this Directive. As opposed to the valuation prior to the resolution action, it should be possible to challenge that comparison separately from the resolution decision. Member States should be free to decide on the procedure as to how to pay any difference of treatment that has been determined to shareholders and creditors. That difference, if any, should be paid by the financial arrangements established in accordance with this Directive.
- (52) It is important that losses be recognised upon failure of the institution. The valuation of assets and liabilities of failing institutions 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 institution's financial state. It should be possible, for reasons of urgency, that the resolution authorities make a rapid valuation

of the assets or the liabilities of a failing institution. That valuation should be provisional and should apply until an independent valuation is carried out. EBA's binding technical standards relating to valuation methodology should establish a framework of principles to be used in conducting such valuations and should allow different specific methodologies to be applied by resolution authorities and independent valuers, as appropriate.

- (53) Rapid and coordinated action is necessary to sustain market confidence and minimise contagion. Once an institution is deemed to be failing or likely to fail and there is no reasonable prospect that any alternative private sector or supervisory action would prevent the failure of the institution within a reasonable timeframe, resolution authorities should not delay in taking appropriate and coordinated resolution action in the public interest. The circumstances under which the failure of an institution may occur, and in particular taking account of the possible urgency of the situation, should allow resolution authorities to take resolution action without imposing an obligation to first use the early intervention powers.
- (54) When taking resolution actions, resolution authorities should take into account and follow the measures provided for in the resolution plans unless resolution authorities assess, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans.
- (55) Save as expressly specified in this Directive, the resolution tools should be applied before any public sector injection of capital or equivalent extraordinary public financial support to an institution. This, however, should not impede the use of funds from the deposit guarantee schemes or resolution funds in order to absorb losses that would have otherwise been suffered by covered depositors or discretionarily excluded creditors. In that respect, the use of extraordinary public financial support, resolution funds or deposit guarantee schemes to assist in the resolution of failing institutions should comply with the relevant State aid provisions.
- (56) Problems in financial markets in the Union arising from system-wide events could have adverse effects on the Union economy and citizens of the Union. Therefore, resolution tools should be designed and suitable to counter a broad set of largely unpredictable scenarios, taking into account that there could be a difference between a single institution in a crisis and a broader systemic banking crisis.
- (57) When the Commission undertakes State aid assessment under Article 107 TFEU of the government stabilisation tools referred to in this Directive, it should separately assess whether the notified government stabilisation tools do not infringe any intrinsically linked provisions of Union law, including those relating to the minimum loss absorption requirement of 8 % contained in this Directive, as well as whether there is a very extraordinary situation of a systemic crisis justifying resorting to those tools under this Directive while ensuring the level playing field in the internal market. In accordance with Articles 107 and 108 TFEU, that assessment should be made before any government stabilisation tools may be used.
- (58) The application of government stabilisation tools should be fiscally neutral in the medium term.
- (59) The resolution tools should include the sale of the business or shares of the institution under resolution, the setting up of a bridge institution, the separation of the performing assets from the impaired or under-performing assets of the failing institution, and the bail-in of the shareholders and creditors of the failing institution.
- (60) Where the resolution tools have been used to transfer the systemically important services or viable business of an institution to a sound entity such as a private sector purchaser or bridge institution, the residual part of the institution should be liquidated within an appropriate time frame having regard to any need for the failing institution to provide services or support to enable the purchaser or bridge institution to carry out the activities or services acquired by virtue of that transfer.

- (61) The sale of business tool should enable authorities to effect a sale of the institution 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 institution or part of its business in an open, transparent and non-discriminatory process, while aiming to maximise, as far as possible, the sale price. Where, for reasons of urgency, such a process is impossible, authorities should take steps to redress detrimental effects on competition and on the internal market.
- (62) Any net proceeds from the transfer of assets or liabilities of the institution under resolution when applying the sale of business tool should benefit the institution left in the winding up proceedings. Any net proceeds from the transfer of shares or other instruments of ownership issued by the institution under resolution when applying the sale of business tool should benefit the owners of those shares or other instruments of ownership. Proceeds should be calculated net of the costs arisen from the failure of the institution 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 in accordance with this Directive by way of derogation from the time-limits and procedures laid down in Directive 2013/36/EU and Directive 2014/65/EU of the European Parliament and of the Council<sup>(1)</sup>.
- (64) Information concerning the marketing of a failing institution and the negotiations with potential acquirers prior to the application of the sale-of-business tool is likely to be of systemic importance. In order to ensure financial stability, it is important that the disclosure to the public of such information required by Regulation (EU) No 596/2014 of the European Parliament and of the Council<sup>(2)</sup> may be delayed for the time necessary to plan and structure the resolution of the institution in accordance with delays permitted under the market abuse regime.
- (65) As an institution which is wholly or partially owned by one or more public authorities or controlled by the resolution authority, a bridge institution would have as its main purpose ensuring that essential financial services continue to be provided to the clients of the failing institution and that essential financial activities continue to be performed. The bridge institution should be operated as a viable going concern and be put back on the market when conditions are appropriate and within the period laid down in this Directive or wound up if not viable.
- (66) The asset separation tool should enable authorities to transfer assets, rights or liabilities of an institution under resolution to a separate vehicle. That tool should be used only in conjunction with other tools to prevent an undue competitive advantage for the failing institution.
- (67) An effective resolution regime should minimise the costs of the resolution of a failing institution borne by the taxpayers. It should ensure that systemic institutions can be resolved without jeopardising financial stability. The bail-in tool achieves that objective by ensuring that shareholders and creditors of the failing institution suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the institution. The bail-in tool will therefore give shareholders and creditors of institutions a stronger incentive to monitor the health of an institution during normal circumstances and meets the Financial Stability Board recommendation that statutory debt-write down and conversion powers be included in a framework for resolution, as an additional option in conjunction with other resolution tools.
- (68) In order to ensure that resolution authorities have the necessary flexibility to allocate losses to creditors in a range of circumstances, it is appropriate that those authorities be able to apply the bail-in tool both where the objective is to resolve the failing institution as a going concern if there is a realistic prospect that the institution's viability may be restored, and where systemically important services are transferred to a bridge institution and the residual part of the institution ceases to operate and is wound up.

<sup>(1)</sup> Directive 2014/65/EU of 15 May 2014 of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (see page 349 of this Official Journal).

<sup>(2)</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 (See page 1 of this Official Journal).

- (69) Where the bail-in tool is applied with the objective of restoring the capital of the failing institution to enable it to continue to operate as a going concern, the resolution through bail-in 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 institution 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. Where applicable, such plans should be compatible with the restructuring plan that the institution is required to submit to the Commission under the State aid framework. In particular, in addition to measures aiming to restore the long-term viability of the institution, the plan should include measures limiting the aid to the minimum burden sharing, and measures limiting distortions of competition.
- (70) It is not appropriate to apply the bail-in tool to claims in so far as they are secured, collateralised or otherwise guaranteed. However, in order to ensure that the bail-in tool is effective and achieves its objectives, it is desirable that it can be applied to as wide a range of the unsecured liabilities of a failing institution as possible. Nevertheless, it is appropriate to exclude certain kinds of unsecured liability from the scope of application of the bail-in tool. In order to protect holders of covered deposits, the bail-in tool should not apply to those deposits that are protected under Directive 2014/49/EU of the European Parliament and of the Council<sup>(1)</sup>. In order to ensure continuity of critical functions, the bail-in tool should not apply to certain liabilities to employees of the failing institution or to commercial claims that relate to goods and services critical to the daily functioning of the institution. In order to honour pension entitlements and pension amounts owed or owing to pension trusts and pension trustees, the bail-in tool should not apply to the failing institution's liabilities to a pension scheme. However, the bail-in tool would apply to liabilities for pension benefits attributable to variable remuneration which do not arise from collective bargaining agreements, as well as to the variable component of the remuneration of material risk takers. To reduce risk of systemic contagion, the bail-in tool should not apply to liabilities arising from a participation in payment systems which have a remaining maturity of less than seven days, or liabilities to institutions, excluding entities that are part of the same group, with an original maturity of less than seven days.
- (71) As the protection of covered depositors is one of the most important objectives of resolution, covered deposits should not be subject to the exercise of the bail-in tool. The deposit guarantee scheme should, however, contribute to funding the resolution process by absorbing losses to the extent of the net losses that it would have had to suffer after compensating depositors in normal insolvency proceedings. The exercise of the bail-in powers would ensure that depositors continue to have access to their deposits up to at least the coverage level which is the main reason why the deposit guarantee schemes have been established. Not providing for the involvement of those schemes in such cases would constitute an unfair advantage with respect to the rest of creditors which would be subject to the exercise of the powers by the resolution authority.
- (72) Resolution authorities should be able to exclude or partially exclude liabilities in a number of circumstances including where it is not possible to bail-in such liabilities within a reasonable timeframe, the exclusion is strictly necessary and is proportionate to achieving the continuity of critical functions and core business lines or the application of the bail-in tool to liabilities would cause a destruction in value such that losses borne by other creditors would be higher than if those liabilities were not excluded from bail-in. Resolution authorities should be able to exclude or partially exclude liabilities where necessary to avoid the spreading of contagion and financial instability which may cause serious disturbance to the economy of a Member State. When carrying out those assessments, resolution authorities should give consideration to the consequences of a potential bail-in of liabilities stemming from eligible deposits held by natural persons and micro, small and medium-sized enterprises above the coverage level provided for in Directive 2014/49/EU.
- (73) Where those exclusions are applied, the level of write down or conversion of other eligible liabilities may be increased to take account of such exclusions subject to the 'no creditor worse off than under normal insolvency proceedings' principle being respected. Where the losses cannot be passed to other creditors, the resolution financing arrangement may make a contribution to the institution under resolution subject to a number of strict conditions including the requirement that losses totalling not less than 8 % of total liabilities including own funds have already been absorbed, and the funding provided by the resolution fund is limited to the lower of 5 % of total liabilities including own funds or the means available to the resolution fund and the amount that can be raised through ex-post contributions within three years.

<sup>(1)</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes (see page 149 of this Official Journal).

- (74) In extraordinary circumstances, where liabilities have been excluded and the resolution fund has been used to contribute to bail-in in lieu of those liabilities to the extent of the permissible cap, the resolution authority should be able to seek funding from alternative financing sources.
- (75) The minimum amount of contribution to loss absorption and recapitalisation of 8 % of total liabilities including own funds or, where applicable, of 20 % of risk-weighted assets should be calculated based on the valuation for the purposes of resolution in accordance with this Directive. Historical losses which have already been absorbed by shareholders through a reduction in own funds prior to such a valuation should not be included in those percentages.
- (76) Nothing in this Directive should require Member States to finance resolution financing arrangements by means from their general budget.
- (77) Except where otherwise specified in this Directive, resolution authorities should apply the bail-in tool in a way that respects the *pari passu* treatment of creditors and the statutory ranking of claims under the applicable insolvency law. Losses should first be absorbed by regulatory capital instruments and should be allocated to shareholders either through the cancellation or transfer of shares or through severe dilution. Where those instruments are not sufficient, subordinated debt should be converted or written down. Senior liabilities should be converted or written down if the subordinate classes have been converted or written down entirely.
- (78) Where there are exemptions of liabilities such as for payment and settlement systems, employee or trade creditors, or preferential ranking such as for deposits of natural persons and micro, small and medium-sized enterprises, they should apply in third countries as well as in the Union. To ensure the ability to write down or convert liabilities when appropriate in third countries, recognition of that possibility should be included in the contractual provisions governed by the law of the third countries, especially for those liabilities ranking at a lower level within the hierarchy of creditors. Such contractual terms should not be required for liabilities exempted from bail-in for deposits of natural persons and micro, small and medium-sized enterprises or where the law of the third country or a binding agreement concluded with that third country allow the resolution authority of the Member State to exercise its write down or conversion powers.
- (79) To avoid institutions structuring their liabilities in a manner that impedes the effectiveness of the bail-in tool it is appropriate to establish that the institutions meet at all times a minimum requirement for own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution. Resolution authorities should be able to require, on a case-by-case basis, that that percentage is wholly or partially composed of own funds or of a specific type of liabilities.
- (80) This Directive adopts a 'top down' approach to the determination of the minimum requirement for own funds and eligible liabilities (MREL) within a group. The approach further recognises that resolution action is applied at the level of the individual legal person, and that it is imperative that loss-absorbing capacity is located in, or accessible to, the legal person within the group in which losses occur. To that end, resolution authorities should ensure that loss-absorbing capacity within a group is distributed across the group in accordance with the level of risk in its constituent legal persons. The minimum requirement necessary for each individual subsidiary should be separately assessed. Furthermore, resolution authorities should ensure that all capital and liabilities which are counted towards the consolidated minimum requirement are located in entities where losses are liable to occur, or are otherwise available to absorb losses. This Directive should allow for a multiple-point-of-entry or a single-point-of-entry resolution. The MREL should reflect the resolution strategy which is appropriate to a group in accordance with the resolution plan. In particular, the MREL should be required at the appropriate level in the group in order to reflect a multiple-point-of-entry approach or single-point-of-entry-approach contained in the resolution plan while keeping in mind that there could be circumstances where an approach different from that contained in the plan is used as it would allow, for instance, reaching the resolution objectives more efficiently. Against that background, regardless of whether a group has chosen the single-point- of-entry or the multiple-point-of entry approach, all institutions and other legal persons in the group where required by the resolution authorities should, at all times, have a robust MREL so as to avoid the risk of contagion or a bank run.

- (81) Member States should ensure that Additional Tier 1 and Tier 2 capital instruments fully absorb losses at the point of non-viability of the issuing institution. Accordingly, resolution authorities should be required to write down those instruments in full, or to convert them to Common Equity Tier 1 instruments, at the point of non-viability and before any resolution action is taken. For that purpose, the point of non-viability should be understood as the point at which the relevant authority determines that the institution meets the conditions for resolution or the point at which the authority decides that the institution would cease to be viable if those capital instruments were not written down or converted. The fact that the instruments are to be written down or converted by authorities in the circumstances required by this Directive should be recognised in the terms governing the instrument, and in any prospectus or offering documents published or provided in connection with the instruments.
- (82) In order to allow for effective resolution outcomes, it should be possible to apply the bail-in tool before 1 January 2016.
- (83) Resolution authorities should be able to apply the bail-in tool only partially where an assessment of the potential impact on the stability of the financial system in the Member States concerned and in the rest of the Union demonstrates that its full application would be contrary to the overall public interests of the Member State or the Union as a whole.
- (84) Resolution authorities should have all the necessary legal powers that, in different combinations, may be exercised when applying the resolution tools. They should include the power to transfer shares in, or assets, rights or liabilities of, a failing institution to another entity such as another institution or a bridge institution, the power to write down or cancel shares, or write down or convert liabilities of a failing institution, the power to replace the management and the power to impose a temporary moratorium on the payment of claims. Supplementary powers are needed, including the power to require continuity of essential services from other parts of a group.
- (85) It is not necessary to prescribe the exact means through which the resolution authorities should intervene in the failing institution. Resolution authorities should have the choice between taking control through a direct intervention in the institution or through executive order. They should decide according to the circumstances of the case. It does not appear necessary for efficient cooperation between Member States to impose a single model at this stage.
- (86) The resolution framework should include procedural requirements to ensure that resolution actions are properly notified and, subject to the limited exceptions laid down in this Directive, 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, that information should be subject to an effective confidentiality regime. The fact that information on the contents and details of recovery and resolution plans and the result of any assessment of those plans may have far-reaching effects, in particular on the undertakings concerned, must be taken into account. Any information provided in respect of a decision before it is taken, be it on whether the conditions for resolution are satisfied, on the use of a specific tool or of any action during the proceedings, must be presumed to have effects on the public and private interests concerned by the action. However, information that the resolution authority is examining a specific institution could be enough for there to be negative effects on that institution. 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.
- (87) Resolution authorities should have ancillary powers to ensure the effectiveness of the transfer of shares or debt instruments and assets, rights and liabilities. Subject to the safeguards specified in this Directive, those powers should include the power to remove third parties rights from the transferred instruments or assets and the power to enforce contracts and to provide for the continuity of arrangements vis-à-vis the recipient of the transferred assets and shares. 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 an institution under resolution, or a group entity thereof, for reasons other than the resolution of the failing institution should not be affected either. Resolution authorities should have the ancillary power to require the residual institution that is being wound up under normal insolvency

proceedings to provide services that are necessary to enable the institution to which assets or shares have been transferred by virtue of the application of the sale of business tool or the bridge institution tool to operate its business.

- (88) In accordance with Article 47 of the Charter, the parties concerned have a right to due process and to an effective remedy against the measures affecting them. Therefore, the decisions taken by the resolution authorities should be subject to a right of appeal.
- (89) Crisis management measures taken by national resolution authorities may require complex 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 complex 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.
- (90) Since this Directive aims 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 with a presumption that its suspension would be against the public interest.
- (91) In addition, where necessary in order to protect third parties who have acquired assets, rights and liabilities of the institution under resolution in good faith by virtue of the exercise of the resolution powers by the authorities and to ensure the stability of the financial markets, a right of appeal should not affect any subsequent administrative act or transaction concluded on the basis of an annulled decision. In such cases, remedies for a wrongful decision should therefore be limited to the award of compensation for the damages suffered by the affected persons.
- (92) Given that crisis management measures may be required to be taken urgently due to serious financial stability risks in the Member State and the Union, any procedure under national law relating to the application for *ex-ante* judicial approval of a crisis management measure and the court's consideration of such an application should be swift. 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 has given its approval. This is without prejudice to the right that interested parties might have in making an application to the court to set aside the decision for a limited period after the resolution authority has taken the crisis management measure.
- (93) It is in the interest of an efficient resolution, and in order to avoid conflicts of jurisdiction, that no normal insolvency proceedings for the failing institution be opened or continued whilst the resolution authority is exercising its resolution powers or applying the resolution tools, except at the initiative of, or with the consent of, the resolution authority. It is useful and necessary to suspend, for a limited period, certain contractual obligations so that the resolution authority has time to put into practice the resolution tools. This should not, however, apply to obligations in relation to systems designated under Directive 98/26/EC of the European Parliament and of the Council<sup>(1)</sup>, central counterparties and central banks. Directive 98/26/EC reduces the risk associated with participation in payment and securities settlement systems, in particular by reducing disruption in the event of the insolvency of a participant in such a system. To ensure that those protections apply appropriately in crisis situations, whilst maintaining appropriate certainty for operators of payment and securities systems and other market participants, this Directive provides that a crisis prevention measure or a crisis management measure should not, *per se*, 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, nothing in this Directive prejudices the operation of a system designated under Directive 98/26/EC or the right to collateral security guaranteed by Article 9 of Directive 98/26/EC.

<sup>(1)</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).

- (94) In order to ensure that resolution authorities, when transferring assets and liabilities to a private sector purchaser or bridge institution, have an adequate period to identify contracts that need to be transferred, it might be appropriate to impose proportionate restrictions on counterparties' rights to close out, accelerate or otherwise terminate financial contracts before the transfer is made. Such a restriction would be necessary to allow authorities to obtain a true picture of the balance sheet of the failing institution, without the changes in value and scope that extensive exercise of termination rights would entail. In order to interfere with the contractual rights of counterparties to the minimum extent necessary, the restriction on termination rights should apply only in relation to the crisis prevention measure or crisis management measure, including the occurrence of any event directly linked to the application of such a measure, and rights to terminate arising from any other default, including failure to pay or deliver margin, should remain.
- (95) In order to preserve legitimate capital market arrangements in the event of a transfer of some, but not all, of the assets, rights and liabilities of a failing institution, it is appropriate to include safeguards to prevent the splitting of linked liabilities, rights and contracts, as appropriate. Such a restriction on selected practices in relation to linked contracts should extend to contracts with the same counterparty covered by security arrangements, title transfer financial collateral arrangements, set-off arrangements, close out netting agreements, and structured finance arrangements. Where the safeguard applies, resolution authorities should be bound to transfer all linked contracts within a protected arrangement, or leave them all with the residual failing institution. Those safeguards should ensure that the regulatory capital treatment of exposures covered by a netting agreement for the purposes of Directive 2013/36/EU is not affected.
- (96) While ensuring that resolution authorities have the same tools and powers at their disposal will facilitate co-ordinated action in the event of a failure of a cross-border group, further action appears necessary to promote cooperation and prevent fragmented national responses. Resolution authorities should be required to consult each other and cooperate in resolution colleges when resolving group entities with a view to agreeing a group resolution scheme. Resolution colleges should be established around the core of the existing supervisory colleges through the inclusion of resolution authorities and the involvement of competent ministries, central banks, EBA and, where appropriate, authorities responsible for the deposit guarantee schemes. In the event of a crisis, the resolution college should provide a forum for the exchange of information and the coordination of resolution actions.
- (97) Resolution of cross-border groups 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 for the group as a whole and, on the other, the necessity to protect financial stability in all the Member States where the group operates. The different resolution authorities should share their views in the resolution college. Resolution actions proposed by the group-level resolution authority should be prepared and discussed amongst different resolution authorities in the context of the group resolution plans. Resolution colleges should incorporate the views of the resolution authorities of all the Member States in which the group is active, in order to facilitate swift and joint decisions wherever possible. Resolution actions by the group-level resolution authority should always take into account their impact on the financial stability in the Member States where the group operates. This should be ensured by the possibility for the resolution authorities of the Member State in which a subsidiary is established to object to the decisions of the group-level resolution authority, not only on appropriateness of resolution actions and measures but also on ground of the need to protect financial stability in that Member State.
- (98) The resolution college should not be a decision-making body, but a platform facilitating decision-making by national authorities. The joint decisions should be taken by the national authorities concerned.
- (99) The production of a group resolution scheme should facilitate coordinated resolution that is more likely to deliver the best result for all institutions of a group. The group-level resolution authority should propose the group resolution scheme and submit it to the resolution college. National resolution authorities that disagree with the scheme or decide to take independent resolution action should explain the reasons for their disagreement and notify those reasons, together with details of any independent resolution action they intend to take, to the group-level resolution authority and other resolution authorities covered by the group resolution scheme. Any national authority that decides to depart from the group resolution scheme should duly consider the potential impact on financial stability in the Member States where the other resolution authorities are located and the potential effects on other parts of the group.

- (100) As part of a group resolution scheme, authorities should be invited to apply the same tool to legal persons meeting the conditions for resolution. The group-level resolution authorities should have the power to apply the bridge institution tool at group level (which may involve, where appropriate, burden sharing arrangements) to stabilise a group as a whole. Ownership of subsidiaries could be transferred to the bridge bank with a view to onward sale, either as a package or individually, when market conditions are appropriate. In addition, the group-level resolution authority should have the power to apply the bail-in tool at parent level.
- (101) Effective resolution of internationally active institutions and groups requires cooperation between the Union, Member States and third-country resolution authorities. Cooperation will be facilitated if the resolution regimes of third countries are based on common principles and approaches that are being developed by the Financial Stability Board and the G20. For that purpose EBA should be empowered to develop and enter into non-binding framework cooperation arrangements with authorities of third countries in accordance with Article 33 of Regulation (EU) No 1093/2010 and national authorities should be permitted to conclude bilateral arrangements in line with EBA framework arrangements. The development of those arrangements between national authorities responsible for managing the failure of global firms should be a means to ensure effective planning, decision-making and coordination in respect of international groups. In general, there should be reciprocity in those arrangements. National resolution authorities, as part of the European resolution college, where applicable, should recognise and enforce third-country resolution proceedings in the circumstances laid down in this Directive.
- (102) Cooperation should take place both with regard to subsidiaries of Union or third-country groups and with regard to branches of Union or third-country institutions. Subsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to Union law, including the resolution tools laid down in this Directive. It is necessary, however, that Member States retain the right to act in relation to branches of institutions having their head office in third countries, when the recognition and application of third-country resolution proceedings relating to a branch would endanger financial stability in the Union or when Union depositors would not receive equal treatment with third-country depositors. In those circumstances, and in the other circumstances as laid down in this Directive, Member States should have the right, after consulting the national resolution authorities, to refuse recognition of third-country resolution proceedings with regard to Union branches of third-country institutions.
- (103) There are circumstances when the effectiveness of the resolution tools applied may depend on the availability of short-term funding for an institution or a bridge institution, the provision of guarantees to potential purchasers, or the provision of capital to the bridge institution. Notwithstanding the role of central banks in providing liquidity to the financial system even in times of stress, it is important that Member States set up financing arrangements to avoid that the funds needed for such purposes come from the national budgets. It should be the financial industry, as a whole, that finances the stabilisation of the financial system.
- (104) As a general rule, Member States should establish their national financing arrangements through funds controlled by resolution authorities to be used for the purposes as laid down in this Directive. However, a strictly framed exception should be provided to allow Member States to establish their national financing arrangements through mandatory contributions from institutions which are authorised in their territories and which are not held through funds controlled by their resolution authorities provided that certain conditions are met.
- (105) As a principle, contributions should be collected from the industry prior to and independently of any operation of resolution. When prior funding is insufficient to cover the losses or costs incurred by the use of the financing arrangements, additional contributions should be collected to bear the additional cost or loss.
- (106) In order to reach a critical mass and to avoid pro-cyclical effects which would arise if financing arrangements had to rely solely on *ex-post* contributions in a systemic crisis, it is indispensable that the *ex-ante* available financial means of the national financing arrangements amount at least to a certain minimum target level.

- (107) In order to ensure a fair calculation of contributions and provide incentives to operate under a less risky model, contributions to national financing arrangements should take account of the degree of credit, liquidity and market risk incurred by the institutions.
- (108) Ensuring effective resolution of failing institutions within the Union is an essential element in the completion of the internal market. The failure of such institutions has an effect not only on the financial stability of the markets where it directly operates but also on the whole Union financial market. With the completion of the internal market in financial services, the interplay between the different national financial systems is reinforced. Institutions operate outside their Member State of establishment and are interrelated through the interbank and other markets which, in essence, are pan-European. Ensuring effective financing of the resolution of those institutions across Member States is not only in the best interests of the Member States in which they operate but also of all the Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal financial market. Setting up a European system of financing arrangements should ensure that all institutions that operate in the Union are subject to equally effective resolution financing arrangements and contribute to the stability of the internal market.
- (109) In order to build up the resilience of that European system of financing arrangements, and in accordance with the objective requiring that financing should come primarily from the shareholders and creditors of the institution under resolution and then from industry rather than from public budgets, financing arrangements may make a request to borrow from other financing arrangements in the case of need. Likewise they should have the power to grant loans to other arrangements that are in need. Such lending should be strictly voluntary. The decision to lend to other arrangements should be made by the lending financing arrangement, but due to potential fiscal implications, Member States should be able to require consultation or the consent of the competent ministry.
- (110) While financing arrangements are set up at national level, they should be mutualised in the context of group resolution, provided that an agreement is found between national authorities on the resolution of the institution. Deposits covered by deposit guarantee schemes should not bear any losses in the resolution process. When a resolution action ensures that depositors continue to have access to their deposits, deposit guarantee schemes to which an institution under resolution is affiliated should be required to make a contribution not greater than the amount of losses that they would have had to bear if the institution had been wound up under normal insolvency proceedings.
- (111) While covered deposits are protected from losses in resolution, other eligible deposits are potentially available for loss absorbency purposes. In order to provide a certain level of protection for natural persons and micro, small and medium-sized enterprises holding eligible deposits above the level of covered deposits, such deposits should have a higher priority ranking over the claims of ordinary unsecured, non-preferred creditors under the national law governing normal insolvency proceedings. The claim of the deposit guarantee scheme should have an even higher ranking under such national law than the aforementioned categories of eligible deposits. Harmonisation of national insolvency law in that area is necessary in order to minimise exposure of the resolution funds of Member States under the no creditor worse off principle as specified in this Directive.
- (112) Where deposits are transferred to another institution in the context of the resolution of a institution, depositors should not be insured beyond the coverage level provided for in Directive 2014/49/EU. Therefore, claims with regard to deposits remaining in the institution under resolution should be limited to the difference between the funds transferred and the coverage level provided for in Directive 2014/49/EU. Where transferred deposits are superior to the coverage level, the depositor should have no claim against the deposit guarantee scheme with regard to deposits remaining in the institution under resolution.
- (113) The setting up of financing arrangements establishing the European system of financing arrangements laid down in this Directive should ensure coordination of the use of funds available at national level for resolution.

- (114) The power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in order to specify the criteria for defining ‘critical functions’ and ‘core business lines’ for the purposes of this Directive; the circumstances when exclusion of liabilities from the write down or conversion requirements under this Directive is necessary; the classes of arrangement for which Member States should ensure appropriate protection in partial transfers; the manner in which institutions’ contributions to resolution financing arrangements should be adjusted in proportion to their risk profile; the registration, accounting, reporting obligations and other obligations intended to ensure that the *ex-ante* contributions are effectively paid; and the circumstances in which and conditions subject to which an institution may be temporarily exempted from paying *ex-post* contributions. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (115) Where provided for in this Directive, it is appropriate that EBA promote convergence of the practices of national authorities through guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010. In areas not covered by regulatory or implementing technical standards, EBA is able to issue guidelines and recommendations on the application of Union law under its own initiative.
- (116) The European Parliament and the Council should have three months from the date of notification to object to a delegated act. It should be possible for the European Parliament and the Council to inform the other institutions of their intention not to raise objections.
- (117) Technical standards in financial services should facilitate consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate, where provided for in this Directive, to entrust EBA with the development of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission.
- (118) The Commission should, where provided for in this Directive, adopt draft regulatory technical standards developed by EBA by means of delegated acts pursuant to Article 290 TFEU, in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010. The Commission should, where provided for in this Directive, adopt draft implementing technical standards developed by EBA by means of implementing acts pursuant to Article 291 TFEU, in accordance with Article 15 of Regulation (EU) No 1093/2010.
- (119) Directive 2001/24/EC of the European Parliament and of the Council (<sup>1</sup>) provides for the mutual recognition and enforcement in all Member States of decisions concerning the reorganisation or winding up of institutions having branches in Member States other than those in which they have their head offices. That directive ensures that all assets and liabilities of the institution, regardless of the country in which they are situated, are dealt with in a single process in the home Member State and that creditors in the host Member States are treated in the same way as creditors in the home Member State. In order to achieve an effective resolution, Directive 2001/24/EC should apply in the event of use of the resolution tools both when those instruments are applied to institutions and when they are applied to other entities covered by the resolution regime. Directive 2001/24/EC should therefore be amended accordingly.
- (120) Union company law directives contain mandatory rules for the protection of shareholders and creditors of institutions which fall within the scope of those directives. In a situation where resolution authorities need to act rapidly, those rules may hinder effective action and use of resolution tools and powers by resolution authorities and appropriate derogations should be included in this Directive. In order to guarantee the maximum degree of legal certainty for stakeholders, the derogations should be clearly and narrowly defined, and they should only be used in the public interest and when resolution triggers are met. The use of resolution tools presupposes that the resolution objectives and the conditions for resolution laid down in this Directive are met.

<sup>(1)</sup> Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ L 125, 5.5.2001, p. 15).

- (121) Directive 2012/30/EU of the European Parliament and of the Council (1) contains rules on shareholders' rights to decide on capital increases and reductions, on their right to participate in any new share issue for cash consideration, on creditor protection in the event of capital reduction and the convening of shareholders' meeting in the event of serious loss of capital. Those rules may hinder the rapid action by resolution authorities and appropriate derogations from them should be provided for.
- (122) Directive 2011/35/EU of the European Parliament and of the Council (2) lays down rules, inter alia, on the approval of mergers by the general meeting of each of the merging companies, on the requirements concerning the draft terms of merger, management report and expert report, and on creditor protection. Council Directive 82/891/EEC (3) contains similar rules on the division of public limited liability companies. Directive 2005/56/EC of the European Parliament and of the Council (4) provides for corresponding rules concerning cross-border mergers of limited liability companies. Appropriate derogations from those directives should be provided in order to allow a rapid action by resolution authorities.
- (123) Directive 2004/25/EC of the European Parliament and of the Council (5) sets out an obligation to launch a mandatory takeover bid on all shares of the company for the equitable price, as defined in that directive, if a shareholder acquires, directly or indirectly and alone or in concert with others, a certain percentage of shares of that company, which gives it control of that company and is defined by national law. The purpose of the mandatory bid rule is to protect minority shareholders in the case of change of control. However, the prospect of such a costly obligation might deter possible investors in the affected institution, thereby making it difficult for resolution authorities to make use of all their resolution powers. Appropriate derogations should be provided from the mandatory bid rule, to the extent necessary for the use of the resolution powers, while after the resolution period the mandatory bid rule should be applied to any shareholder acquiring control in the affected institution.
- (124) Directive 2007/36/EC of the European Parliament and of the Council (6), provides for procedural shareholders' rights relating to general meetings. Directive 2007/36/EC provides, inter alia, for a minimum notice period for general meetings and the contents of the notice of general meeting. Those rules may hinder rapid action by resolution authorities and appropriate derogations from the directive should be provided for. Prior to resolution there may be a need for a rapid increase of capital when the institution does not meet or is likely not to fulfil the requirements of Regulation (EU) No 575/2013 and Directive 2013/36/EU and an increase of capital is likely to restore the financial situation and avoid a situation where the threshold conditions for resolution are met. In such situations a possibility for convening a general meeting at short notice should be permitted. However, the shareholders should retain the decision making power on the increase and on the shortening of the notice period for the general meetings. Appropriate derogations from Directive 2007/36/EC should be provided for the establishment of that mechanism.
- (125) In order to ensure that resolution authorities are represented in the European System of Financial Supervision established by Regulation (EU) No 1092/2010, Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 of the European Parliament and of the Council (7) and Regulation (EU) No 1095/2010 of the European Parliament

(1) Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

(2) Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p. 1).

(3) Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ L 378, 31.12.1982, p. 47).

(4) Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p. 1).

(5) 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).

(6) 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).

(7) Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Investment 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).

and of the Council (<sup>(1)</sup>), and to ensure that EBA has the expertise necessary to carry out the tasks laid down in this Directive, Regulation (EU) No 1093/2010 should be amended in order to include national resolution authorities as defined in this Directive in the concept of competent authorities established by that Regulation. Such assimilation between resolution authorities and competent authorities pursuant to Regulation (EU) No 1093/2010 is consistent with the functions attributed to EBA pursuant to Article 25 of Regulation (EC) No 1093/2010 to contribute and participate actively in the development and coordination of recovery and resolution plans and to aim at the facilitation of the resolution of failing institutions and in particular cross-border groups.

- (126) In order to ensure compliance by institutions, those who effectively control their business and their management body with the obligations deriving from this Directive and to ensure that they are subject to similar treatment across the Union, Member States should be required to provide for administrative sanctions and other administrative measures which are effective, proportionate and dissuasive. Therefore, administrative sanctions and other administrative measures laid down by Member States should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or other administrative measure, publication of sanctions or other administrative measures, key penalising powers and levels of administrative fines. Subject to strict professional secrecy, EBA should maintain a central database of all administrative sanctions and information on the appeals reported to it by competent authorities and resolution authorities.
- (127) This Directive refers to both administrative sanctions and other administrative measures in order to cover all actions applied after an infringement is committed, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or another administrative measure under national law.
- (128) Even though nothing prevents Member States from laying down rules for administrative sanctions as well as criminal sanctions for the same infringements, Member States should not be required to lay down rules for administrative sanctions for infringements of this Directive which are subject to national criminal law. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they can do so if their national law so permits. However, the maintenance of criminal sanctions rather than administrative sanctions or other administrative measures for infringements of this Directive should not reduce or otherwise affect the ability of resolution authorities and competent authorities to cooperate, access and exchange information in a timely way with resolution authorities and competent authorities in other Member States for the purposes of this Directive, including after any referral of the relevant infringements to the competent judicial authorities for prosecution.
- (129) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents (<sup>(2)</sup>), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (130) This Directive respects the fundamental rights and observes the rights, freedoms and principles recognised in particular by the Charter, and, in particular, the right to property, the right to an effective remedy and to a fair trial and the right of defence.
- (131) Since the objective of this Directive, namely the harmonisation of the rules and processes for the resolution of institutions, cannot be sufficiently achieved by the Member States, but can rather, by reason of the effects of a failure of any institution 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 Directive does not go beyond what is necessary in order to achieve that objective.

(<sup>1</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>2</sup>) OJ C 369, 17.12.2011, p. 14.

- (132) When taking decisions or actions under this Directive, competent authorities and resolution authorities should always have due regard to the impact of their decisions and actions on financial stability in other Member States and on the economic situation in other Member States and should give consideration to the significance of any subsidiary or branch for the financial sector and the economy of the Member State where such a subsidiary or branch is established or located, even in cases where the subsidiary or branch concerned is of lesser importance for the consolidated group.
- (133) The Commission will review the general application of this Directive and, in particular, consider, in light of the arrangements taken under any act of Union law establishing a resolution mechanism covering more than one Member State, the exercise of EBA's powers under this Directive to mediate between a resolution authority in a Member State participating in the mechanism and a resolution authority in a Member State not participating therein,

HAVE ADOPTED THIS DIRECTIVE:

## TITLE I

### SCOPE, DEFINITIONS AND AUTHORITIES

#### *Article 1*

##### **Subject matter and scope**

1. This Directive lays down rules and procedures relating to the recovery and resolution of the following entities:
- (a) institutions that are established in the Union;
  - (b) financial institutions that are established in the Union when the financial institution is a subsidiary of a credit institution or investment firm, or of a company referred to in point (c) or (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013;
  - (c) financial holding companies, mixed financial holding companies and mixed-activity holding companies that are established in the Union;
  - (d) parent financial holding companies in a Member State, Union parent financial holding companies, parent mixed financial holding companies in a Member State, Union parent mixed financial holding companies;
  - (e) branches of institutions that are established outside the Union in accordance with the specific conditions laid down in this Directive.

When establishing and applying the requirements under this Directive and when using the different tools at their disposal in relation to an entity referred to in the first subparagraph, and subject to specific provisions, resolution authorities and competent authorities shall take account of the nature of its business, its shareholding structure, its legal form, its risk profile, size and legal status, its interconnectedness to other institutions or to the financial system in general, the scope and the complexity of its activities, its membership of an institutional protection scheme (IPS) that meets the requirements of Article 113(7) of Regulation (EU) No 575/2013 or other cooperative mutual solidarity systems as referred to in Article 113(6) of that Regulation and whether it exercises any investment services or activities as defined in point (2) of Article 4(1) of Directive 2014/65/EU.

2. Member States may adopt or maintain rules that are stricter or additional to those laid down in this Directive and in the delegated and implementing acts adopted on the basis of this Directive, provided that they are of general application and do not conflict with this Directive and with the delegated and implementing acts adopted on its basis.

**Article 2****Definitions**

1. For the purposes of this Directive the following definitions apply:
  - (1) 'resolution' means the application of a resolution tool or a tool referred to in Article 37(9) in order to achieve one or more of the resolution objectives referred to in Article 31(2);
  - (2) 'credit institution' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013, not including the entities referred to in Article 2(5) of Directive 2013/36/EU;
  - (3) 'investment firm' means an investment firm as defined in point (2) of Article 4(1) of Regulation (EU) No 575/2013 that is subject to the initial capital requirement laid down in Article 28(2) of Directive 2013/36/EU;
  - (4) 'financial institution' means a financial institution as defined in point (26) of Article 4(1) of Regulation (EU) No 575/2013;
  - (5) 'subsidiary' means a subsidiary as defined in point (16) of Article 4(1) of Regulation (EU) No 575/2013;
  - (6) 'parent undertaking' means a parent undertaking as defined in point (15)(a) of Article 4(1) of Regulation (EU) No 575/2013;
  - (7) 'consolidated basis' means the basis of the consolidated situation as defined in point (47) of Article 4(1) of Regulation (EU) No 575/2013;
  - (8) 'institutional protection scheme' or 'IPS' means an arrangement that meets the requirements laid down in Article 113(7) of Regulation (EU) No 575/2013;
  - (9) 'financial holding company' means a financial holding company as defined in point (20) of Article 4(1) of Regulation (EU) No 575/2013;
  - (10) 'mixed financial holding company' means a mixed financial holding company as defined in point (21) of Article 4(1) of Regulation (EU) No 575/2013;
  - (11) 'mixed-activity holding company' means a mixed-activity holding company as defined in point (22) of Article 4(1) of Regulation (EU) No 575/2013;
  - (12) 'parent financial holding company in a Member State' means a parent financial holding company in a Member State as defined in point (30) of Article 4(1) of Regulation (EU) No 575/2013;
  - (13) 'Union parent financial holding company' means an EU parent financial holding company as defined in point (31) of Article 4(1) of Regulation (EU) No 575/2013;
  - (14) 'parent mixed financial holding company in a Member State' means a parent mixed financial holding company in a Member State as defined in point (32) of Article 4(1) of Regulation (EU) No 575/2013;
  - (15) 'Union parent mixed financial holding company' means an EU parent mixed financial holding company as defined in point (33) of Article 4(1) of Regulation (EU) No 575/2013;
  - (16) 'resolution objectives' means the resolution objectives referred to in Article 31(2);
  - (17) 'branch' means a branch as defined in point (17) of Article 4(1) of Regulation (EU) No 575/2013;

- (18) 'resolution authority' means an authority designated by a Member State in accordance with Article 3;
- (19) 'resolution tool' means a resolution tool referred to in Article 37(3);
- (20) 'resolution power' means a power referred to in Articles 63 to 72;
- (21) 'competent authority' means a competent authority as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013 including the European Central Bank with regard to specific tasks conferred on it by Council Regulation (EU) No 1024/2013 (<sup>(1)</sup>);
- (22) 'competent ministries' means finance ministries or other ministries of the Member States which are responsible for economic, financial and budgetary decisions at the national level according to national competencies and which have been designated in accordance with Article 3(5);
- (23) 'institution' means a credit institution or an investment firm;
- (24) 'management body' means a management body as defined in point (7) of Article 3(1) of Directive 2013/36/EU;
- (25) 'senior management' means senior management as defined in point (9) of Article 3(1) of Directive 2013/36/EU;
- (26) 'group' means a parent undertaking and its subsidiaries;
- (27) 'cross-border group' means a group having group entities established in more than one Member State;
- (28) 'extraordinary public financial support' means State aid within the meaning of Article 107(1) TFEU, or any other public financial support at supra-national level, which, if provided for at national level, would constitute State aid, that is provided in order to preserve or restore the viability, liquidity or solvency of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) or of a group of which such an institution or entity forms part;
- (29) 'emergency liquidity assistance' means the provision by a central bank of central bank money, or any other assistance that may lead to an increase in central bank money, to a solvent financial institution, or group of solvent financial institutions, that is facing temporary liquidity problems, without such an operation being part of monetary policy;
- (30) 'systemic crisis' means a disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree;
- (31) 'group entity' means a legal person that is part of a group;
- (32) 'recovery plan' means a recovery plan drawn up and maintained by an institution in accordance with Article 5;
- (33) 'group recovery plan' means a group recovery plan drawn up and maintained in accordance with Article 7;
- (34) 'significant branch' means a branch that would be considered to be significant in a host Member State in accordance with Article 51(1) of Directive 2013/36/EU;

<sup>(1)</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

- (35) 'critical functions' means activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations;
- (36) 'core business lines' means business lines and associated services which represent material sources of revenue, profit or franchise value for an institution or for a group of which an institution forms part;
- (37) 'consolidating supervisor' means consolidating supervisor as defined in point (41) of Article 4(1) of Regulation (EU) No 575/2013;
- (38) 'own funds' means own funds as defined in point (118) of Article 4(1) of Regulation (EU) No 575/2013;
- (39) 'conditions for resolution' means the conditions referred to in Article 32(1);
- (40) 'resolution action' means the decision to place an institution or entity referred to in point (b), (c) or (d) of Article 1(1) under resolution pursuant to Article 32 or 33, the application of a resolution tool, or the exercise of one or more resolution powers;
- (41) 'resolution plan' means a resolution plan for an institution drawn up in accordance with Article 10;
- (42) 'group resolution' means either of the following:
- (a) the taking of resolution action at the level of a parent undertaking or of an institution subject to consolidated supervision, or
  - (b) the coordination of the application of resolution tools and the exercise of resolution powers by resolution authorities in relation to group entities that meet the conditions for resolution;
- (43) 'group resolution plan' means a plan for group resolution drawn up in accordance with Articles 12 and 13;
- (44) 'group-level resolution authority' means the resolution authority in the Member State in which the consolidating supervisor is situated;
- (45) 'group resolution scheme' means a plan drawn up for the purposes of group resolution in accordance with Article 91;
- (46) 'resolution college' means a college established in accordance with Article 88 to carry out the tasks referred to in Article 88(1);
- (47) '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 institutions under national law and either specific to those institutions or generally applicable to any natural or legal person;
- (48) 'debt instruments' referred to in points (g) and (j) of Article 63(1) means bonds and other forms of transferable debt, instruments creating or acknowledging a debt, and instruments giving rights to acquire debt instruments;
- (49) 'parent institution in a Member State' means a parent institution in a Member State as defined in point (28) of Article 4(1) of Regulation (EU) No 575/2013;

(50) 'Union parent institution' means an EU parent institution as defined in point (29) of Article 4(1) of Regulation (EU) No 575/2013;

(51) 'own funds requirements' means the requirements laid down in Articles 92 to 98 of Regulation (EU) No 575/2013;

(52) 'supervisory college' means a college of supervisors established in accordance with Article 116 of Directive 2013/36/EU;

(53) '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;

(54) 'winding up' means the realisation of assets of an institution or entity referred to in point (b), (c) or (d) of Article 1(1);

(55) 'asset separation tool' means the mechanism for effecting a transfer by a resolution authority of assets, rights or liabilities of an institution under resolution to an asset management vehicle in accordance with Article 42;

(56) 'asset management vehicle' means a legal person that meets the requirements laid down in Article 42(2);

(57) 'bail-in tool' means the mechanism for effecting the exercise by a resolution authority of the write-down and conversion powers in relation to liabilities of an institution under resolution in accordance with Article 43;

(58) 'sale of business tool' means the mechanism for effecting a transfer by a resolution authority of shares or other instruments of ownership issued by an institution under resolution, or assets, rights or liabilities, of an institution under resolution to a purchaser that is not a bridge institution, in accordance with Article 38;

(59) 'bridge institution' means a legal person that meets the requirements laid down in Article 40(2);

(60) 'bridge institution tool' means the mechanism for transferring shares or other instruments of ownership issued by an institution under resolution or assets, rights or liabilities of an institution under resolution to a bridge institution, in accordance with Article 40;

(61) '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;

(62) 'shareholders' means shareholders or holders of other instruments of ownership;

(63) 'transfer powers' means the powers specified in point (c) or (d) of Article 63(1) to transfer shares, other instruments of ownership, debt instruments, assets, rights or liabilities, or any combination of those items from an institution under resolution to a recipient;

(64) 'central counterparty' means a CCP as defined in point (1) of Article 2 of Regulation (EU) No 648/2012;

(65) 'derivative', means a derivative as defined in point (5) of Article 2 of Regulation (EU) No 648/2012;

(66) 'write-down and conversion powers' means the powers referred to in Article 59(2) and in points (e) to (i) of Article 63(1);

- (67) 'secured liability' means a liability where the right of the creditor to payment or other form of performance is secured by a charge, pledge or lien, or collateral arrangements including liabilities arising from repurchase transactions and other title transfer collateral arrangements;
- (68) 'Common Equity Tier 1 instruments' means capital instruments that meet the conditions laid down in Article 28(1) to (4), Article 29(1) to (5) or Article 31(1) of Regulation (EU) No 575/2013;
- (69) 'Additional Tier 1 instruments' means capital instruments that meet the conditions laid down in Article 52(1) of Regulation (EU) No 575/2013;
- (70) 'aggregate amount' means the aggregate amount by which the resolution authority has assessed that eligible liabilities are to be written down or converted, in accordance with Article 46(1);
- (71) 'eligible liabilities' means the liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) that are not excluded from the scope of the bail-in tool by virtue of Article 44(2);
- (72) 'deposit guarantee scheme' means a deposit guarantee scheme introduced and officially recognised by a Member State pursuant to Article 4 of Directive 2014/49/EU;
- (73) 'Tier 2 instruments' means capital instruments or subordinated loans that meet the conditions laid down in Article 63 of Regulation (EU) No 575/2013;
- (74) 'relevant capital instruments' for the purposes of Section 5 of Chapter IV of Title IV and Chapter V of Title IV, means Additional Tier 1 instruments and Tier 2 instruments;
- (75) 'conversion rate' means the factor that determines the number of shares or other instruments of ownership into which a liability of a specific class will be converted, by reference either to a single instrument of the class in question or to a specified unit of value of a debt claim;
- (76) 'affected creditor' means a creditor whose claim relates to a liability that is reduced or converted to shares or other instruments of ownership by the exercise of the write down or conversion power pursuant to the use of the bail-in tool;
- (77) 'affected holder' means a holder of instruments of ownership whose instruments of ownership are cancelled by means of the power referred to in point (h) of Article 63(1);
- (78) 'appropriate authority' means authority of the Member State identified in accordance with Article 61 that is responsible under the national law of that State for making the determinations referred to in Article 59(3);
- (79) 'relevant parent institution' means a parent institution in a Member State, a Union parent institution, a financial holding company, a mixed financial holding company, a mixed-activity holding company, a parent financial holding company in a Member State, a Union parent financial holding company, a parent mixed financial holding company in a Member State, or a Union parent mixed financial holding company, in relation to which the bail-in tool is applied;
- (80) 'recipient' means the entity to which shares, other instruments of ownership, debt instruments, assets, rights or liabilities, or any combination of those items are transferred from an institution under resolution;
- (81) 'business day' means a day other than a Saturday, a Sunday or a public holiday in the Member State concerned;

- (82) '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;
- (83) 'institution under resolution' means an institution, a financial institution, a financial holding company, a mixed financial holding company, a mixed-activity holding company, a parent financial holding company in a Member State, a Union parent financial holding company, a parent mixed financial holding company in a Member State, or a Union parent mixed financial holding company, in respect of which a resolution action is taken;
- (84) 'Union subsidiary' means an institution which is established in a Member State and which is a subsidiary of a third-country institution or a third-country parent undertaking;
- (85) 'Union parent undertaking' means a Union parent institution, a Union parent financial holding company or a Union parent mixed financial holding company;
- (86) 'third-country institution' means an entity, the head office of which is established in a third country, that would, if it were established within the Union, be covered by the definition of an institution;
- (87) 'third-country parent undertaking' means a parent undertaking, a parent financial holding company or a parent mixed financial holding company, established in a third country;
- (88) 'third-country resolution proceedings' means an action under the law of a third country to manage the failure of a third-country institution or a third-country parent undertaking that is comparable, in terms of objectives and anticipated results, to resolution actions under this Directive;
- (89) 'Union branch' means a branch located in a Member State of a third-country institution;
- (90) '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 Directive;
- (91) 'group financing arrangement' means the financing arrangement or arrangements of the Member State of the group-level resolution authority;
- (92) 'back-to-back transaction' means a transaction entered into between two group entities for the purpose of transferring, in whole or in part, the risk generated by another transaction entered into between one of those group entities and a third party;
- (93) 'intra-group guarantee' means a contract by which one group entity guarantees the obligations of another group entity to a third party;
- (94) 'covered deposits' means covered deposits as defined in point (5) of Article 2(1) of Directive 2014/49/EU;
- (95) 'eligible deposits' means eligible deposits as defined in point (4) of Article 2(1) of Directive 2014/49/EU;
- (96) 'covered bond' means an instrument as referred to in Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council <sup>(1)</sup>;

<sup>(1)</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

(97) '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 of the European Parliament and of the Council (<sup>(1)</sup>);

(98) 'netting arrangement' means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including 'close-out netting provisions' as defined in point (n)(i) of Article 2(1) of Directive 2002/47/EC and 'netting' as defined in point (k) of Article 2 of Directive 98/26/EC;

(99) 'set-off arrangement' means an arrangement under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other;

(100) 'financial contracts' includes the following contracts and agreements:

(a) securities contracts, including:

(i) contracts for the purchase, sale or loan of a security, a group or index of securities;

(ii) options on a security or group or index of securities;

(iii) repurchase or reverse repurchase transactions on any such security, group or index;

(b) commodities contracts, including:

(i) contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;

(ii) options on a commodity or group or index of commodities;

(iii) repurchase or reverse repurchase transactions on any such commodity, group or index;

(c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;

(d) swap agreements, including:

(i) swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;

(ii) total return, credit spread or credit swaps;

(iii) any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

(e) inter-bank borrowing agreements where the term of the borrowing is three months or less;

(f) master agreements for any of the contracts or agreements referred to in points (a) to (e);

<sup>(1)</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).

- (101) ‘crisis prevention measure’ means the exercise of powers to direct removal of deficiencies or impediments to recoverability under Article 6(6), the exercise of powers to address or remove impediments to resolvability under Article 17 or 18, the application of an early intervention measure under Article 27, the appointment of a temporary administrator under Article 29 or the exercise of the write down or conversion powers under Article 59;
- (102) ‘crisis management measure’ means a resolution action or the appointment of a special manager under Article 35 or a person under Article 51(2) or under Article 72(1);
- (103) ‘recovery capacity’ means the capability of an institution to restore its financial position following a significant deterioration;
- (104) ‘depositor’ means a depositor as defined in point (6) of Article 2(1) of Directive 2014/49/EU;
- (105) ‘investor’ means an investor within the meaning of point (4) of Article 1 of Directive 97/9/EC of the European Parliament and of the Council (<sup>(1)</sup>);
- (106) ‘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 of 22 December 2011 on the macroprudential mandate of national authorities (ESRB/2011/3);
- (107) ‘micro, small and medium-sized enterprises’ means micro, small and medium-sized enterprises as defined with regard to the annual turnover criterion referred to in Article 2(1) of the Annex to Commission Recommendation 2003/361/EC (<sup>(2)</sup>);
- (108) ‘regulated market’ means a regulated market as defined in point (21) of Article 4(1) of Directive 2014/65/EU.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 in order to specify the criteria for the determination of the activities, services and operations referred to in point (35) of the first subparagraph as regards the definition of ‘critical functions’ and the criteria for the determination of the business lines and associated services referred to in point (36) of the first subparagraph as regards the definition of ‘core business lines’.

### Article 3

#### **Designation of authorities responsible for resolution**

1. Each Member State shall designate one or, exceptionally, more resolution authorities that are empowered to apply the resolution tools and exercise the resolution powers.
2. The resolution authority shall be a public administrative authority or authorities entrusted with public administrative powers.
3. Resolution authorities may be national central banks, competent ministries or other public administrative authorities or authorities entrusted with public administrative powers. Member States may exceptionally provide for the resolution authority to be the competent authorities for supervision for the purposes of Regulation (EU) No 575/2013 and Directive 2013/36/EU. Adequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive, without prejudice to the exchange of information and cooperation obligations as required by paragraph 4. In particular, Member States shall ensure that, within the competent authorities, national central banks, competent ministries or other authorities there is operational independence between the resolution function and the supervisory or other functions of the relevant authority.

<sup>(1)</sup> Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ L 84, 26.3.1997, p. 22).

<sup>(2)</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

The staff involved in carrying out the functions of the resolution authority pursuant to this Directive shall be structurally separated from, and subject to, separate reporting lines from the staff involved in carrying out the tasks pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or with regard to the other functions of the relevant authority.

For the purposes of this paragraph, the Member States or the resolution authority shall adopt and make public any necessary relevant internal rules including rules regarding professional secrecy and information exchanges between the different functional areas.

4. Member States shall require that authorities exercising supervision and resolution functions and persons exercising those functions on their behalf 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 in the same entity.

5. Each Member State shall designate a single ministry which is responsible for exercising the functions of the competent ministry under this Directive.

6. Where the resolution authority in a Member State is not the competent ministry it shall inform the competent ministry of the decisions pursuant to this Directive and, unless otherwise laid down in national law, have its approval before implementing decisions that have a direct fiscal impact or systemic implications.

7. Decisions taken by competent authorities, resolution authorities and EBA in accordance with this Directive shall take into account the potential impact of the decision in all the Member States where the institution or the group operate and minimise the negative effects on financial stability and negative economic and social effects in those Member States. Decisions of EBA are subject to Article 38 of Regulation (EU) No 1093/2010.

8. Member States shall ensure that each resolution authority has the expertise, resources and operational capacity to apply resolution actions, and is able to exercise their powers with the speed and flexibility that are necessary to achieve the resolution objectives.

9. EBA, in cooperation with competent authorities and resolution authorities, shall develop the required expertise, resources and operational capacity and shall monitor the implementation of paragraph 8, including through periodical peer reviews.

10. Where, in accordance with paragraph 1, a Member State designates more than one authority to apply the resolution tools and exercise the resolution powers, it shall provide a fully reasoned notification to EBA and the Commission for doing so and shall allocate functions and responsibilities clearly between those authorities, ensure adequate coordination between them and designate a single authority as a contact authority for the purposes of cooperation and coordination with the relevant authorities of other Member States.

11. Member States shall inform EBA of the national authority or authorities designated as resolution authorities and the contact authority and, where relevant, their specific functions and responsibilities. EBA shall publish the list of those resolution authorities and contact authorities.

12. Without prejudice to Article 85, Member States may limit the liability of the resolution authority, the competent authority and their respective staff in accordance with national law for acts and omissions in the course of discharging their functions under this Directive.

## TITLE II

## PREPARATION

## CHAPTER I

***Recovery and resolution planning***

## Section 1

**General provisions**

## Article 4

**Simplified obligations for certain institutions**

1. Having regard to the impact that the failure of the institution could have, due to the nature of its business, its shareholding structure, its legal form, its risk profile, size and legal status, its interconnectedness to other institutions or to the financial system in general, the scope and the complexity of its activities, its membership of an IPS or other cooperative mutual solidarity systems as referred to in Article 113(7) of Regulation (EU) No 575/2013 and any exercise of investment services or activities as defined in point (2) of Article 4(1) of Directive 2014/65/EU, and 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 institutions, on funding conditions, or on the wider economy, Member States shall ensure that competent and resolution authorities determine:

- (a) the contents and details of recovery and resolution plans provided for in Articles 5 to 12;
- (b) the date by which the first recovery and resolution plans are to be drawn up and the frequency for updating recovery and resolution plans which may be lower than that provided for in Article 5(2), Article 7(5), Article 10(6) and Article 13(3);
- (c) the contents and details of the information required from institutions as provided for in Article 5(5), Article 11(1) and Article 12(2) and in Sections A and B of the Annex;
- (d) the level of detail for the assessment of resolvability provided for in Articles 15 and 16, and Section C of the Annex.

2. Competent authorities and, where relevant, resolution authorities shall make the assessment referred to in paragraph 1 after consulting, where appropriate, the national macroprudential authority.

3. Member States shall ensure that where simplified obligations are applied the competent authorities and, where relevant, resolution authorities can impose full, unsimplified obligations at any time.

4. Member States shall ensure that the application of simplified obligations shall not, per se, affect the competent authority's and, where relevant, the resolution authority's powers to take a crisis prevention measure or a crisis management measure.

5. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify the criteria referred to in paragraph 1, for assessing, in accordance with that paragraph, the impact of an institution's failure on financial markets, on other institutions and on funding conditions.

6. Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 5, EBA shall develop draft regulatory technical standards to specify the criteria referred to in paragraph 1, for assessing, in accordance with that paragraph, the impact of an institution's failure on financial markets, on other institutions and on funding conditions.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2017.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

7. Competent authorities and resolution authorities shall inform EBA of the way they have applied paragraphs 1, 8, 9 and 10 to institutions in their jurisdiction. EBA shall submit a report to the European Parliament, to the Council and to the Commission by 31 December 2017 on the implementation of paragraphs 1, 8, 9 and 10. In particular, that report shall identify any divergences regarding the implementation at national level of paragraphs 1, 8, 9 and 10.

8. Subject to paragraphs 9 and 10, Member States shall ensure that competent authorities and, where relevant, resolution authorities may waive the application of:

- (a) the requirements of Sections 2 and 3 of this Chapter to institutions affiliated to a central body and wholly or partially exempted from prudential requirements in national law in accordance with Article 10 of Regulation (EU) No 575/2013;
- (b) the requirements of Section 2 to institutions which are members of an IPS.

9. Where a waiver pursuant to paragraph 8 is granted, Member States shall:

- (a) apply the requirements of Sections 2 and 3 of this Chapter on a consolidated basis to the central body and institutions affiliated to it within the meaning of Article 10 of Regulation (EU) No 575/2013;
- (b) require the IPS to fulfil the requirements of Section 2 in cooperation with each of its waived members.

For that purpose, any reference in Sections 2 and 3 of this Chapter to a group shall include a central body and institutions affiliated to it within the meaning of Article 10 of Regulation (EU) No 575/2013 and their subsidiaries, and any reference to parent undertakings or institutions that are subject to consolidated supervision pursuant to Article 111 of Directive 2013/36/EU shall include the central body.

10. Institutions subject to direct supervision by the European Central Bank pursuant to Article 6(4) of Regulation (EU) No 1024/2013 or constituting a significant share in the financial system of a Member State shall draw up their own recovery plans in accordance with Section 2 of this Chapter and shall be the subject of individual resolution plans in accordance with Section 3.

For the purposes of this paragraph, the operations of an institution shall be considered to constitute a significant share of that Member State's financial system if any of the following conditions are met:

- (a) the total value of its assets exceeds EUR 30 000 000 000; or
- (b) the ratio of its total assets over the GDP of the Member State of establishment exceeds 20 %, unless the total value of its assets is below EUR 5 000 000 000.

11. EBA shall develop draft implementing technical standards to specify uniform formats, templates and definitions for the identification and transmission of information by competent authorities and resolution authorities to EBA for the purposes of paragraph 7, subject to the principle of proportionality.

EBA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

## Section 2

### Recovery planning

#### Article 5

##### Recovery plans

1. Member States shall ensure that each institution, that is not part of a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU, draws up and maintains a recovery plan providing for measures to be taken by the institution to restore its financial position following a significant deterioration of its financial situation. Recovery plans shall be considered to be a governance arrangement within the meaning of Article 74 of Directive 2013/36/EU.

2. Competent authorities shall ensure that the institutions update their recovery plans at least annually or after a change to the legal or organisational structure of the institution, its business or its financial situation, which could have a material effect on, or necessitates a change to, the recovery plan. Competent authorities may require institutions to update their recovery plans more frequently.

3. Recovery plans shall not assume any access to or receipt of extraordinary public financial support.

4. Recovery plans shall include, where applicable, an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities and identify those assets which would be expected to qualify as collateral.

5. Without prejudice to Article 4, Member States shall ensure that the recovery plans include the information listed in Section A of the Annex. Member States may require that additional information is included in the recovery plans.

Recovery plans shall also include possible measures which could be taken by the institution where the conditions for early intervention under Article 27 are met.

6. Member States shall require that recovery plans include appropriate conditions and procedures to ensure the timely implementation of recovery actions as well as a wide range of recovery options. Member States shall require that recovery plans contemplate a range of scenarios of severe macroeconomic and financial stress relevant to the institution's specific conditions including system-wide events and stress specific to individual legal persons and to groups.

7. EBA, in close cooperation with the European Systemic Risk Board (ESRB), shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify further the range of scenarios to be used for the purposes of paragraph 6 of this Article.

8. Member States may provide that competent authorities have the power to require an institution to maintain detailed records of financial contracts to which the institution concerned is a party.

9. The management body of the institution referred to in paragraph 1 shall assess and approve the recovery plan before submitting it to the competent authority.

10. EBA shall develop draft regulatory technical standards further specifying, without prejudice to Article 4, the information to be contained in the recovery plan referred to in paragraph 5 of this Article.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

**Article 6****Assessment of recovery plans**

1. Member States shall require institutions that are required to draw up recovery plans under Article 5(1) and Article 7(1) to submit those recovery plans to the competent authority for review. Member States shall require institutions to demonstrate to the satisfaction of the competent authority that those plans meet the criteria of paragraph 2.

2. The competent authorities shall, within six months of the submission of each plan, and after consulting the competent authorities of the Member States where significant branches are located insofar as is relevant to that branch, review it and assess the extent to which it satisfies the requirements laid down in Article 5 and the following criteria:

(a) the implementation of the arrangements proposed in the plan is reasonably likely to maintain or restore the viability and financial position of the institution or of the group, taking into account the preparatory measures that the institution has taken or has planned to take;

(b) the plan and specific options within the plan are reasonably likely to be implemented quickly and effectively in situations of financial stress and avoiding to the maximum extent possible any significant adverse effect on the financial system, including in scenarios which would lead other institutions to implement recovery plans within the same period.

3. When assessing the appropriateness of the recovery plans, the competent authority shall take into consideration the appropriateness of the institution's capital and funding structure to the level of complexity of the organisational structure and the risk profile of the institution.

4. The competent authority shall provide the recovery plan to the resolution authority. The resolution authority may examine the recovery plan with a view to identifying any actions in the recovery plan which may adversely impact the resolvability of the institution and make recommendations to the competent authority with regard to those matters.

5. Where the competent authority assesses that there are material deficiencies in the recovery plan, or material impediments to its implementation, it shall notify the institution or the parent undertaking of the group of its assessment and require the institution to submit, within two months, extendable with the authorities' approval by one month, a revised plan demonstrating how those deficiencies or impediments are addressed.

Before requiring an institution to resubmit a recovery plan the competent authority shall give the institution the opportunity to state its opinion on that requirement.

Where the competent authority does not consider the deficiencies and impediments to have been adequately addressed by the revised plan, it may direct the institution to make specific changes to the plan.

6. If the institution fails to submit a revised recovery plan, or if the competent authority determines that the revised recovery plan does not adequately remedy the deficiencies or potential impediments identified in its original assessment, and it is not possible to adequately remedy the deficiencies or impediments through a direction to make specific changes to the plan, the competent authority shall require the institution to identify within a reasonable timeframe changes it can make to its business in order to address the deficiencies in or impediments to the implementation of the recovery plan.

If the institution fails to identify such changes within the timeframe set by the competent authority, or if the competent authority assesses that the actions proposed by the institution would not adequately address the deficiencies or impediments, the competent authority may direct the institution to take any measures it considers to be necessary and proportionate, taking into account the seriousness of the deficiencies and impediments and the effect of the measures on the institution's business.

The competent authority may, without prejudice to Article 104 of Directive 2013/36/EU, direct the institution to:

- (a) reduce the risk profile of the institution, including liquidity risk;
- (b) enable timely recapitalisation measures;
- (c) review the institution's strategy and structure;
- (d) make changes to the funding strategy so as to improve the resilience of the core business lines and critical functions;
- (e) make changes to the governance structure of the institution.

The list of measures referred to in this paragraph does not preclude Member States from authorising competent authorities to take additional measures under national law.

7. When the competent authority requires an institution to take measures according to paragraph 6, its decision on the measures shall be reasoned and proportionate.

The decision shall be notified in writing to the institution and subject to a right of appeal.

8. EBA shall develop draft regulatory technical standards specifying the minimum criteria that the competent authority is to assess for the purposes of the assessment of paragraph 2 of this Article and of Article 8(1).

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

## *Article 7*

### **Group recovery plans**

1. Member States shall ensure that Union parent undertakings draw up and submit to the consolidating supervisor a group recovery plan. Group recovery plans shall consist of a recovery plan for the group headed by the Union parent undertaking as a whole. The group recovery plan shall identify measures that may be required to be implemented at the level of the Union parent undertaking and each individual subsidiary.

2. In accordance with Article 8, competent authorities may require subsidiaries to draw up and submit recovery plans on an individual basis.

3. The consolidating supervisor shall, provided that the confidentiality requirements laid down in this Directive are in place, transmit the group recovery plans to:

- (a) the relevant competent authorities referred to in Articles 115 and 116 of Directive 2013/36/EU;
- (b) the competent authorities of the Member States where significant branches are located insofar as is relevant to that branch;
- (c) the group- level resolution authority; and
- (d) the resolution authorities of subsidiaries.

4. The group recovery plan shall aim to achieve the stabilisation of the group as a whole, or any institution of the group, when it is in a situation of stress so as to address or remove the causes of the distress and restore the financial position of the group or the institution in question, at the same time taking into account the financial position of other group entities.

The group recovery plan shall include arrangements to ensure the coordination and consistency of measures to be taken at the level of the Union parent undertaking, at the level of the entities referred to in points (c) and (d) of Article 1(1) as well as measures to be taken at the level of subsidiaries and, where applicable, in accordance with Directive 2013/36/EU at the level of significant branches.

5. The group recovery plan, and any plan drawn up for an individual subsidiary, shall include the elements specified in Article 5. Those plans shall include, where applicable, arrangements for intra-group financial support adopted pursuant to an agreement for intra-group financial support that has been concluded in accordance with Chapter III.

6. Group recovery plans shall include a range of recovery options setting out actions to address those scenarios provided for in Article 5(6).

For each of the scenarios, the group recovery plan shall identify whether there are obstacles to the implementation of recovery measures within the group, including at the level of individual entities covered by the plan, and whether there are substantial practical or legal impediments to the prompt transfer of own funds or the repayment of liabilities or assets within the group.

7. The management body of the entity drawing up the group recovery plan pursuant to paragraph 1 shall assess and approve the group recovery plan before submitting it to the consolidating supervisor.

## Article 8

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

1. The consolidating supervisor shall, together with the competent authorities of subsidiaries, after consulting the competent authorities referred to in Article 116 of Directive 2013/36/EU and with the competent authorities of significant branches insofar as is relevant to the significant branch, review the group recovery plan and assess the extent to which it satisfies the requirements and criteria laid down in Articles 6 and 7. That assessment shall be made in accordance with the procedure established in Article 6 and with this Article and shall take into account the potential impact of the recovery measures on financial stability in all the Member States where the group operates.

2. The consolidating supervisor and the competent authorities of subsidiaries shall endeavour to reach a joint decision on:

(a) the review and assessment of the group recovery plan;

(b) whether a recovery plan on an individual basis shall be drawn up for institutions that are part of the group; and

(c) the application of the measures referred to in Article 6(5) and (6).

The parties shall endeavour to reach a joint decision within four months of the date of the transmission by the consolidating supervisor of the group recovery plan in accordance with Article 7(3).

EBA may, at the request of a competent authority, assist the competent authorities in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

3. In the absence of a joint decision between the competent authorities, within four months of the date of transmission, on the review and assessment of the group recovery plan or on any measures the Union parent undertaking is required to take in accordance with Article 6(5) and (6), the consolidating supervisor shall make its own decision with regard to those matters. The consolidating supervisor shall make its decision having taken into account the views and reservations of the other competent authorities expressed during the four-month period. The consolidating supervisor shall notify the decision to the Union parent undertaking and to the other competent authorities.

If, at the end of that four-month period, any of the competent authorities referred to in paragraph 2 has referred a matter mentioned in paragraph 7 to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the consolidating supervisor shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of the Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the consolidating supervisor shall apply.

4. In the absence of a joint decision between the competent authorities within four months of the date of transmission on:

- (a) whether a recovery plan on an individual basis is to be drawn up for the institutions under its jurisdiction; or
- (b) the application at subsidiary level of the measures referred to in Article 6(5) and (6);

each competent authority shall make its own decision on that matter.

If, at the end of the four-month period, any of the competent authorities concerned has referred a matter mentioned in paragraph 7 to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the competent authority of the subsidiary shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the competent authority responsible for the subsidiary at an individual level shall apply.

5. The other competent authorities which do not disagree under paragraph 4 may reach a joint decision on a group recovery plan covering group entities under their jurisdictions.

6. The joint decision referred to in paragraph 2 or 5 and the decisions taken by the competent authorities in the absence of a joint decision referred to in paragraphs 3 and 4 shall be recognised as conclusive and applied by the competent authorities in the Member States concerned.

7. Upon request of a competent authority in accordance with paragraph 3 or 4, EBA may only assist the competent authorities in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010 in relation to the assessment of recovery plans and implementation of the measures of point (a), (b) and (d) of Article 6(6).

## Article 9

### Recovery Plan Indicators

1. For the purpose of Articles 5 to 8, competent authorities shall require that each recovery plan includes a framework of indicators established by the institution which identifies the points at which appropriate actions referred to in the plan may be taken. Such indicators shall be agreed by competent authorities when making the assessment of recovery plans in accordance with Articles 6 and 8. The indicators may be of a qualitative or quantitative nature relating to the institution's financial position and shall be capable of being monitored easily. Competent authorities shall ensure that institutions put in place appropriate arrangements for the regular monitoring of the indicators.

Notwithstanding the first subparagraph, an institution may:

- (a) take action under its recovery plan where the relevant indicator has not been met, but where the management body of the institution considers it to be appropriate in the circumstances; or
- (b) refrain from taking such an action where the management body of the institution does not consider it to be appropriate in the circumstances of the situation.

A decision to take an action referred to in the recovery plan or a decision to refrain from taking such an action shall be notified to the competent authority without delay.

2. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify the minimum list of qualitative and quantitative indicators as referred to in paragraph 1.

### Section 3

#### **Resolution planning**

##### *Article 10*

###### **Resolution plans**

1. The resolution authority, after consulting the competent authority and after consulting the resolution authorities of the jurisdictions in which any significant branches are located insofar as is relevant to the significant branch shall draw up a resolution plan for each institution that is not part of a group subject to consolidated supervision pursuant to Articles 111 and 112 of Directive 2013/36/EU. The resolution plan shall provide for the resolution actions which the resolution authority may take where the institution meets the conditions for resolution. Information referred to paragraph 7(a) shall be disclosed to the institution concerned.

2. When drawing up the resolution plan, the resolution authority shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed, according to Chapter II of this Title.

3. The resolution plan shall take into consideration relevant scenarios including that the event of failure may be idiosyncratic or may occur at a time of broader financial instability or system wide events. The resolution plan shall not assume any of the following:

- (a) any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 100;
- (b) any central bank emergency liquidity assistance; or
- (c) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

4. The resolution plan shall include an analysis of how and when an institution may apply, in the conditions addressed by the plan, for the use of central bank facilities and shall identify those assets which would be expected to qualify as collateral.

5. Resolution authorities may require institutions to assist them in the drawing up and updating of the plans.

6. Resolution plans shall be reviewed, and where appropriate updated, at least annually and after any material changes to the legal or organisational structure of the institution or to its business or its financial position that could have a material effect on the effectiveness of the plan or otherwise necessitates a revision of the resolution plan.

For the purpose of the revision or update of the resolution plans referred to in the first subparagraph, the institutions and the competent authorities shall promptly communicate to the resolution authorities any change that necessitates such a revision or update.

7. Without prejudice to Article 4, the resolution plan shall set out options for applying the resolution tools and resolution powers referred to in Title IV to the institution. It shall include, quantified whenever appropriate and possible:

- (a) a summary of the key elements of the plan;
- (b) a summary of the material changes to the institution that have occurred after the latest resolution information was filed;
- (c) a demonstration of how critical functions and core business lines could be legally and economically separated, to the extent necessary, from other functions so as to ensure continuity upon the failure of the institution;
- (d) an estimation of the timeframe for executing each material aspect of the plan;
- (e) a detailed description of the assessment of resolvability carried out in accordance with paragraph 2 of this Article and with Article 15;
- (f) a description of any measures required pursuant to Article 17 to address or remove impediments to resolvability identified as a result of the assessment carried out in accordance with Article 15;
- (g) a description of the processes for determining the value and marketability of the critical functions, core business lines and assets of the institution;
- (h) a detailed description of the arrangements for ensuring that the information required pursuant to Article 11 is up to date and at the disposal of the resolution authorities at all times;
- (i) an explanation by the resolution authority as to how the resolution options could be financed without the assumption of any of the following:
  - (i) any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 100;
  - (ii) any central bank emergency liquidity assistance; or
  - (iii) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms;
- (j) a detailed description of the different resolution strategies that could be applied according to the different possible scenarios and the applicable timescales;
- (k) a description of critical interdependencies;
- (l) a description of options for preserving access to payments and clearing services and other infrastructures and, an assessment of the portability of client positions;
- (m) an analysis of the impact of the plan on the employees of the institution, including an assessment of any associated costs, and a description of envisaged procedures to consult staff during the resolution process, taking into account national systems for dialogue with social partners where applicable;
- (n) a plan for communicating with the media and the public;

- (o) the minimum requirement for own funds and eligible liabilities required pursuant to Article 45(1) and a deadline to reach that level, where applicable;
- (p) where applicable, the minimum requirement for own funds and contractual bail-in instruments pursuant to Article 45(1), and a deadline to reach that level, where applicable;
- (q) a description of essential operations and systems for maintaining the continuous functioning of the institution's operational processes;
- (r) where applicable, any opinion expressed by the institution in relation to the resolution plan.

8. Member States shall ensure that resolution authorities have the power to require an institution and an entity referred to in point (b), (c) or (d) of Article 1(1) to maintain detailed records of financial contracts to which it is a party. The resolution authority may specify a time-limit within which the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is to be capable of producing those records. The same time-limit shall apply to all institutions and all entities referred to in point (b), (c) and (d) of Article 1(1) under its jurisdiction. The resolution authority may decide to set different time-limits for different types of financial contracts as referred to in Article 2(100). This paragraph shall not affect the information gathering powers of the competent authority.

9. EBA, after consulting the ESRB, shall develop draft regulatory technical standards further specifying the contents of the resolution plan.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### *Article 11*

#### **Information for the purpose of resolution plans and cooperation from the institution**

1. Member States shall ensure that resolution authorities have the power to require institutions to:

- (a) cooperate as much as necessary in the drawing up of resolution plans;
- (b) provide them, either directly or through the competent authority, with all of the information necessary to draw up and implement resolution plans.

In particular the resolution authorities shall have the power to require, among other information, the information and analysis specified in Section B of the Annex.

2. Competent authorities in the relevant Member States shall cooperate with resolution authorities in order to verify whether some or all of the information referred to in paragraph 1 is already available. Where such information is available, competent authorities shall provide that information to the resolution authorities.

3. EBA shall develop draft implementing technical standards to specify procedures and a minimum set of standard forms and templates for the provision of information under this Article.

EBA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

*Article 12***Group resolution plans**

1. Member States shall ensure that group-level resolution authorities, together with the resolution authorities of subsidiaries and after consulting the resolution authorities of significant branches insofar as is relevant to the significant branch, draw up group resolution plans. Group resolution plans shall include a plan for resolution of the group headed by the Union parent undertaking as a whole, either through resolution at the level of the Union parent undertaking or through break up and resolution of the subsidiaries. The group resolution plan shall identify measures for the resolution of:

- (a) the Union parent undertaking;
- (b) the subsidiaries that are part of the group and that are located in the Union;
- (c) the entities referred to in points (c) and (d) of Article 1(1); and
- (d) subject to Title VI, the subsidiaries that are part of the group and that are located outside the Union.

2. The group resolution plan shall be drawn up on the basis of the information provided pursuant to Article 11.

3. The group resolution plan shall:

- (a) set out the resolution actions to be taken in relation to group entities, both through resolution actions in respect of the entities referred to in points (b), (c) and (d) of Article 1(1), the parent undertaking and subsidiary institutions and through coordinated resolution actions in respect of subsidiary institutions, in the scenarios provided for in Article 10(3);
- (b) examine the extent to which the resolution tools and powers could be applied and exercised in a coordinated way to group entities established in the Union, including measures to facilitate the purchase by a third party of the group as a whole, or separate business lines or activities that are delivered by a number of group entities, or particular group entities, and identify any potential impediments to a coordinated resolution;
- (c) where a group includes entities incorporated in third countries, identify appropriate arrangements for cooperation and coordination with the relevant authorities of those third countries and the implications for resolution within the Union;
- (d) identify measures, including the legal and economic separation of particular functions or business lines, that are necessary to facilitate group resolution when the conditions for resolution are met;
- (e) set out any additional actions, not referred to in this Directive, which the group-level resolution authority intends to take in relation to the resolution of the group;
- (f) identify how the group resolution actions could be financed and, where the financing arrangement would be required, set out principles for sharing responsibility for that financing between sources of funding in different Member States. The plan shall not assume any of the following:
  - (i) any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 100;
  - (ii) any central bank emergency liquidity assistance; or

(iii) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

Those principles shall be set out on the basis of equitable and balanced criteria and shall take into account, in particular Article 107(5) and the impact on financial stability in all Member States concerned.

4. The assessment of the resolvability of the group under Article 16 shall be carried out at the same time as the drawing up and updating of the group resolution plan in accordance with this Article. A detailed description of the assessment of resolvability carried out in accordance with Article 16 shall be included in the group resolution plan.

5. The group resolution plan shall not have a disproportionate impact on any Member State.

6. EBA shall, after consulting the ESRB, develop draft regulatory technical standards specifying the contents of group resolution plans, by taking into account the diversity of business models of groups in the internal market.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### Article 13

##### **Requirement and procedure for group resolution plans**

1. Union parent undertakings shall submit the information that may be required in accordance with Article 11 to the group-level resolution authority. That information shall concern the Union parent undertaking and to the extent required each of the group entities including entities referred to in points (c) and (d) of Article 1(1).

The group-level resolution authority shall, provided that the confidentiality requirements laid down in this Directive are in place, transmit the information provided in accordance with this paragraph to:

(a) EBA;

(b) the resolution authorities of subsidiaries;

(c) the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch;

(d) the relevant competent authorities referred to in Articles 115 and 116 of Directive 2013/36/EU; and

(e) the resolution authorities of the Member States where the entities referred to in points (c) and (d) of Article 1(1) are established.

The information provided by the group-level resolution authority to the resolution authorities and competent authorities of subsidiaries, resolution authorities of the jurisdiction in which any significant branches are located, and to the relevant competent authorities referred to in Articles 115 and 116 of Directive 2013/36/EU, shall include at a minimum all information that is relevant to the subsidiary or significant branch. The information provided to EBA shall include all information that is relevant to the role of EBA in relation to the group resolution plans. In the case of information relating to third-country subsidiaries, the group-level resolution authority shall not be obliged to transmit that information without the consent of the relevant third-country supervisory authority or resolution authority.

2. Member States shall ensure that group-level resolution authorities, acting jointly with the resolution authorities referred to in the second subparagraph of paragraph 1 of this Article, in resolution colleges and after consulting the relevant competent authorities, including the competent authorities of the jurisdictions of Member States in which any significant branches are located, draw up and maintain group resolution plans. Group-level resolution authorities may, at their discretion, and subject to them meeting the confidentiality requirements laid down in Article 98 of this Directive, involve in the drawing up and maintenance of group resolution plans third-country resolution authorities of jurisdictions in which the group has established subsidiaries or financial holding companies or significant branches as referred to in Article 51 of Directive 2013/36/EU.

3. Member States shall ensure that group resolution plans are reviewed, and where appropriate updated, at least annually, and after any change to the legal or organisational structure, to the business or to the financial position of the group including any group entity, that could have a material effect on or require a change to the plan.

4. The adoption of the group resolution plan shall take the form of a joint decision of the group-level resolution authority and the resolution authorities of subsidiaries.

Those resolution authorities shall make a joint decision within four months of the date of the transmission by the group-level resolution authority of the information referred to in the second subparagraph of paragraph 1.

EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

5. In the absence of a joint decision between the resolution authorities within four months, the group-level resolution authority shall make its own decision on the group resolution plan. The decision shall be fully reasoned and shall take into account the views and reservations of other resolution authorities. The decision shall be provided to the Union parent undertaking by the group-level resolution authority.

Subject to paragraph 9 of this Article, if, at the end of the four-month period, any resolution authority has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the group-level resolution authority shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the group-level resolution authority shall apply.

6. In the absence of a joint decision between the resolution authorities within four months, each resolution authority responsible for a subsidiary shall make its own decision and shall draw up and maintain a resolution plan for the entities under its jurisdiction. Each of the individual decisions shall be fully reasoned, shall set out the reasons disagreement with the proposed group resolution plan and shall take into account the views and reservations of the other competent authorities and resolution authorities. Each resolution authority shall notify its decision to the other members of the resolution college.

Subject to paragraph 9 of this Article, if, at the end of the four-month period, any resolution authority has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authority concerned shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the resolution authority of the subsidiary shall apply.

7. The other resolution authorities which do not disagree under paragraph 6 may reach a joint decision on a group resolution plan covering group entities under their jurisdictions.

8. The joint decisions referred to in paragraphs 4 and 7 and the decisions taken by the resolution authorities in the absence of a joint decision referred to in paragraphs 5 and 6 shall be recognised as conclusive and applied by the other resolution authorities concerned.

9. In accordance with paragraphs 5 and 6 of this Article, upon request of a resolution authority, EBA may assist the resolution authorities in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010 unless any resolution authority concerned assesses that the subject matter under disagreement may in any way impinge on its Member States' fiscal responsibilities.

10. Where joint decisions are taken pursuant to paragraphs 4 and 7 and where a resolution authority assesses under paragraph 9 that the subject matter of a disagreement regarding group resolution plans impinges on the fiscal responsibilities of its Member State, the group-level resolution authority shall initiate a reassessment of the group resolution plan, including the minimum requirement for own funds and eligible liabilities.

#### *Article 14*

##### **Transmission of resolution plans to the competent authorities**

1. The resolution authority shall transmit the resolution plans and any changes thereto to the relevant competent authorities.

2. The group-level resolution authority shall transmit group resolution plans and any changes thereto to the relevant competent authorities.

#### **CHAPTER II**

##### ***Resolvability***

#### *Article 15*

##### **Assessment of resolvability for institutions**

1. Member States shall ensure that, after the resolution authority has consulted the competent authority and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, it assesses the extent to which an institution which is not part of a group is resolvable without the assumption of any of the following:

(a) any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 100;

(b) any central bank emergency liquidity assistance;

(c) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

An institution shall be deemed to be resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system-wide events, of the Member State in which the institution is established, or other Member States or the Union and with a view to ensuring the continuity of critical functions carried out by the institution. The resolution authorities shall notify EBA in a timely manner whenever an institution is deemed not to be resolvable.

2. For the purposes of the assessment of resolvability referred to in paragraph 1, the resolution authority shall, as a minimum, examine the matters specified in Section C of the Annex.

3. The resolvability assessment under this Article shall be made by the resolution authority at the same time as and for the purposes of the drawing up and updating of the resolution plan in accordance with Article 10.

4. EBA, after consulting the ESRB, shall develop draft regulatory technical standards to specify the matters and criteria for the assessment of the resolvability of institutions or groups provided for in paragraph 2 of this Article and in Article 16.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the draft regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### *Article 16*

##### **Assessment of resolvability for groups**

1. Member States shall ensure that group-level resolution authorities, together with the resolution authorities of subsidiaries, after consulting the consolidating supervisor and the competent authorities of such subsidiaries, and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, assess the extent to which groups are resolvable without the assumption of any of the following:

(a) any extraordinary public financial support besides the use of the financing arrangements established in accordance with Article 100;

(b) any central bank emergency liquidity assistance;

(c) any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms.

A group shall be deemed to be resolvable if it is feasible and credible for the resolution authorities to either wind up group entities under normal insolvency proceedings or to resolve group entities by applying resolution tools and powers to group entities while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system wide events, of the Member States in which group entities are established, or other Member States or the Union and with a view to ensuring the continuity of critical functions carried out by the group entities, where they can be easily separated in a timely manner or by other means. Group-level resolution authorities shall notify EBA in a timely manner whenever a group is deemed not to be resolvable.

The assessment of group resolvability shall be taken into consideration by the resolution colleges referred to in Article 88.

2. For the purposes of the assessment of group resolvability, resolution authorities shall, as a minimum, examine the matters specified in Section C of the Annex.

3. The assessment of group resolvability under this Article shall be made at the same time as, and for the purposes of drawing up and updating of the group resolution plans in accordance with Article 12. The assessment shall be made under the decision-making procedure laid down in Article 13.

## Article 17

### Powers to address or remove impediments to resolvability

1. Member States shall ensure that when, pursuant to an assessment of resolvability for an institution carried out in accordance with Articles 15 and 16, a resolution authority after consulting the competent authority determines that there are substantive impediments to the resolvability of that institution, the resolution authority shall notify in writing that determination to the institution concerned, to the competent authority and to the resolution authorities of the jurisdictions in which significant branches are located.

2. The requirement for resolution authorities to draw up resolution plans and for the relevant resolution authorities to reach a joint decision on group resolution plans in Article 10(1) and Article 13(4) respectively shall be suspended following the notification referred to in paragraph 1 of this Article until the measures to remove the substantive impediments to resolvability have been accepted by the resolution authority pursuant to paragraph 3 of this Article or decided pursuant to paragraph 4 of this Article.

3. Within four months of the date of receipt of a notification made in accordance with paragraph 1, the institution shall propose to the resolution authority possible measures to address or remove the substantive impediments identified in the notification. The resolution authority, after consulting the competent authority, shall assess whether those measures effectively address or remove the substantive impediments in question.

4. Where the resolution authority assesses that the measures proposed by an institution in accordance with paragraph 3 do not effectively reduce or remove the impediments in question, it shall, either directly or indirectly through the competent authority, require the institution to take alternative measures that may achieve that objective, and notify in writing those measures to the institution, which shall propose within one month a plan to comply with them.

In identifying alternative measures, the resolution authority shall demonstrate how the measures proposed by the institution would not be able to remove the impediments to resolvability and how the alternative measures proposed are proportionate in removing them. The resolution authority shall take into account the threat to financial stability of those impediments to resolvability and the effect of the measures on the business of the institution, its stability and its ability to contribute to the economy.

5. For the purposes of paragraph 4, resolution authorities shall have the power to take any of the following measures:

- (a) require the institution to revise any intragroup financing agreements or review the absence thereof, or draw up service agreements, whether intra-group or with third parties, to cover the provision of critical functions;
- (b) require the institution to limit its maximum individual and aggregate exposures;
- (c) impose specific or regular additional information requirements relevant for resolution purposes;
- (d) require the institution to divest specific assets;
- (e) require the institution to limit or cease specific existing or proposed activities;
- (f) restrict or prevent the development of new or existing business lines or sale of new or existing products;
- (g) require changes to legal or operational structures of the institution or any group entity, either directly or indirectly under its control, so as to reduce complexity in order to ensure that critical functions may be legally and operationally separated from other functions through the application of the resolution tools;

- (h) require an institution or a parent undertaking to set up a parent financial holding company in a Member State or a Union parent financial holding company;
- (i) require an institution or entity referred to in point (b), (c) or (d) of Article 1(1) to issue eligible liabilities to meet the requirements of Article 45;
- (j) require an institution or entity referred to in point(b), (c) or (d) of Article 1(1), to take other steps to meet the minimum requirement for own funds and eligible liabilities under Article 45, including in particular to attempt to renegotiate any eligible liability, additional Tier 1 instrument or Tier 2 instrument it has issued, with a view to ensuring that any decision of the resolution authority to write down or convert that liability or instrument would be effected under the law of the jurisdiction governing that liability or instrument; and
- (k) where an institution is the subsidiary of a mixed-activity holding company, requiring that the mixed-activity holding company set up a separate financial holding company to control the institution, if necessary in order to facilitate the resolution of the institution and to avoid the application of the resolution tools and powers referred to in Title IV having an adverse effect on the non-financial part of the group.

6. A decision made pursuant to paragraph 1 or 4 shall meet the following requirements:

- (a) it shall be supported by reasons for the assessment or determination in question;
- (b) it shall indicate how that assessment or determination complies with the requirement for proportionate application laid down in paragraph 4; and
- (c) it shall be subject to a right of appeal.

7. Before identifying any measure referred to in paragraph 4, the resolution authority, after consulting the competent authority and, if appropriate, the designated national macroprudential authority, shall duly consider the potential effect of those measures on the particular institution, on the internal market for financial services, on the financial stability in other Member States and Union as a whole.

8. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify further details on the measures provided for in paragraph 5 and the circumstances in which each measure may be applied.

#### Article 18

##### **Powers to address or remove impediments to resolvability: group treatment**

- 1. The group-level resolution authority together with the resolution authorities of subsidiaries, after consulting the supervisory college and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch, shall consider the assessment required by Article 16 within the resolution college and shall take all reasonable steps to reach a joint decision on the application of measures identified in accordance with Article 17(4) in relation to all institutions that are part of the group.
- 2. The group-level resolution authority, in cooperation with the consolidating supervisor and EBA in accordance with Article 25(1) of Regulation (EU) No 1093/2010, shall prepare and submit a report to the Union parent undertaking, to the resolution authorities of subsidiaries, which will provide it to the subsidiaries under their supervision, and to the resolution authorities of jurisdictions in which significant branches are located. The report shall be prepared after consulting the competent authorities, and shall analyse the substantive impediments to the effective application of the resolution tools and the exercising of the resolution powers in relation to the group. The report shall consider the impact on the institution's business model and recommend any proportionate and targeted measures that, in the authority's view, are necessary or appropriate to remove those impediments.

3. Within four months of the date of receipt of the report, the Union parent undertaking may submit observations and propose to the group-level resolution authority alternative measures to remedy the impediments identified in the report.

4. The group-level resolution authority shall communicate any measure proposed by the Union parent undertaking to the consolidating supervisor, EBA, the resolution authorities of the subsidiaries and the resolution authorities of the jurisdictions in which significant branches are located insofar as is relevant to the significant branch. The group-level resolution authorities and the resolution authorities of the subsidiaries, after consulting the competent authorities and the resolution authorities of jurisdictions in which significant branches are located, shall do everything within their power to reach a joint decision within the resolution college regarding the identification of the material impediments, and if necessary, the assessment of the measures proposed by the Union parent undertaking and the measures required by the authorities in order to address or remove the impediments, which shall take into account the potential impact of the measures in all the Member States where the group operates.

5. The joint decision shall be reached within four months of submission of any observations by the Union parent undertaking or at the expiry of the four-month period referred to in paragraph 3, whichever the earlier. It shall be reasoned and set out in a document which shall be provided by the group-level resolution authority to the Union parent undertaking.

EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

6. In the absence of a joint decision within the period referred to in paragraph 5, the group-level resolution authority shall make its own decision on the appropriate measures to be taken in accordance with Article 17(4) at the group level.

The decision shall be fully reasoned and shall take into account the views and reservations of other resolution authorities. The decision shall be provided to the Union parent undertaking by the group-level resolution authority.

If, at the end of the four-month period, any resolution authority has referred a matter mentioned in paragraph 9 of this Article to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the group-level resolution authority shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the group-level resolution authority shall apply.

7. In the absence of a joint decision, the resolution authorities of subsidiaries shall make their own decisions on the appropriate measures to be taken by subsidiaries at individual level in accordance with Article 17(4). The decision shall be fully reasoned and shall take into account the views and reservations of the other resolution authorities. The decision shall be provided to the subsidiary concerned and to the group-level resolution authority.

If, at the end of the four-month period, any resolution authority has referred a matter mentioned in paragraph 9 of this Article to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authority of the subsidiary shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the resolution authority of the subsidiary shall apply.

8. The joint decision referred to in paragraph 5 and the decisions taken by the resolution authorities in the absence of a joint decision referred to in paragraph 6 shall be recognised as conclusive and applied by the other resolution authorities concerned.

9. In the absence of a joint decision on the taking of any measures referred to in point (g), (h) or (k) of Article 17(5), EBA may, upon the request of a resolution authority in accordance with paragraph 6 or 7 of this Article, assist the resolution authorities in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010.

### CHAPTER III

#### *Intra group financial support*

##### Article 19

###### **Group financial support agreement**

1. Member States shall ensure that a parent institution in a Member State, a Union parent institution, or an entity referred to in point (c) or (d) of Article 1(1) and its subsidiaries in other Member States or third countries that are institutions or financial institutions covered by the consolidated supervision of the parent undertaking, may enter into an agreement to provide financial support to any other party to the agreement that meets the conditions for early intervention pursuant to Article 27, provided that the conditions laid down in this Chapter are also met.

2. This Chapter does not apply to intra-group financial arrangements including funding arrangements and the operation of centralised funding arrangements provided that none of the parties to such arrangements meets the conditions for early intervention.

3. A group financial support agreement shall not constitute a prerequisite:

(a) to provide group financial support to any group entity that experiences financial difficulties if the institution decides to do so, on a case-by-case basis and according to the group policies if it does not represent a risk for the whole group; or

(b) to operate in a Member State.

4. Member States shall remove any legal impediment in national law to intra-group financial support transactions that are undertaken in accordance with this Chapter, provided that nothing in this Chapter shall prevent Member States from imposing limitations on intra-group transactions in connection with national laws exercising the options provided for in Regulation (EU) No 575/2013, transposing Directive 2013/36/EU or requiring the separation of parts of a group or activities carried on within a group for reasons of financial stability.

5. The group financial support agreement may:

(a) cover one or more subsidiaries of the group, and may provide for financial support from the parent undertaking to subsidiaries, from subsidiaries to the parent undertaking, between subsidiaries of the group that are party to the agreement, or any combination of those entities;

(b) provide for financial support in the form of a loan, the provision of guarantees, the provision of assets for use as collateral, or any combination of those forms of financial support, in one or more transactions, including between the beneficiary of the support and a third party.

6. Where, in accordance with the terms of the group financial support agreement, a group entity agrees to provide financial support to another group entity, the agreement may include a reciprocal agreement by the group entity receiving the support to provide financial support to the group entity providing the support.

7. The group financial support agreement shall specify the principles for the calculation of the consideration, for any transaction made under it. Those principles shall include a requirement that the consideration shall be set at the time of the provision of financial support. The agreement, including the principles for calculation of the consideration for the provision of financial support and the other terms of the agreement, shall comply with the following principles:

- (a) each party must be acting freely in entering into the agreement;
- (b) in entering into the agreement and in determining the consideration for the provision of financial support, each party must be acting in its own best interests which may take account of any direct or any indirect benefit that may accrue to a party as a result of provision of the financial support;
- (c) each party providing financial support must have full disclosure of relevant information from any party receiving financial support prior to determination of the consideration for the provision of financial support and prior to any decision to provide financial support;
- (d) the consideration for the provision of financial support may take account of information in the possession of the party providing financial support based on it being in the same group as the party receiving financial support and which is not available to the market; and
- (e) the principles for the calculation of the consideration for the provision of financial support are not obliged to take account of any anticipated temporary impact on market prices arising from events external to the group.

8. The group financial support agreement may only be concluded if, at the time the proposed agreement is made, in the opinion of their respective competent authorities, none of the parties meets the conditions for early intervention.

9. Member States shall ensure that any right, claim or action arising from the group financial support agreement may be exercised only by the parties to the agreement, with the exclusion of third parties.

#### Article 20

##### **Review of proposed agreement by competent authorities and mediation**

1. The Union parent institution shall submit to the consolidating supervisor an application for authorisation of any proposed group financial support agreement proposed pursuant to Article 19. The application shall contain the text of the proposed agreement and identify the group entities that propose to be parties.

2. The consolidating supervisor shall forward without delay the application to the competent authorities of each subsidiary that proposes to be a party to the agreement, with a view to reaching a joint decision.

3. The consolidating supervisor shall, in accordance with the procedure set out in paragraphs 5 and 6 of this Article, grant the authorisation if the terms of the proposed agreement are consistent with the conditions for financial support set out in Article 23.

4. The consolidating supervisor may, in accordance with the procedure set out in paragraphs 5 and 6 of this Article, prohibit the conclusion of the proposed agreement if it is considered to be inconsistent with the conditions for financial support set out in Article 23.

5. The competent authorities shall do everything within their power to reach a joint decision, taking into account the potential impact, including any fiscal consequences, of the execution of the agreement in all the Member States where the group operates, on whether the terms of the proposed agreement are consistent with the conditions for financial support laid down in Article 23 within four months of the date of receipt of the application by the consolidating supervisor. The joint decision shall be set out in a document containing the fully reasoned decision, which shall be provided to the applicant by the consolidating supervisor.

EBA may at the request of a competent authority assist the competent authorities in reaching an agreement in accordance with Article 31 of Regulation (EU) No 1093/2010.

6. In the absence of a joint decision between the competent authorities within four months, the consolidating supervisor shall make its own decision on the application. The decision shall be set out in a document containing the full reasoning and shall take into account the views and reservations of the other competent authorities expressed during the four-month period. The consolidating supervisor shall notify its decision to the applicant and the other competent authorities.

7. If, at the end of the four-month period, any of the competent authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the consolidating supervisor shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached.

#### Article 21

##### **Approval of proposed agreement by shareholders**

1. Member States shall require that any proposed agreement that has been authorised by the competent authorities be submitted for approval to the shareholders of every group entity that proposes to enter into the agreement. In such a case, the agreement shall be valid only in respect of those parties whose shareholders have approved the agreement in accordance with paragraph 2.

2. A group financial support agreement shall be valid in respect of a group entity only if its shareholders have authorised the management body of that group entity to make a decision that the group entity shall provide or receive financial support in accordance with the terms of the agreement and in accordance with the conditions laid down in this Chapter and that shareholder authorisation has not been revoked.

3. The management body of each entity that is party to an agreement shall report each year to the shareholders on the performance of the agreement, and on the implementation of any decision taken pursuant to the agreement.

#### Article 22

##### **Transmission of the group financial support agreements to resolution authorities**

Competent authorities shall transmit to the relevant resolution authorities the group financial support agreements they authorised and any changes thereto.

#### Article 23

##### **Conditions for group financial support**

1. Financial support by a group entity in accordance with Article 19 may only be provided if all the following conditions are met:

- (a) there is a reasonable prospect that the support provided significantly redresses the financial difficulties of the group entity receiving the support;
- (b) the provision of financial support has the objective of preserving or restoring the financial stability of the group as a whole or any of the entities of the group and is in the interests of the group entity providing the support;
- (c) the financial support is provided on terms, including consideration in accordance with Article 19(7);

- (d) there is a reasonable prospect, on the basis of the information available to the management body of the group entity providing financial support at the time when the decision to grant financial support is taken, that the consideration for the support will be paid and, if the support is given in the form of a loan, that the loan will be reimbursed, by the group entity receiving the support. If the support is given in the form of a guarantee or any form of security, the same condition shall apply to the liability arising for the recipient if the guarantee or the security is enforced;
- (e) the provision of the financial support would not jeopardise the liquidity or solvency of the group entity providing the support;
- (f) the provision of the financial support would not create a threat to financial stability, in particular in the Member State of the group entity providing support;
- (g) the group entity providing the support complies at the time the support is provided with the requirements of Directive 2013/36/EU relating to capital or liquidity and any requirements imposed pursuant to Article 104(2) of Directive 2013/36/EU and the provision of the financial support shall not cause the group entity to infringe those requirements, unless authorised by the competent authority responsible for the supervision on an individual basis of the entity providing the support;
- (h) the group entity providing the support complies, at the time when the support is provided, with the requirements relating to large exposures laid down in Regulation (EU) No 575/2013 and in Directive 2013/36/EU including any national legislation exercising the options provided therein, and the provision of the financial support shall not cause the group entity to infringe those requirements, unless authorised by the competent authority responsible for the supervision on an individual basis of the group entity providing the support;
- (i) the provision of the financial support would not undermine the resolvability of the group entity providing the support.

2. EBA shall develop draft regulatory technical standards to specify the conditions laid down in points (a), (c), (e) and (i) of paragraph 1.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

3. EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote convergence in practices to specify the conditions laid down in points (b), (d), (f), (g) and (h) of paragraph 1 of this Article.

#### Article 24

##### **Decision to provide financial support**

The decision to provide group financial support in accordance with the agreement shall be taken by the management body of the group entity providing financial support. That decision shall be reasoned and shall indicate the objective of the proposed financial support. In particular, the decision shall indicate how the provision of the financial support complies with the conditions laid down in Article 23(1). The decision to accept group financial support in accordance with the agreement shall be taken by the management body of the group entity receiving financial support.

#### Article 25

##### **Right of opposition of competent authorities**

1. Before providing support in accordance with a group financial support agreement, the management body of a group entity that intends to provide financial support shall notify:

- (a) its competent authority;

- (b) where different from authorities in points (a) and (c), where applicable, the consolidating supervisor;
- (c) where different from points (a) and (b), the competent authority of the group entity receiving the financial support; and
- (d) EBA.

The notification shall include the reasoned decision of the management body in accordance with Article 24 and details of the proposed financial support including a copy of the group financial support agreement.

2. Within five business days from the date of receipt of a complete notification, the competent authority of the group entity providing financial support may agree with the provision of financial support, or may prohibit or restrict it if it assesses that the conditions for group financial support laid down in Article 23 have not been met. A decision of the competent authority to prohibit or restrict the financial support shall be reasoned.

3. The decision of the competent authority to agree, prohibit or restrict the financial support shall be immediately notified to:

- (a) the consolidating supervisor;
- (b) the competent authority of the group entity receiving the support; and
- (c) EBA.

The consolidating supervisor shall immediately inform other members of the supervisory college and the members of the resolution college.

4. Where the consolidating supervisor or the competent authority responsible for the group entity receiving support has objections regarding the decision to prohibit or restrict the financial support, they may within two days refer the matter to EBA and request its assistance in accordance with Article 31 of Regulation (EU) No 1093/2010.

5. If the competent authority does not prohibit or restrict the financial support within the period indicated in paragraph 2, or has agreed before the end of that period to that support, financial support may be provided in accordance with the terms submitted to the competent authority.

6. The decision of the management body of the institution to provide financial support shall be transmitted to:

- (a) the competent authority;
- (b) where different from authorities in points (a) and (c), and where applicable, the consolidating supervisor;
- (c) where different from points (a) and (b), the competent authority of the group entity receiving the financial support; and
- (d) EBA.

The consolidating supervisor shall immediately inform the other members of the supervisory college and the members of the resolution college.

7. If the competent authority restricts or prohibits group financing support pursuant to paragraph 2 of this Article and where the group recovery plan in accordance with Article 7(5) makes reference to intra-group financial support, the competent authority of the group entity in relation to whom the support is restricted or prohibited may request the consolidating supervisor to initiate a reassessment of the group recovery plan pursuant to Article 8 or, where a recovery plan is drawn up on an individual basis, request the group entity to submit a revised recovery plan.

*Article 26***Disclosure**

1. Member States shall ensure that group entities make public whether or not they have entered into a group financial support agreement pursuant to Article 19 and make public a description of the general terms of any such agreement and the names of the group entities that are party to it and update that information at least annually.

Articles 431 to 434 of Regulation (EU) No 575/2013 shall apply.

2. EBA shall develop draft implementing technical standards to specify the form and content of the description referred to in paragraph 1.

EBA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the draft implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

**TITLE III****EARLY INTERVENTION***Article 27***Early intervention measures**

1. Where an institution infringes or, due, inter alia, to a rapidly deteriorating financial condition, including deteriorating liquidity situation, increasing level of leverage, non-performing loans or concentration of exposures, as assessed on the basis of a set of triggers, which may include the institution's own funds requirement plus 1,5 percentage points, is likely in the near future to infringe the requirements of Regulation (EU) No 575/2013, Directive 2013/36/EU, Title II of Directive 2014/65/EU or any of Articles 3 to 7, 14 to 17, and 24, 25 and 26 of Regulation (EU) No 600/2014, Member States shall ensure that competent authorities have at their disposal, without prejudice to the measures referred to in Article 104 of Directive 2013/36/EU where applicable, at least the following measures:

- (a) require the management body of the institution to implement one or more of the arrangements or measures set out in the recovery plan or in accordance with Article 5(2) to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan and implement one or more of the arrangements or measures set out in the updated plan within a specific timeframe and in order to ensure that the conditions referred to in the introductory phrase no longer apply;
- (b) require the management body of the institution to examine the situation, identify measures to overcome any problems identified and draw up an action programme to overcome those problems and a timetable for its implementation;
- (c) require the management body of the institution to convene, or if the management body fails to comply with that requirement convene directly, a meeting of shareholders of the institution, and in both cases set the agenda and require certain decisions to be considered for adoption by the shareholders;
- (d) require one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of Directive 2013/36/EU or Article 9 of Directive 2014/65/EU;
- (e) require the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan, where applicable;

- (f) require changes to the institution's business strategy;
- (g) require changes to the legal or operational structures of the institution; and
- (h) acquire, including through on-site inspections and provide to the resolution authority, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 36.
2. Member States shall ensure that the competent authorities shall notify the resolution authorities without delay upon determining that the conditions laid down in paragraph 1 have been met in relation to an institution and that the powers of the resolution authorities include the power to require the institution to contact potential purchasers in order to prepare for the resolution of the institution, subject to the conditions laid down in Article 39(2) and the confidentiality provisions laid down in Article 84.
3. For each of the measures referred to in paragraph 1, competent authorities shall set an appropriate deadline for completion, and to enable the competent authority to evaluate the effectiveness of the measure.
4. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the consistent application of the trigger for use of the measures referred to in paragraph 1 of this Article.
5. Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 4, EBA may develop draft regulatory technical standards in order to specify a minimum set of triggers for the use of the measures referred to in paragraph 1.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

## Article 28

### **Removal of senior management and management body**

Where there is a significant deterioration in the financial situation of an institution or where there are serious infringements of law, of regulations or of the statutes of the institution, or serious administrative irregularities, and other measures taken in accordance with Article 27 are not sufficient to reverse that deterioration, Member States shall ensure that competent authorities may require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals. The appointment of the new senior management or management body shall be done in accordance with national and Union law and be subject to the approval or consent of the competent authority.

## Article 29

### **Temporary administrator**

1. Where replacement of the senior management or management body as referred to in Article 28 is deemed to be insufficient by the competent authority to remedy the situation, Member States shall ensure that competent authorities may appoint one or more temporary administrators to the institution. Competent authorities may, based on what is proportionate in the circumstances, appoint any temporary administrator either to replace the management body of the institution temporarily or to work temporarily with the management body of the institution and the competent authority shall specify its decision at the time of appointment. If the competent authority appoints a temporary administrator to work with the management body of the institution, the competent authority shall further specify at the time of such an appointment the role, duties and powers of the temporary administrator and any requirements for the management body of the institution to consult or to obtain the consent of the temporary administrator prior to taking specific decisions or actions. The competent authority shall be required to make public the appointment of any temporary administrator except where the temporary administrator does not have the power to represent the institution. Member States shall further ensure that any temporary administrator has the qualifications, ability and knowledge required to carry out his or her functions and is free of any conflict of interests.

2. The competent authority shall specify the powers of the temporary administrator at the time of the appointment of the temporary administrator based on what is proportionate in the circumstances. Such powers may include some or all of the powers of the management body of the institution under the statutes of the institution and under national law, including the power to exercise some or all of the administrative functions of the management body of the institution. The powers of the temporary administrator in relation to the institution shall comply with the applicable company law.

3. The role and functions of the temporary administrator shall be specified by competent authority at the time of appointment and may include ascertaining the financial position of the institution, managing the business or part of the business of the institution with a view to preserving or restoring the financial position of the institution and taking measures to restore the sound and prudent management of the business of the institution. The competent authority shall specify any limits on the role and functions of the temporary administrator at the time of appointment.

4. Member States shall ensure that the competent authorities have the exclusive power to appoint and remove any temporary administrator. The competent authority may remove a temporary administrator at any time and for any reason. The competent authority may vary the terms of appointment of a temporary administrator at any time subject to this Article.

5. The competent authority may require that certain acts of a temporary administrator be subject to the prior consent of the competent authority. The competent authority shall specify any such requirements at the time of appointment of a temporary administrator or at the time of any variation of the terms of appointment of a temporary administrator.

In any case, the temporary administrator may exercise the power to convene a general meeting of the shareholders of the institution and to set the agenda of such a meeting only with the prior consent of the competent authority.

6. The competent authority may require that a temporary administrator draws up reports on the financial position of the institution and on the acts performed in the course of its appointment, at intervals set by the competent authority and at the end of his or her mandate.

7. The appointment of a temporary administrator shall not last more than one year. That period may be exceptionally renewed if the conditions for appointing the temporary administrator continue to be met. The competent authority shall be responsible for determining whether conditions are appropriate to maintain a temporary administrator and justifying any such decision to shareholders.

8. Subject to this Article the appointment of a temporary administrator shall not prejudice the rights of the shareholders in accordance with Union or national company law.

9. Member States may limit the liability of any temporary administrator in accordance with national law for acts and omissions in the discharge of his or her duties as temporary administrator in accordance with paragraph 3.

10. A temporary administrator appointed pursuant to this Article shall not be deemed to be a shadow director or a de facto director under national law.

#### Article 30

##### **Coordination of early intervention measures and appointment of temporary administrator in relation to groups**

1. Where the conditions for the imposition of requirements under Article 27 or the appointment of a temporary administrator in accordance with Article 29 are met in relation to a Union parent undertaking, the consolidating supervisor shall notify EBA and consult the other competent authorities within the supervisory college.

2. Following that notification and consultation the consolidating supervisor shall decide whether to apply any of the measures in Article 27 or appoint a temporary administrator under Article 29 in respect of the relevant Union parent undertaking, taking into account the impact of those measures on the group entities in other Member States. The consolidating supervisor shall notify the decision to the other competent authorities within the supervisory college and EBA.

3. Where the conditions for the imposition of requirements under Article 27 or the appointment of a temporary administrator under Article 29 are met in relation to a subsidiary of an Union parent undertaking, the competent authority responsible for the supervision on an individual basis that intends to take a measure in accordance with those Articles shall notify EBA and consult the consolidating supervisor.

On receiving the notification the consolidating supervisor may assess the likely impact of the imposition of requirements under Article 27 or the appointment of a temporary administrator in accordance with Article 29 to the institution in question, on the group or on group entities in other Member States. It shall communicate that assessment to the competent authority within three days.

Following that notification and consultation the competent authority shall decide whether to apply any of the measures in Article 27 or appoint a temporary administrator under Article 29. The decision shall give due consideration to any assessment of the consolidating supervisor. The competent authority shall notify the decision to the consolidating supervisor and other competent authorities within the supervisory college and EBA.

4. Where more than one competent authority intends to appoint a temporary administrator or apply any of the measures in Article 27 to more than one institution in the same group, the consolidating supervisor and the other relevant competent authorities shall consider whether it is more appropriate to appoint the same temporary administrator for all the entities concerned or to coordinate the application of any measures in Article 27 to more than one institution in order to facilitate solutions restoring the financial position of the institution concerned. The assessment shall take the form of a joint decision of the consolidating supervisor and the other relevant competent authorities. The joint decision shall be reached within five days from the date of the notification referred to in paragraph 1. The joint decision shall be reasoned and set out in a document, which shall be provided by the consolidating supervisor to the Union parent undertaking.

EBA may at the request of a competent authority assist the competent authorities in reaching an agreement in accordance with Article 31 of Regulation (EU) No 1093/2010.

In the absence of a joint decision within five days the consolidating supervisor and the competent authorities of subsidiaries may take individual decisions on the appointment of a temporary administrator to the institutions for which they have responsibility and on the application of any of the measures in Article 27.

5. Where a competent authority concerned does not agree with the decision notified in accordance with paragraph 1 or 3, or in the absence of a joint decision under paragraph 4, the competent authority may refer the matter to EBA in accordance with paragraph 6.

6. EBA may at the request of any competent authority assist the competent authorities that intend to apply one or more of the measures in point (a) of Article 27(1) of this Directive with respect to the points (4), (10), (11) and (19) of Section A of the Annex to this Directive, in point (e) of Article 27(1) of this Directive or in point (g) of Article 27(1) of this Directive in reaching an agreement in accordance with Article 19(3) of Regulation (EU) No 1093/2010.

7. The decision of each competent authority shall be reasoned. The decision shall take into account the views and reservations of the other competent authorities expressed during the consultation period referred to in paragraph 1 or 3 or the five-day period referred to in paragraph 4 as well as the potential impact of the decision on financial stability in the Member States concerned. The decisions shall be provided by the consolidating supervisor to the Union parent undertaking and to the subsidiaries by the respective competent authorities.

In the cases referred to in paragraph 6 of this Article, where, before the end of the consultation period referred to in paragraphs 1 and 3 of this Article or at the end of the five-day period referred to in paragraph 4 of this Article, any of the competent authorities concerned has referred the matter to EBA in accordance with Article 19(3) of Regulation (EU) No 1093/2010, the consolidating supervisor and the other competent authorities shall defer their decisions and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take their decision in accordance with the decision of EBA. The five-day period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within three days. The matter shall not be referred to EBA after the end of the five-day period or after a joint decision has been reached.

8. In the absence of a decision by EBA within three days, individual decisions taken in accordance with paragraph 1 or 3, or the third subparagraph of paragraph 4, shall apply.

## TITLE IV

### RESOLUTION

#### CHAPTER I

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

###### *Article 31*

###### **Resolution objectives**

1. When applying the resolution tools and exercising the resolution powers, resolution authorities shall have regard to the resolution objectives, and choose the tools and powers that best achieve the objectives that are relevant in the circumstances of the case.

2. The resolution objectives referred to in paragraph 1 are:

- (a) to ensure the continuity of critical functions;
- (b) to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline;
- (c) to protect public funds by minimising reliance on extraordinary public financial support;
- (d) to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC;
- (e) to protect client funds and client assets.

When pursuing the above objectives, the resolution authority shall seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives.

3. Subject to different provisions of this Directive, the resolution objectives are of equal significance, and resolution authorities shall balance them as appropriate to the nature and circumstances of each case.

### Article 32

#### Conditions for resolution

1. Member States shall ensure that resolution authorities shall take a resolution action in relation to an institution referred to in point (a) of Article 1(1) only if the resolution authority considers that all of the following conditions are met:

- (a) the determination that the institution is failing or is likely to fail has been made by the competent authority, after consulting the resolution authority or, subject to the conditions laid down in paragraph 2, by the resolution authority after consulting the competent authority;
- (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments in accordance with Article 59(2) taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe;
- (c) a resolution action is necessary in the public interest pursuant to paragraph 5.

2. Member States may provide that, in addition to the competent authority, the determination that the institution is failing or likely to fail under point (a) of paragraph 1 can be made by the resolution authority, after consulting the competent authority, where resolution authorities under national law have the necessary tools for making such a determination including, in particular, adequate access to the relevant information. The competent authority shall provide the resolution authority with any relevant information that the latter requests in order to perform its assessment without delay.

3. The previous adoption of an early intervention measure according to Article 27 is not a condition for taking a resolution action.

4. For the purposes of point (a) of paragraph 1, an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances:

- (a) the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds;
- (b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities;
- (c) the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due;
- (d) extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support takes any of the following forms:
  - (i) a State guarantee to back liquidity facilities provided by central banks according to the central banks' conditions;

- (ii) a State guarantee of newly issued liabilities; or
- (iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution, where neither the circumstances referred to in point (a), (b) or (c) of this paragraph nor the circumstances referred to in Article 59(3) are present at the time the public support is granted.

In each of the cases mentioned in points (d)(i), (ii) and (iii) of the first subparagraph, the guarantee or equivalent measures referred to therein shall be confined to solvent institutions and shall be conditional on final approval under the Union State aid framework. Those measures shall be of a precautionary and temporary nature and shall be proportionate to remedy the consequences of the serious disturbance and shall not be used to offset losses that the institution has incurred or is likely to incur in the near future.

Support measures under point (d)(iii) of the first subparagraph shall be limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, EBA or national authorities, where applicable, confirmed by the competent authority.

EBA shall, by 3 January 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 on the type of tests, reviews or exercises referred to above which may lead to such support.

By 31 December 2015, the Commission shall review whether there is a continuing need for allowing the support measures under point (d)(iii) of the first subparagraph and the conditions that need to be met in the case of continuation and report thereon to the European Parliament and to the Council. If appropriate, that report shall be accompanied by a legislative proposal.

5. For the purposes of point (c) of paragraph 1 of this Article, a resolution action shall be treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives referred to in Article 31 and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.

6. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the convergence of supervisory and resolution practices regarding the interpretation of the different circumstances when an institution shall be considered to be failing or likely to fail.

### Article 33

#### **Conditions for resolution with regard to financial institutions and holding companies**

1. Member States shall ensure that resolution authorities may take a resolution action in relation to a financial institution referred to in point (b) of Article 1(1), when the conditions laid down in Article 32(1), are met with regard to both the financial institution and with regard to the parent undertaking subject to consolidated supervision.

2. Member States shall ensure that resolution authorities may take a resolution action in relation to an entity referred to in point (c) or (d) of Article 1(1), when the conditions laid down in Article 32(1) are met with regard to both the entity referred to in point (c) or (d) of Article 1(1) and with regard to one or more subsidiaries which are institutions or, where the subsidiary is not established in the Union, the third-country authority has determined that it meets the conditions for resolution under the law of that third country.

3. Where the subsidiary institutions of a mixed-activity holding company are held directly or indirectly by an intermediate financial holding company, Member States shall ensure that resolution actions for the purposes of group resolution are taken in relation to the intermediate financial holding company, and shall not take resolution actions for the purposes of group resolution in relation to the mixed-activity holding company.

4. Subject to paragraph 3 of this Article, notwithstanding the fact that an entity referred to in point (c) or (d) of Article 1(1) does not meet the conditions established in Article 32(1), resolution authorities may take resolution action with regard to an entity referred to in point (c) or (d) of Article 1(1) when one or more of the subsidiaries which are institutions comply with the conditions established in Article 32(1), (4) and (5) and their assets and liabilities are such that their failure threatens an institution or the group as a whole or the insolvency law of the Member State requires that groups be treated as a whole and resolution action with regard to the entity referred to in point (c) or (d) of Article 1(1) is necessary for the resolution of such subsidiaries which are institutions or for the resolution of the group as a whole.

For the purposes of paragraph 2 and of the first subparagraph of this paragraph, when assessing whether the conditions in Article 32(1) are met in respect of one or more subsidiaries which are institutions, the resolution authority of the institution and the resolution authority of the entity referred to in point (c) or (d) of Article 1(1) may by way of joint agreement disregard any intra-group capital or loss transfers between the entities, including the exercise of write down or conversion powers.

#### Article 34

##### **General principles governing resolution**

1. Member States shall ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities take all appropriate measures to ensure that the resolution action is taken in accordance with the following principles:

- (a) the shareholders of the institution under resolution bear first losses;
- (b) creditors of the institution under resolution bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings, save as expressly provided otherwise in this Directive;
- (c) management body and senior management of the institution under resolution are replaced, except in those cases when the retention of the management body and senior management, in whole or in part, as appropriate to the circumstances, is considered to be necessary for the achievement of the resolution objectives;
- (d) management body and senior management of the institution under resolution shall provide all necessary assistance for the achievement of the resolution objectives;
- (e) natural and legal persons are made liable, subject to Member State law, under civil or criminal law for their responsibility for the failure of the institution;
- (f) except where otherwise provided in this Directive, creditors of the same class are treated in an equitable manner;
- (g) no creditor shall incur greater losses than would have been incurred if the institution or entity referred to in point (b), (c) or (d) of Article 1(1) had been wound up under normal insolvency proceedings in accordance with the safeguards in Articles 73 to 75;
- (h) covered deposits are fully protected; and
- (i) resolution action is taken in accordance with the safeguards in this Directive.

2. Where an institution is a group entity resolution authorities shall, without prejudice to Article 31, apply resolution tools and exercise resolution powers in a way that minimises the impact on other group entities and on the group as a whole and minimises the adverse effects on financial stability in the Union and its Member States, in particular, in the countries where the group operates.

3. When applying the resolution tools and exercising the resolution powers, Member States shall ensure that they comply with the Union State aid framework, where applicable.

4. Where the sale of business tool, the bridge institution tool or the asset separation tool is applied to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), that institution or entity shall be considered to be the subject of bankruptcy proceedings or analogous insolvency proceedings for the purposes of Article 5(1) of Council Directive 2001/23/EC (<sup>(1)</sup>).

5. When applying the resolution tools and exercising the resolution powers, resolution authorities shall inform and consult employee representatives where appropriate.

6. Resolution authorities shall apply resolution tools and exercise resolution powers without prejudice to provisions on the representation of employees in management bodies as provided for in national law or practice.

## CHAPTER II

### ***Special management***

#### *Article 35*

### ***Special management***

1. Member States shall ensure that resolution authorities may appoint a special manager to replace the management body of the institution under resolution. Resolution authorities shall make public the appointment of a special manager. Member States shall further ensure that the special manager has the qualifications, ability and knowledge required to carry out his or her functions.

2. The special manager shall have all the powers of the shareholders and the management body of the institution. However, the special manager may only exercise such powers under the control of the resolution authority.

3. The special manager shall have the statutory duty to take all the measures necessary to promote the resolution objectives referred to in Article 31 and implement resolution actions according to the decision of the resolution authority. Where necessary, that duty shall override any other duty of management in accordance with the statutes of the institution or national law, insofar as they are inconsistent. Those measures may include an increase of capital, reorganisation of the ownership structure of the institution or takeovers by institutions that are financially and organisationally sound in accordance with the resolution tools referred to in Chapter IV.

4. Resolution authorities may set limits to the action of a special manager or require that certain acts of the special manager be subject to the resolution authority's prior consent. The resolution authorities may remove the special manager at any time.

5. Member States shall require that a special manager draw up reports for the appointing resolution authority on the economic and financial situation of the institution and on the acts performed in the conduct of his or her duties, at regular intervals set by the resolution authority and at the beginning and the end of his or her mandate.

6. A special manager shall not be appointed for more than one year. That period may be renewed, on an exceptional basis, if the resolution authority determines that the conditions for appointment of a special manager continue to be met.

7. Where more than one resolution authority intends to appoint a special manager in relation to an entity affiliated to a group, they shall consider whether it is more appropriate to appoint the same special manager for all the entities concerned in order to facilitate solutions redressing the financial soundness of the entities concerned.

<sup>(1)</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82 22.3.2001, p. 16).

8. In the event of insolvency, where national law provides for the appointment of insolvency management, such management may constitute special management as referred to in this Article.

### CHAPTER III

#### **Valuation**

##### *Article 36*

###### **Valuation for the purposes of resolution**

1. Before taking resolution action or exercising the power to write down or convert relevant capital instruments resolution authorities shall ensure that a fair, prudent and realistic valuation of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is carried out by a person independent from any public authority, including the resolution authority, and the institution or entity referred to in point (b), (c) or (d) of Article 1(1). Subject to paragraph 13 of this Article and to Article 85, where all the requirements laid down in this Article are met, the valuation shall be considered to be definitive.

2. Where an independent valuation according to paragraph 1 is not possible, resolution authorities may carry out a provisional valuation of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1), in accordance with paragraph 9 of this Article.

3. The objective of the valuation shall be to assess the value of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) that meets the conditions for resolution of Articles 32 and 33.

4. The purposes of the valuation shall be:

- (a) to inform the determination of whether the conditions for resolution or the conditions for the write down or conversion of capital instruments are met;
- (b) if the conditions for resolution are met, to inform the decision on the appropriate resolution action to be taken in respect of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (c) when the power to write down or convert relevant capital instruments is applied, to inform the decision on the extent of the cancellation or dilution of shares or other instruments of ownership, and the extent of the write down or conversion of relevant capital instruments;
- (d) when the bail-in tool is applied, to inform the decision on the extent of the write down or conversion of eligible liabilities;
- (e) when the bridge institution tool or asset separation tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and the decision on the value of any consideration to be paid to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;
- (f) when the sale of business tool is applied, to inform the decision on the assets, rights, liabilities or shares or other instruments of ownership to be transferred and to inform the resolution authority's understanding of what constitutes commercial terms for the purposes of Article 38;
- (g) in all cases, to ensure that any losses on the assets of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) are fully recognised at the moment the resolution tools are applied or the power to write down or convert relevant capital instruments is exercised.

5. Without prejudice to the Union State aid framework, where applicable, the valuation shall be based on prudent assumptions, including as to rates of default and severity of losses. The valuation shall not assume any potential future provision of extraordinary public financial support or central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralisation, tenor and interest rate terms to the institution or entity referred to in point (b), (c) or (d) of Article 1(1) from the point at which resolution action is taken or the power to write down or convert relevant capital instruments is exercised. Furthermore, the valuation shall take account of the fact that, if any resolution tool is applied:

- (a) the resolution authority and any financing arrangement acting pursuant to Article 101 may recover any reasonable expenses properly incurred from the institution under resolution, in accordance with Article 37(7);
- (b) the resolution financing arrangement may charge interest or fees in respect of any loans or guarantees provided to the institution under resolution, in accordance with Article 101.

6. The valuation shall be supplemented by the following information as appearing in the accounting books and records of the institution or entity referred to in point (b), (c) or (d) of Article 1(1):

- (a) an updated balance sheet and a report on the financial position of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (b) an analysis and an estimate of the accounting value of the assets;
- (c) the list of outstanding on balance sheet and off balance sheet liabilities shown in the books and records of the institution or entity referred to in point (b), (c) or (d) of Article 1(1), with an indication of the respective credits and priority levels under the applicable insolvency law.

7. Where appropriate, to inform the decisions referred to in points (e) and (f) of paragraph 4, the information in point (b) of paragraph 6 may be complemented by an analysis and estimate of the value of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) on a market value basis.

8. The valuation shall indicate the subdivision of the creditors in classes in accordance with their priority levels under the applicable insolvency law and an estimate of the treatment that each class of shareholders and creditors would have been expected to receive, if the institution or entity referred to in point (b), (c) or (d) of Article 1(1) were wound up under normal insolvency proceedings.

That estimate shall not affect the application of the 'no creditor worse off' principle to be carried out under Article 74.

9. Where due to the urgency in the circumstances of the case it is not possible to comply with the requirements in paragraphs 6 and 8 or paragraph 2 applies, a provisional valuation shall be carried out. The provisional valuation shall comply with the requirements in paragraph 3 and in so far as reasonably practicable in the circumstances with the requirements of paragraphs 1, 6 and 8.

The provisional valuation referred to in this paragraph shall include a buffer for additional losses, with appropriate justification.

10. A valuation that does not comply with all the requirements laid down in this Article shall be considered to be provisional until an independent person has carried out a valuation that is fully compliant with all the requirements laid down in this Article. That *ex-post* definitive valuation shall be carried out as soon as practicable. It may be carried out either separately from the valuation referred to in Article 74, or simultaneously with and by the same independent person as that valuation, but shall be distinct from it.

The purposes of the *ex-post* definitive valuation shall be:

- (a) to ensure that any losses on the assets of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) are fully recognised in the books of accounts of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (b) to inform a decision to write back creditors' claims or to increase the value of the consideration paid, in accordance with paragraph 11.

11. In the event that the *ex-post* definitive valuation's estimate of the net asset value of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is higher than the provisional valuation's estimate of the net asset value of the institution or entity referred to in point (b), (c) or (d) of Article 1(1), the resolution authority may:

- (a) exercise its power to increase the value of the claims of creditors or owners of relevant capital instruments which have been written down under the bail-in tool;
- (b) instruct a bridge institution or asset management vehicle to make a further payment of consideration in respect of the assets, rights, liabilities to the institution under resolution, or as the case may be, in respect of the shares or instruments of ownership to the owners of the shares or other instruments of ownership.

12. Notwithstanding paragraph 1, a provisional valuation conducted in accordance with paragraphs 9 and 10 shall be a valid basis for resolution authorities take resolution actions, including taking control of a failing institution or entity referred to in point (b), (c) or (d) of Article 1(1), or to exercise the write down or conversion power of capital instruments.

13. The valuation shall be an integral part of the decision to apply a resolution tool or exercise a resolution power, or the decision to exercise the write down or conversion power of capital instruments. The valuation itself shall not be subject to a separate right of appeal but may be subject to an appeal together with the decision in accordance with Article 85.

14. EBA shall develop draft regulatory technical standards to specify the circumstances in which a person is independent from both the resolution authority and the institution or entity referred to in point (b), (c) or (d) of Article 1(1) for the purposes of paragraph 1 of this Article, and for the purposes of Article 74.

15. EBA may develop draft regulatory technical standards to specify the following criteria for the purposes of paragraphs 1, 3 and 9 of this Article, and for the purposes of Article 74:

- (a) the methodology for assessing the value of the assets and liabilities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (b) the separation of the valuations under Articles 36 and 74;
- (c) the methodology for calculating and including a buffer for additional losses in the provisional valuation.

16. EBA shall submit the draft regulatory technical standards referred to in paragraph 14 to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in paragraphs 14 and 15 in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

**CHAPTER IV****Resolution tools****Section 1****General principles****Article 37****General principles of resolution tools**

1. Member States shall ensure that resolution authorities have the necessary powers to apply the resolution tools to institutions and to entities referred to in point (b), (c) or (d) of Article 1(1) that meet the applicable conditions for resolution.

2. Where a resolution authority decides to apply a resolution tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), and that resolution action would result in losses being borne by creditors or their claims being converted, the resolution authority shall exercise the power to write down and convert capital instruments in accordance with Article 59 immediately before or together with the application of the resolution tool.

3. The resolution tools referred to in paragraph 1 are the following:

(a) the sale of business tool;

(b) the bridge institution tool;

(c) the asset separation tool;

(d) the bail-in tool.

4. Subject to paragraph 5, resolution authorities may apply the resolution tools individually or in any combination.

5. Resolution authorities may apply the asset separation tool only together with another resolution tool.

6. Where only the resolution tools referred to in point (a) or (b) of paragraph 3 of this Article are used, and they are used to transfer only part of the assets, rights or liabilities of the institution under resolution, the residual institution or entity referred to in point (b), (c) or (d) of Article 1(1) from which the assets, rights or liabilities have been transferred, shall be wound up under normal insolvency proceedings. Such winding up shall be done within a reasonable timeframe, having regard to any need for that institution or entity referred to in point (b), (c) or (d) of Article 1(1) to provide services or support pursuant to Article 65 in order to enable the recipient to carry out the activities or services acquired by virtue of that transfer, and any other reason that the continuation of the residual institution or entity referred to in point (b), (c) or (d) of Article 1(1) is necessary to achieve the resolution objectives or comply with the principles referred to in Article 34.

7. The resolution authority and any financing arrangement acting pursuant to Article 101 may recover any reasonable expenses properly incurred in connection with the use of the resolution tools or powers or government financial stabilisation tools in one or more of the following ways:

(a) as a deduction from any consideration paid by a recipient to the institution under resolution or, as the case may be, to the owners of the shares or other instruments of ownership;

- (b) from the institution under resolution, as a preferred creditor; or
- (c) from any proceeds generated as a result of the termination of the operation of the bridge institution or the asset management vehicle, as a preferred creditor.

8. Member States shall ensure that rules under national insolvency law relating to the voidability or unenforceability of legal acts detrimental to creditors do not apply to transfers of assets, rights or liabilities from an institution under resolution to another entity by virtue of the application of a resolution tool or exercise of a resolution power, or use of a government financial stabilisation tool.

9. Member States may confer upon resolution authorities additional tools and powers exercisable where an institution or entity referred to in point (b), (c) or (d) of Article 1(1) meets the conditions for resolution, provided that:

- (a) when applied to a cross-border group, those additional powers do not pose obstacles to effective group resolution; and
- (b) they are consistent with the resolution objectives and the general principles governing resolution referred to in Articles 31 and 34.

10. In the very extraordinary situation of a systemic crisis, the resolution authority may seek funding from alternative financing sources through the use of government stabilisation tools provided for in Articles 56 to 58 when the following conditions are met:

- (a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise;
- (b) it shall be conditional on prior and final approval under the Union State aid framework.

## Section 2

### The sale of business tool

#### Article 38

##### The sale of business tool

1. Member States shall ensure that resolution authorities have the power to transfer to a purchaser that is not a bridge institution:

- (a) shares or other instruments of ownership issued by an institution under resolution;
- (b) all or any assets, rights or liabilities of an institution under resolution;

Subject to paragraphs 8 and 9 of this Article and to Article 85, the transfer referred to in the first subparagraph shall take place without obtaining the consent of the shareholders of the institution under resolution or any third party other than the purchaser, and without complying with any procedural requirements under company or securities law other than those included in Article 39.

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.

3. In accordance with paragraph 2 of this Article, resolution authorities shall take all reasonable steps to obtain commercial terms for the transfer that conform with the valuation conducted under Article 36, having regard to the circumstances of the case.

4. Subject to Article 37(7), any consideration paid by the purchaser shall benefit:

- (a) the owners of the shares or other instruments of ownership, where the sale of business has been effected by transferring shares or instruments of ownership issued by the institution under resolution from the holders of those shares or instruments to the purchaser;
- (b) the institution under resolution, where the sale of business has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the purchaser.

5. When applying the sale of business tool the resolution authority may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution.

6. Following an application of the sale of business tool, resolution authorities may, with the consent of the purchaser, exercise the transfer powers in respect of assets, rights or liabilities transferred to the purchaser in order to transfer the assets, rights or liabilities back to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership.

7. A purchaser shall have the appropriate authorisation to carry out the business it acquires when the transfer is made pursuant to paragraph 1. Competent authorities shall ensure that an application for authorisation shall be considered, in conjunction with the transfer, in a timely manner.

8. By way of derogation from Articles 22 to 25 of Directive 2013/36/EU, from the requirement to inform the competent authorities in Article 26 of Directive 2013/36/EU, from Article 10(3), Article 11(1) and (2) and Articles 12 and 13 of Directive 2014/65/EU and from the requirement to give a notice in Article 11(3) of that Directive, where a transfer of shares or other instruments of ownership by virtue of an application of the sale of business tool would result in the acquisition of or increase in a qualifying holding in an institution of a kind referred to in Article 22(1) of Directive 2013/36/EU or Article 11(1) of Directive 2014/65/EU, the competent authority of that institution shall carry out the assessment required under those Articles in a timely manner that does not delay the application of the sale of business tool and prevent the resolution action from achieving the relevant resolution objectives.

9. Member States shall ensure that if the competent authority of that institution has not completed the assessment referred to in paragraph 8 from the date of transfer of shares or other instruments of ownership in the application of the sale of business tool by the resolution authority, the following provisions shall apply:

(a) such a transfer of shares or other instruments of ownership to the acquirer shall have immediate legal effect;

(b) during the assessment period and during any divestment period provided by point (f), the acquirer's voting rights attached to such shares or other instruments of ownership shall be suspended and vested solely in the resolution authority, which shall have no obligation to exercise any such voting rights and which shall have no liability whatsoever for exercising or refraining from exercising any such voting rights;

- (c) during the assessment period and during any divestment period provided by point (f), the penalties and other measures for infringing the requirements for acquisitions or disposals of qualifying holdings contemplated by Articles 66, 67 and 68 of Directive 2013/36/EU shall not apply to such a transfer of shares or other instruments of ownership;
- (d) promptly upon completion of the assessment by the competent authority, the competent authority shall notify the resolution authority and the acquirer in writing of whether the competent authority approves or, in accordance with Article 22(5) of Directive 2013/36/EU, opposes such a transfer of shares or other instruments of ownership to the acquirer;
- (e) if the competent authority approves such a transfer of shares or other instruments of ownership to the acquirer, then the voting rights attached to such shares or other instruments of ownership shall be deemed to be fully vested in the acquirer immediately upon receipt by the resolution authority and the acquirer of such an approval notice from the competent authority;
- (f) if the competent authority opposes such a transfer of shares or other instruments of ownership to the acquirer, then:
  - (i) the voting rights attached to such shares or other instruments of ownership as provided by point (b) shall remain in full force and effect;
  - (ii) the resolution authority may require the acquirer to divest such shares or other instruments of ownership within a divestment period determined by the resolution authority having taken into account prevailing market conditions; and
  - (iii) if the acquirer does not complete such a divestment within the divestment period established by the resolution authority, then the competent authority, with the consent of the resolution authority, may impose on the acquirer penalties and other measures for infringing the requirements for acquisitions or disposals of qualifying holdings contemplated by Articles 66, 67, and 68 of Directive 2013/36/EU.

10. Transfers made by virtue of the sale of business tool shall be subject to the safeguards referred to in Chapter VII of Title IV.

11. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2013/36/EU or Directive 2014/65/EU, the purchaser shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

12. Member States shall ensure that the purchaser referred to in paragraph 1 may continue to exercise the rights of membership and access to payment, clearing and settlement systems, stock exchanges, investor compensation schemes and deposit guarantee schemes of the institution under resolution, provided that it meets the membership and participation criteria for participation in such systems.

Notwithstanding the first subparagraph, Member States shall ensure that:

- (a) access is not denied on the ground that the purchaser does not possess a rating from a credit rating agency, or that rating is not commensurate to the rating levels required to be granted access to the systems referred to in the first subparagraph;
- (b) where the purchaser does not meet the membership or participation criteria for a relevant payment, clearing or settlement system, stock exchange, investor compensation scheme or deposit guarantee scheme, the rights referred to in the first subparagraph are exercised for such a period of time as may be specified by the resolution authority, not exceeding 24 months, renewable on application by the purchaser to the resolution authority.

13. Without prejudice to Chapter VII of Title IV, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred shall not have any rights over or in relation to the assets, rights or liabilities transferred.

### Article 39

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

1. Subject to paragraph 3 of this Article, when applying the sale of business tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1), a resolution authority shall market, or make arrangements for the marketing of the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer. Pools of rights, assets, and liabilities may be marketed separately.

2. Without prejudice to the Union State aid framework, where applicable, the marketing referred to in paragraph 1 shall be carried out in accordance with the following criteria:

- (a) it shall be as transparent as possible and shall not materially misrepresent the assets, rights, liabilities, shares or other instruments of ownership of that institution that the authority intends to transfer, 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 not confer any unfair advantage on a potential purchaser;
- (e) it shall take account of the need to effect a rapid resolution action;
- (f) it shall aim at maximising, as far as possible, the sale price for the shares or other instruments of ownership, assets, rights or liabilities involved.

Subject to point (b) of the first subparagraph, the principles referred to in this paragraph shall not prevent the resolution authority from soliciting particular potential purchasers.

Any public disclosure of the marketing of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that would otherwise be required in accordance with Article 17(1) of Regulation (EU) No 596/2014 may be delayed in accordance with Article 17(4) or (5) of that Regulation.

3. The resolution authority may apply the sale of business tool without complying with the requirement to market as laid down in paragraph 1 when it determines that compliance with those requirements would be likely to undermine one or more of the resolution objectives and in particular if the following conditions are met:

- (a) it considers that there is a material threat to financial stability arising from or aggravated by the failure or likely failure of the institution under resolution; and
- (b) it considers that compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool in addressing that threat or achieving the resolution objective referred to in point (b) of Article 31(2).

4. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 specifying the factual circumstances amounting to a material threat and the elements relating to the effectiveness of the sale of business tool provided for in points (a) and (b) of paragraph 3.

## Section 3

### **The bridge institution tool**

#### Article 40

##### **Bridge institution tool**

1. In order to give effect to the bridge institution tool and having regard to the need to maintain critical functions in the bridge institution, Member States shall ensure that resolution authorities have the power to transfer to a bridge institution:

- (a) shares or other instruments of ownership issued by one or more institutions under resolution;
- (b) all or any assets, rights or liabilities of one or more institutions under resolution.

Subject to Article 85, the transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

2. The bridge institution shall be a legal person that meets all of the following requirements:

- (a) it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority;
- (b) it is created for the purpose of receiving and holding some or all of the shares or other instruments of ownership issued by an institution under resolution or some or all of the assets, rights and liabilities of one or more institutions under resolution with a view to maintaining access to critical functions and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1).

The application of the bail-in tool for the purpose referred to in point (b) of Article 43(2) shall not interfere with the ability of the resolution authority to control the bridge institution.

3. When applying the bridge institution tool, the resolution authority shall ensure that the total value of liabilities transferred to the bridge institution does not exceed the total value of the rights and assets transferred from the institution under resolution or provided by other sources.

4. Subject to Article 37(7), any consideration paid by the bridge institution shall benefit:

- (a) the owners of the shares or instruments of ownership, where the transfer to the bridge institution has been effected by transferring shares or instruments of ownership issued by the institution under resolution from the holders of those shares or instruments to the bridge institution;
- (b) the institution under resolution, where the transfer to the bridge institution has been effected by transferring some or all of the assets or liabilities of the institution under resolution to the bridge institution.

5. When applying the bridge institution tool, the resolution authority may exercise the transfer power more than once in order to make supplemental transfers of shares or other instruments of ownership issued by an institution under resolution or, as the case may be, assets, rights or liabilities of the institution under resolution.

6. Following an application of the bridge institution tool, the resolution authority may:

- (a) transfer rights, assets or liabilities back from the bridge institution to the institution under resolution, or the shares or other instruments of ownership back to their original owners, and the institution under resolution or original owners shall be obliged to take back any such assets, rights or liabilities, or shares or other instruments of ownership, provided that the conditions laid down in paragraph 7 are met;
- (b) transfer, shares or other instruments of ownership, or assets, rights or liabilities from the bridge institution to a third party.

7. Resolution authorities may transfer shares or other instruments of ownership, or assets, rights or liabilities back from the bridge institution in one of the following circumstances:

- (a) the possibility that the specific shares or other instruments of ownership, assets, rights or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;
- (b) the specific shares or other instruments of ownership, assets, rights or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of shares or other instruments of ownership, assets, rights or liabilities specified in the instrument by which the transfer was made.

Such a transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

8. Transfers between the institution under resolution, or the original owners of shares or other instruments of ownership, on the one hand, and the bridge institution on the other, shall be subject to the safeguards referred to in Chapter VII of Title IV.

9. For the purposes of exercising the rights to provide services or to establish itself in another Member State in accordance with Directive 2013/36/EU or Directive 2014/65/EU, a bridge institution shall be considered to be a continuation of the institution under resolution, and may continue to exercise any such right that was exercised by the institution under resolution in respect of the assets, rights or liabilities transferred.

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

10. Member States shall ensure that the bridge institution may continue to exercise the rights of membership and access to payment, clearing and settlement systems, stock exchanges, investor compensation schemes and deposit guarantee schemes of the institution under resolution, provided that it meets the membership and participation criteria for participation in such systems.

Notwithstanding the first subparagraph, Member States shall ensure that:

- (a) access is not denied on the ground that the bridge institution does not possess a rating from a credit rating agency, or that rating is not commensurate to the rating levels required to be granted access to the systems referred to in the first subparagraph;

- (b) where the bridge institution does not meet the membership or participation criteria for a relevant payment, clearing or settlement system, stock exchange, investor compensation scheme or deposit guarantee scheme, the rights referred to in the first subparagraph are exercised for such a period of time as may be specified by the resolution authority, not exceeding 24 months, renewable on application by the bridge institution to the resolution authority.

11. Without prejudice to Chapter VII of Title IV, shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred to the bridge institution shall not have any rights over or in relation to the assets, rights or liabilities transferred to the bridge institution, its management body or senior management.

12. The objectives of the bridge institution shall not imply any duty or responsibility to shareholders or creditors of the institution under resolution, and the management body or senior management shall have no liability to such shareholders or creditors for acts and omissions in the discharge of their duties unless the act or omission implies gross negligence or serious misconduct in accordance with national law which directly affects rights of such shareholders or creditors.

Member States may further limit the liability of a bridge institution and its management body or senior management in accordance with national law for acts and omissions in the discharge of their duties.

#### Article 41

##### **Operation of a bridge institution**

1. Member States shall ensure that the operation of a bridge institution respects the following requirements:

- (a) the contents of the bridge institution's constitutional documents are approved by the resolution authority;
- (b) subject to the bridge institution's ownership structure, the resolution authority either appoints or approves the bridge institution's management body;
- (c) the resolution authority approves the remuneration of the members of the management body and determines their appropriate responsibilities;
- (d) the resolution authority approves the strategy and risk profile of the bridge institution;
- (e) the bridge institution is authorised in accordance with Directive 2013/36/EU or Directive 2014/65/EU, as applicable, and has the necessary authorisation under the applicable national law to carry out the activities or services that it acquires by virtue of a transfer made pursuant to Article 63 of this Directive;
- (f) the bridge institution complies with the requirements of, and is subject to supervision in accordance with Regulation (EU) No 575/2013 and with Directives 2013/36/EU and Directive 2014/65/EU, as applicable;
- (g) the operation of the bridge institution shall be in accordance with the Union State aid framework and the resolution authority may specify restrictions on its operations accordingly.

Notwithstanding the provisions referred to in points (e) and (f) of the first subparagraph and where necessary to meet the resolution objectives, the bridge institution may be established and authorised without complying with Directive 2013/36/EU or Directive 2014/65/EU for a short period of time at the beginning of its operation. To that end, the resolution authority shall submit a request in that sense to the competent authority. If the competent authority decides to grant such an authorisation, it shall indicate the period for which the bridge institution is waived from complying with the requirements of those Directives.

2. Subject to any restrictions imposed in accordance with Union or national competition rules, the management of the bridge institution shall operate the bridge institution with a view to maintaining access to critical functions and selling the institution or entity referred to in point (b), (c) or (d) of Article 1(1), its assets, rights or liabilities, to one or more private sector purchasers when conditions are appropriate and within the period specified in paragraph 4 of this Article or, where applicable, paragraph 6 of this Article.

3. The resolution authority shall take a decision that the bridge institution is no longer a bridge institution within the meaning of Article 40(2) in any of the following cases, whichever occurs first:

(a) the bridge institution merges with another entity;

(b) the bridge institution ceases to meet the requirements of Article 40(2);

(c) the sale of all or substantially all of the bridge institution's assets, rights or liabilities to a third party;

(d) the expiry of the period specified in paragraph 5 or, where applicable, paragraph 6;

(e) the bridge institution's assets are completely wound down and its liabilities are completely discharged.

4. Member States shall ensure, in cases when the resolution authority seeks to sell the bridge institution or its assets, rights or liabilities, that the bridge institution or the relevant assets or liabilities are marketed openly and transparently, and that the sale does not materially misrepresent them or unduly favour or discriminate between potential purchasers.

Any such sale shall be made on commercial terms, having regard to the circumstances and in accordance with the Union State aid framework.

5. If none of the outcomes referred to in points (a), (b), (c) and (e) of paragraph 3 applies, the resolution authority shall terminate the operation of a bridge institution as soon as possible and in any event two years after the date on which the last transfer from an institution under resolution pursuant to the bridge institution tool was made.

6. The resolution authority may extend the period referred to in paragraph 5 for one or more additional one-year periods where such an extension:

(a) supports the outcomes referred to in point (a), (b), (c) or (e) of paragraph 3; or

(b) is necessary to ensure the continuity of essential banking or financial services.

7. Any decision of the resolution authority to extend the period referred to in paragraph 5 shall be reasoned and shall contain a detailed assessment of the situation, including of the market conditions and outlook, that justifies the extension.

8. Where the operations of a bridge institution are terminated in the circumstances referred to in point (c) or (d) of paragraph 3, the bridge institution shall be wound up under normal insolvency proceedings.

Subject to Article 37(7), any proceeds generated as a result of the termination of the operation of the bridge institution shall benefit the shareholders of the bridge institution.

9. Where a bridge institution is used for the purpose of transferring assets and liabilities of more than one institution under resolution the obligation referred to in paragraph 8 shall refer to the assets and liabilities transferred from each of the institutions under resolution and not to the bridge institution itself.

## Section 4

### The asset separation tool

#### Article 42

##### **Asset separation tool**

1. In order to give effect to the asset separation tool, Member States shall ensure that resolution authorities have the power to transfer assets, rights or liabilities of an institution under resolution or a bridge institution to one or more asset management vehicles.

Subject to Article 85, the transfer referred to in the first subparagraph may take place without obtaining the consent of the shareholders of the institutions under resolution or any third party other than the bridge institution, and without complying with any procedural requirements under company or securities law.

2. For the purposes of the asset separation tool, an asset management vehicle shall be a legal person that meets all of the following requirements:

- (a) it is wholly or partially owned by one or more public authorities which may include the resolution authority or the resolution financing arrangement and is controlled by the resolution authority;
- (b) it has been created for the purpose of receiving some or all of the assets, rights and liabilities of one or more institutions under resolution or a bridge institution.

3. The asset management vehicle shall manage the assets transferred to it with a view to maximising their value through eventual sale or orderly wind down.

4. Member States shall ensure that the operation of an asset management vehicle respects the following provisions:

- (a) the contents of the asset management vehicle's constitutional documents are approved by the resolution authority;
- (b) subject to the asset management vehicle's ownership structure, the resolution authority either appoints or approves the vehicle's management body;
- (c) the resolution authority approves the remuneration of the members of the management body and determines their appropriate responsibilities;
- (d) the resolution authority approves the strategy and risk profile of the asset management vehicle.

5. Resolution authorities may exercise the power specified in paragraph 1 to transfer assets, rights or liabilities only if:

- (a) the situation of the particular market for those assets is of such a nature that the liquidation of those assets under normal insolvency proceedings could have an adverse effect on one or more financial markets.
- (b) such a transfer is necessary to ensure the proper functioning of the institution under resolution or bridge institution; or
- (c) such a transfer is necessary to maximise liquidation proceeds.

6. When applying the asset separation tool, resolution authorities shall determine the consideration for which assets, rights and liabilities are transferred to the asset management vehicle in accordance with the principles established in Article 36 and in accordance with the Union State aid framework. This paragraph does not prevent the consideration having nominal or negative value.

7. Subject to Article 37(7), any consideration paid by the asset management vehicle in respect of the assets, rights or liabilities acquired directly from the institution under resolution shall benefit the institution under resolution. Consideration may be paid in the form of debt issued by the asset management vehicle.

8. Where the bridge institution tool has been applied, an asset management vehicle may, subsequent to the application of the bridge institution tool, acquire assets, rights or liabilities from the bridge institution.

9. Resolution authorities may transfer assets, rights or liabilities from the institution under resolution to one or more asset management vehicles on more than one occasion and transfer assets, rights or liabilities back from one or more asset management vehicles to the institution under resolution provided that the conditions specified in paragraph 10 are met.

The institution under resolution shall be obliged to take back any such assets, rights or liabilities.

10. Resolution authorities may transfer rights, assets or liabilities back from the asset management vehicle to the institution under resolution in one of the following circumstances:

- (a) the possibility that the specific rights, assets or liabilities might be transferred back is stated expressly in the instrument by which the transfer was made;
- (b) the specific rights, assets or liabilities do not in fact fall within the classes of, or meet the conditions for transfer of, rights, assets or liabilities specified in the instrument by which the transfer was made.

In either of the cases referred in points (a) and (b), the transfer back may be made within any period, and shall comply with any other conditions, stated in that instrument for the relevant purpose.

11. Transfers between the institution under resolution and the asset management vehicle shall be subject to the safeguards for partial property transfers specified in Chapter VII of Title IV.

12. Without prejudice to Chapter VII of Title IV shareholders or creditors of the institution under resolution and other third parties whose assets, rights or liabilities are not transferred to the asset management vehicle shall not have any rights over or in relation to the assets, rights or liabilities transferred to the asset management vehicle or its management body or senior management.

13. The objectives of an asset management vehicle shall not imply any duty or responsibility to shareholders or creditors of the institution under resolution, and the management body or senior management shall have no liability to such shareholders or creditors for acts and omissions in the discharge of their duties unless the act or omission implies gross negligence or serious misconduct in accordance with national law which directly affects rights of such shareholders or creditors.

Member States may further limit the liability of an asset management vehicle and its management body or senior management in accordance with national law for acts and omissions in the discharge of their duties.

14. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to promote the convergence of supervisory and resolution practices regarding the determination when, in accordance to paragraph 5 of this Article the liquidation of the assets or liabilities under normal insolvency proceeding could have an adverse effect on one or more financial markets.

## Section 5

### The bail-in tool

#### Subsection 1

##### Objective and scope of the bail-in tool

###### Article 43

### The bail-in tool

1. In order to give effect to the bail-in tool, Member States shall ensure that resolution authorities have the resolution powers specified in Article 63(1).

2. Member States shall ensure that resolution authorities may apply the bail-in tool to meet the resolution objectives specified in Article 31, in accordance with the resolution principles specified in Article 34 for any of the following purposes:

(a) to recapitalise an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorisation (to the extent that those conditions apply to the entity) and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU, where the entity is authorised under those Directives, and to sustain sufficient market confidence in the institution or entity;

(b) to convert to equity or reduce the principal amount of claims or debt instruments that are transferred:

(i) to a bridge institution with a view to providing capital for that bridge institution; or

(ii) under the sale of business tool or the asset separation tool.

3. Member States shall ensure that resolution authorities may apply the bail-in tool for the purpose referred to in point (a) of paragraph 2 of this Article only if there is a reasonable prospect that the application of that tool together with other relevant measures including measures implemented in accordance with the business reorganisation plan required by Article 52 will, in addition to achieving relevant resolution objectives, restore the institution or entity referred to in point (b), (c) or (d) of Article 1(1) in question to financial soundness and long-term viability.

Member States shall ensure that resolution authorities may apply any of the resolution tools referred to in points (a), (b) and (c) of Article 37(3), and the bail-in tool referred to in point (b) of paragraph 2 of this Article, where the conditions laid down in the first subparagraph are not met.

4. Member States shall ensure that resolution authorities may apply the bail-in tool to all institutions or entities referred to in point (b), (c) or (d) of Article 1(1) while respecting in each case the legal form of the institution or entity concerned or may change the legal form.

###### Article 44

### Scope of bail-in tool

1. Member States shall ensure that the bail-in tool may be applied to all liabilities of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) that are not excluded from the scope of that tool pursuant to paragraphs 2 or 3 of this Article.

2. Resolution authorities shall not exercise the write down or conversion powers in relation to the following liabilities whether they are governed by the law of a Member State or of a third country:

- (a) covered deposits;
- (b) secured liabilities including covered bonds and liabilities in the form of financial 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 covered bonds;
- (c) any liability that arises by virtue of the holding by the institution or entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive of client assets or client money including client assets or client money held on behalf of UCITS as defined in Article 1(2) of Directive 2009/65/EC or of AIFs as defined in point (a) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council<sup>(1)</sup>, provided that such a client is protected under the applicable insolvency law;
- (d) any liability that arises by virtue of a fiduciary relationship between the institution or entity referred to in point (b), (c) or (d) of Article 1(1) (as fiduciary) and another person (as beneficiary) provided that such a beneficiary is protected under the applicable insolvency or civil law;
- (e) liabilities to institutions, excluding entities that are part of the same group, with an original maturity of less than seven days;
- (f) liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems designated according to Directive 98/26/EC or their participants and arising from the participation in such a system;
- (g) a liability to any one of the following:
  - (i) an employee, in relation to accrued salary, pension benefits or other fixed remuneration, except for the variable component of remuneration that is not regulated by a collective bargaining agreement;
  - (ii) a commercial or trade creditor arising from the provision to the institution or entity referred to in point (b), (c) or (d) of Article 1(1) 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;
  - (iii) tax and social security authorities, provided that those liabilities are preferred under the applicable law;
  - (iv) deposit guarantee schemes arising from contributions due in accordance with Directive 2014/49/EU.

Point (g)(i) of the first subparagraph shall not apply to the variable component of the remuneration of material risk takers as identified in Article 92(2) of Directive 2013/36/EU.

Member States shall ensure that all secured assets relating to a covered bond cover pool remain unaffected, segregated and with enough funding. Neither that requirement nor point (b) of the first subparagraph shall prevent resolution authorities, where appropriate, from exercising those powers in relation to any part of a secured liability or a liability for which collateral has been pledged that exceeds the value of the assets, pledge, lien or collateral against which it is secured.

<sup>(1)</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

Point (a) of the first subparagraph shall not prevent resolution authorities, where appropriate, from exercising those powers in relation to any amount of a deposit that exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU.

Without prejudice to the large exposure rules in Regulation (EU) No 575/2013 and Directive 2013/36/EU, Member States shall ensure that in order to provide for the resolvability of institutions and groups, resolution authorities limit, in accordance with point (b) of Article 17(5) of this Directive, the extent to which other institutions hold liabilities eligible for a bail-in tool, save for liabilities that are held at entities that are part of the same group.

3. In exceptional circumstances, where the bail-in tool is applied, the resolution authority may exclude or partially exclude certain liabilities from the application of the write-down or conversion powers where:

- (a) it is not possible to bail-in that liability within a reasonable time notwithstanding the good faith efforts of the resolution authority;
- (b) the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions;
- (c) the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion, in particular as regards eligible deposits held by natural persons and micro, small and medium sized enterprises, which would severely disrupt the functioning of financial markets, including of financial market infrastructures, in a manner that could cause a serious disturbance to the economy of a Member State or of the Union; or
- (d) the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those liabilities were excluded from bail-in.

Where a resolution authority decides to exclude or partially exclude an eligible liability or class of eligible liabilities under this paragraph, the level of write down or conversion applied to other eligible liabilities may be increased to take account of such exclusions, provided that the level of write down and conversion applied to other eligible liabilities complies with the principle in point (g) of Article 34(1).

4. Where a resolution authority decides to exclude or partially exclude an eligible liability or class of eligible liabilities pursuant to this Article, and the losses that would have been borne by those liabilities have not been passed on fully to other creditors, the resolution financing arrangement may make a contribution to the institution under resolution to do one or both of the following:

- (a) cover any losses which have not been absorbed by eligible liabilities and restore the net asset value of the institution under resolution to zero in accordance with point (a) of Article 46(1);
- (b) purchase shares or other instruments of ownership or capital instruments in the institution under resolution, in order to recapitalise the institution in accordance with point (b) of Article 46(1).

5. The resolution financing arrangement may make a contribution referred to in paragraph 4 only where:

- (a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36, has been made by the shareholders and the holders of other instruments of ownership, the holders of relevant capital instruments and other eligible liabilities through write down, conversion or otherwise; and

- (b) the contribution of the resolution financing arrangement does not exceed 5 % of the total liabilities including own funds of the institution under resolution, measured at the time of resolution action in accordance with the valuation provided for in Article 36.

6. The contribution of the resolution financing arrangement referred to in paragraph 4 may be financed by:

- (a) the amount available to the resolution financing arrangement which has been raised through contributions by institutions and Union branches in accordance with Article 100(6) and Article 103;
- (b) the amount that can be raised through *ex-post* contributions in accordance with Article 104 within three years; and
- (c) where the amounts referred to (a) and (b) of this paragraph are insufficient, amounts raised from alternative financing sources in accordance with Article 105.

7. In extraordinary circumstances, the resolution authority may seek further funding from alternative financing sources after:

- (a) the 5 % limit specified in paragraph 5(b) has been reached; and
- (b) all unsecured, non-preferred liabilities, other than eligible deposits, have been written down or converted in full.

As an alternative or in addition, where the conditions laid down in the first subparagraph are met, the resolution financing arrangement may make a contribution from resources which have been raised through *ex-ante* contributions in accordance with Article 100(6) and Article 103 and which have not yet been used.

8. By way of derogation from paragraph 5 (a), the resolution financing arrangement may also make a contribution as referred to in paragraph 4 provided that:

- (a) the contribution to loss absorption and recapitalisation referred to in point (a) of paragraph 5 is equal to an amount not less than 20 % of the risk weighted assets of the institution concerned;
- (b) the resolution financing arrangement of the Member State concerned has at its disposal, by way of *ex-ante* contributions (not including contributions to a deposit guarantee scheme) raised in accordance with Article 100(6) and Article 103, an amount which is at least equal to 3 % of covered deposits of all the credit institutions authorised in the territory of that Member State; and
- (c) the institution concerned has assets below EUR 900 billion on a consolidated basis.

9. When exercising the discretions under paragraph 3, resolution authorities shall give due consideration to:

- (a) the principle that losses should be borne first by shareholders and next, in general, by creditors of the institution under resolution in order of preference;
- (b) the level of loss absorbing capacity that would remain in the institution under resolution if the liability or class of liabilities were excluded; and
- (c) the need to maintain adequate resources for resolution financing.

10. Exclusions under paragraph 3 may be applied either to completely exclude a liability from write down or to limit the extent of the write down applied to that liability.

11. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 in order to specify further the circumstances when exclusion is necessary to achieve the objectives specified in paragraph 3 of this Article.

12. Before exercising the discretion to exclude a liability under paragraph 3, the resolution authority shall notify the Commission. Where the exclusion would require a contribution by the resolution financing arrangement or an alternative financing source under paragraphs 4 to 8, the Commission may, within 24 hours of receipt of such a notification, or a longer period with the agreement of the resolution authority, prohibit or require amendments to the proposed exclusion if the requirements of this Article and delegated acts are not met in order to protect the integrity of the internal market. This is without prejudice to the application by the Commission of the Union State aid framework.

## Subsection 2

### **Minimum requirement for own funds and eligible liabilities**

#### Article 45

##### **Application of the minimum requirement**

1. Member States shall ensure that institutions meet, at all times, a minimum requirement for own funds and eligible liabilities. The minimum requirement shall be calculated as the amount of own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution.

For the purpose of the first subparagraph derivative liabilities shall be included in the total liabilities on the basis that full recognition is given to counterparty netting rights.

2. EBA shall draft technical regulatory standards which specify further the assessment criteria mentioned in points (a) to (f) of paragraph 6 on the basis of which, for each institution, a minimum requirement for own funds and eligible liabilities, including subordinated debt and senior unsecured debt with at least 12 months remaining on their terms that are subject to the bail-in power and those that qualify as own funds, is to be determined.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

Member States may provide for additional criteria on the basis of which the minimum requirement for own funds and eligible liabilities shall be determined.

3. Notwithstanding paragraph 1, resolution authorities shall exempt mortgage credit institutions financed by covered bonds which, according to national law are not allowed to receive deposits from the obligation to meet, at all times, a minimum requirement for own funds and eligible liabilities, as:

- (a) those institutions will be wound-up through national insolvency procedures, or other types of procedure implemented in accordance with Article 38, 40 or 42 of this Directive, provided for those institutions; and
- (b) such national insolvency procedures, or other types of procedure, will ensure that creditors of those institutions, including holders of covered bonds where relevant, will bear losses in a way that meets the resolution objectives.

4. Eligible liabilities shall be included in the amount of own funds and eligible liabilities referred to in paragraph 1 only if they satisfy the following conditions:

- (a) the instrument is issued and fully paid up;
- (b) the liability is not owed to, secured by or guaranteed by the institution itself;
- (c) the purchase of the instrument was not funded directly or indirectly by the institution;
- (d) the liability has a remaining maturity of at least one year;
- (e) the liability does not arise from a derivative;
- (f) the liability does not arise from a deposit which benefits from preference in the national insolvency hierarchy in accordance with Article 108.

For the purpose of point (d) where a liability confers upon its owner a right to early reimbursement, the maturity of that liability shall be the first date where such a right arises.

5. Where a liability is governed by the law of a third-country, resolution authorities may require the institution to demonstrate that any decision of a resolution authority to write down or convert that liability would be effective under the law of that third country, having regard to the terms of the contract governing the liability, international agreements on the recognition of resolution proceedings and other relevant matters. If the resolution authority is not satisfied that any decision would be effective under the law of that third country, the liability shall not be counted towards the minimum requirement for own funds and eligible liabilities.

6. The minimum requirement for own funds and eligible liabilities of each institution pursuant to paragraph 1 shall be determined by the resolution authority, after consulting the competent authority, at least on the basis of the following criteria:

- (a) the need to ensure that the institution can be resolved by the application of the resolution tools including, where appropriate, the bail-in tool, in a way that meets the resolution objectives;
- (b) the need to ensure, in appropriate cases, that the institution has sufficient eligible liabilities to ensure that, if the bail-in tool were to be applied, losses could be absorbed and the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU and to sustain sufficient market confidence in the institution or entity;
- (c) the need to ensure that, if the resolution plan anticipates that certain classes of eligible liabilities might be excluded from bail-in under Article 44(3) or that certain classes of eligible liabilities might be transferred to a recipient in full under a partial transfer, that the institution has sufficient other eligible liabilities to ensure that losses could be absorbed and the Common Equity Tier 1 ratio of the institution could be restored to a level necessary to enable it to continue to comply with the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU;
- (d) the size, the business model, the funding model and the risk profile of the institution;
- (e) the extent to which the Deposit Guarantee Scheme could contribute to the financing of resolution in accordance with Article 109;

- (f) the extent to which the failure of the institution would have adverse effects on financial stability, including, due to its interconnectedness with other institutions or with the rest of the financial system through contagion to other institutions.

7. Institutions shall comply with the minimum requirements laid down in this Article on an individual basis.

A resolution authority may, after consulting a competent authority, decide to apply the minimum requirement laid down in this Article to an entity referred to in point (b), (c) or (d) of Article 1(1).

8. In addition to paragraph 7, Union parent undertakings shall comply with the minimum requirements laid down in this Article on a consolidated basis.

The minimum requirement for own funds and eligible liabilities at consolidated level of an Union parent undertaking shall be determined by the group-level resolution authority, after consulting the consolidating supervisor, in accordance with paragraph 9, at least on the basis of the criteria laid down in paragraph 6 and of whether the third-country subsidiaries of the group are to be resolved separately according to the resolution plan.

9. The group-level resolution authority and the resolution authorities responsible for the subsidiaries on an individual basis shall do everything within their power to reach a joint decision on the level of the minimum requirement applied at the consolidated level.

The joint decision shall be fully reasoned and shall be provided to the Union parent undertaking by the group-level resolution authority.

In the absence of such a joint decision within four months, a decision shall be taken on the consolidated minimum requirement by the group-level resolution authority after duly taking into consideration the assessment of subsidiaries performed by the relevant resolution authorities. If, at the end of the four-month period, any of the resolution authorities concerned has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the group-level resolution authority shall defer its decision and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take its decision in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. In the absence of an EBA decision within one month, the decision of the group-level resolution authority shall apply.

The joint decision and the decision taken by the group-level resolution authority in the absence of a joint decision shall be binding on the resolution authorities in the Member States concerned.

The joint decision and any decision taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis.

10. Resolution authorities shall set the minimum requirement to be applied to the group's subsidiaries on an individual basis. Those minimum requirements shall be set at a level appropriate for the subsidiary having regard to:

- (a) the criteria listed in paragraph 6, in particular the size, business model and risk profile of the subsidiary, including its own funds; and
- (b) the consolidated requirement that has been set for the group under paragraph 9.

The group-level resolution authority and the resolution authorities responsible for subsidiaries on an individual basis shall do everything within their power to reach a joint decision on the level of the minimum requirement to be applied to each respective subsidiary at an individual level.

The joint decision shall be fully reasoned and shall be provided to the subsidiaries and to the Union parent institution by the resolution authority of the subsidiaries and by the group-level resolution authority, respectively.

In the absence of such a joint decision between the resolution authorities within a period of four months the decision shall be taken by the respective resolution authorities of the subsidiaries duly considering the views and reservations expressed by the group-level resolution authority.

If, at the end of the four-month period, the group-level resolution authority has referred the matter to EBA in accordance with Article 19 of Regulation (EU) No 1093/2010, the resolution authorities responsible for the subsidiaries on an individual basis shall defer their decisions and await any decision that EBA may take in accordance with Article 19(3) of that Regulation, and shall take their decisions in accordance with the decision of EBA. The four-month period shall be deemed to be the conciliation period within the meaning of that Regulation. EBA shall take its decision within one month. The matter shall not be referred to EBA after the end of the four-month period or after a joint decision has been reached. The group-level resolution authority shall not refer the matter to EBA for binding mediation where the level set by the resolution authority of the subsidiary is within one percentage point of the consolidated level set under paragraph 9 of this Article.

In the absence of an EBA decision within one month, the decisions of the resolution authorities of the subsidiaries shall apply.

The joint decision and any decisions taken by the resolution authorities of the subsidiaries in the absence of a joint decision shall be binding on the resolution authorities concerned.

The joint decision and any decisions taken in the absence of a joint decision shall be reviewed and where relevant updated on a regular basis.

11. The group-level resolution authority may fully waive the application of the individual minimum requirement to an Union parent institution where:

- (a) the Union parent institution complies on a consolidated basis with the minimum requirement set under paragraph 8; and
- (b) the competent authority of the Union parent institution has fully waived the application of individual capital requirements to the institution in accordance with Article 7(3) of Regulation (EU) No 575/2013.

12. The resolution authority of a subsidiary may fully waive the application of paragraph 7 to that subsidiary where:

- (a) both the subsidiary and its parent undertaking are subject to authorisation and supervision by the same Member State;
- (b) the subsidiary is included in the supervision on a consolidated basis of the institution which is the parent undertaking;
- (c) the highest level group institution in the Member State of the subsidiary, where different to the Union parent institution, complies on a sub-consolidated basis with the minimum requirement set under paragraph 7;

- (d) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities to the subsidiary by its parent undertaking;
- (e) either the parent undertaking satisfies the competent authority regarding the prudent management of the subsidiary and has declared, with the consent of the competent authority, that it guarantees the commitments entered into by the subsidiary, or the risks in the subsidiary are of no significance;
- (f) the risk evaluation, measurement and control procedures of the parent undertaking cover the subsidiary;
- (g) the parent undertaking holds more than 50 % of the voting rights attached to shares in the capital of the subsidiary or has the right to appoint or remove a majority of the members of the management body of the subsidiary; and
- (h) the competent authority of the subsidiary has fully waived the application of individual capital requirements to the subsidiary under Article 7(1) of Regulation (EU) No 575/2013.

13. The decisions taken in accordance with this Article may provide that the minimum requirement for own funds and eligible liabilities is partially met at consolidated or individual level through contractual bail-in instruments.

14. To qualify as a contractual bail-in instrument under paragraph 13, the resolution authority shall be satisfied that the instrument:

- (a) contains a contractual term providing that, where a resolution authority decides to apply the bail-in tool to that institution, the instrument shall be written down or converted to the extent required before other eligible liabilities are written down or converted; and
- (b) is subject to a binding subordination agreement, undertaking or provision under which in the event of normal insolvency proceedings, it ranks below other eligible liabilities and cannot be repaid until other eligible liabilities outstanding at the time have been settled.

15. Resolution authorities, in coordination with competent authorities, shall require and verify that institutions meet the minimum requirement for own funds and eligible liabilities laid down in paragraph 1 and where relevant the requirement laid down in paragraph 13, and shall take any decision pursuant to this Article in parallel with the development and the maintenance of resolution plans.

16. Resolution authorities, in coordination with competent authorities, shall inform EBA of the minimum requirement for own funds and eligible liabilities, and where relevant the requirement laid down in paragraph 13, that have been set for each institution under their jurisdiction.

17. EBA shall develop draft implementing technical standards to specify uniform formats, templates and definitions for the identification and transmission of information by resolution authorities, in coordination with competent authorities, to EBA for the purposes of paragraph 16.

EBA shall submit those draft implementing technical standards to the Commission by 3 July 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

18. Based on the results of the report referred to in paragraph 19, the Commission shall, if appropriate, submit by 31 December 2016 to the European Parliament and the Council a legislative proposal on the harmonised application of the minimum requirement for own funds and eligible liabilities. That proposal shall include, where appropriate, proposals for the introduction of an appropriate number of minimum levels of the minimum requirement, taking account of the different business models of institutions and groups. The proposal shall include any appropriate adjustments to the parameters of the minimum requirement, and if necessary, appropriate amendments to the application of the minimum requirement to groups.

19. EBA shall submit a report to the Commission by 31 October 2016 on at least the following:

- (a) how the minimum requirement for own funds and eligible liabilities has been implemented at national level, and in particular whether there have been divergences in the levels set for comparable institutions across Member States;
- (b) how the power to require institutions to meet the minimum requirement through contractual bail-in instruments has been applied across Member States and whether there have been divergences in those approaches;
- (c) the identification of business models that reflect the overall risk profiles of the institution;
- (d) the appropriate level of the minimum requirement for each of the business models identified under point (c);
- (e) whether a range for the level of the minimum requirement of each business model should be established;
- (f) the appropriate transitional period for institutions to achieve compliance with any harmonised minimum levels prescribed;
- (g) whether the requirements laid down in Article 45 are sufficient to ensure that each institution has adequate loss-absorbing capacity and, if not, which further enhancements are needed in order to ensure that objective;
- (h) whether changes to the calculation methodology provided for in this Article are necessary to ensure that the minimum requirement can be used as an appropriate indicator of an institution's loss-absorbing capacity;
- (i) whether it is appropriate to base the requirement on total liabilities and own funds and in particular whether it is more appropriate to use the institution's risk-weighted assets as a denominator for the requirement;
- (j) whether the approach of this Article on the application of the minimum requirement to groups is appropriate, and in particular whether the approach adequately ensures that loss absorbing capacity in the group is located in, or accessible to, the entities where losses might arise;
- (k) whether the conditions for waivers from the minimum requirement are appropriate, and in particular whether such waivers should be available for subsidiaries on a cross-border basis;
- (l) whether it is appropriate that resolution authorities may require that the minimum requirement be met through contractual bail-in instruments, and whether further harmonisation of the approach to contractual bail-in instruments is appropriate;
- (m) whether the requirements for contractual bail-in instruments laid down in paragraph 14 are appropriate; and
- (n) whether it is appropriate for institutions and groups to be required to disclose their minimum requirement for own funds and eligible liabilities, or their level of own funds and eligible liabilities, and if so the frequency and format of such disclosure.

20. The report in paragraph 19 shall cover at least the period from 2 July 2014 until 30 June 2016 and shall take account of at least the following:

- (a) the impact of the minimum requirement, and any proposed harmonised levels of the minimum requirement on:
  - (i) financial markets in general and markets for unsecured debt and derivatives in particular;
  - (ii) business models and balance sheet structures of institutions, in particular the funding profile and funding strategy of institutions, and the legal and operational structure of groups;
  - (iii) the profitability of institutions, in particular their cost of funding;
  - (iv) the migration of exposures to entities which are not subject to prudential supervision;
  - (v) financial innovation;
  - (vi) the prevalence of contractual bail-in instruments, and the nature and marketability of such instruments;
  - (vii) the risk-taking behaviour of institutions;
  - (viii) the level of asset encumbrance of institutions;
  - (ix) the actions taken by institutions to comply with minimum requirements, and in particular the extent to which minimum requirements have been met by asset deleveraging, long-term debt issuance and capital raising; and
  - (x) the level of lending by credit institutions, with a particular focus on lending to micro, small and medium-sized enterprises, local authorities, regional governments and public sector entities and on trade financing, including lending under official export credit insurance schemes;
- (b) the interaction of the minimum requirements with the own funds requirements, leverage ratio and the liquidity requirements laid down in Regulation (EU) No 575/2013 and in Directive 2013/36/EU;
- (c) the capacity of institutions to independently raise capital or funding from markets in order to meet any proposed harmonised minimum requirements;
- (d) consistency with the minimum requirements relating to any international standards developed by international fora.

#### Subsection 3

#### Implementation of the bail-in tool

##### Article 46

##### Assessment of amount of bail-in

1. Member States shall ensure that, when applying the bail-in tool, resolution authorities assess on the basis of a valuation that complies with Article 36 the aggregate of:

- (a) where relevant, the amount by which eligible liabilities must be written down in order to ensure that the net asset value of the institution under resolution is equal to zero; and

- (b) where relevant, the amount by which eligible liabilities must be converted into shares or other types of capital instruments in order to restore the Common Equity Tier 1 capital ratio of either:
- (i) the institution under resolution; or
  - (ii) the bridge institution.

2. The assessment referred to in paragraph 1 of this Article shall establish the amount by which eligible liabilities need to be written down or converted in order to restore the Common Equity Tier 1 capital ratio of the institution under resolution or where applicable establish the ratio of the bridge institution taking into account any contribution of capital by the resolution financing arrangement pursuant to point (d) of Article 101(1) of this Directive, and to sustain sufficient market confidence in the institution under resolution or the bridge institution and enable it to continue to meet, for at least one year, the conditions for authorisation and to continue to carry out the activities for which it is authorised under Directive 2013/36/EU or Directive 2014/65/EU.

Where resolution authorities intend to use the asset separation tool referred to in Article 42, the amount by which eligible liabilities need to be reduced shall take into account a prudent estimate of the capital needs of the asset management vehicle as appropriate.

3. Where capital has been written down in accordance with Articles 59 to 62 and bail-in has been applied pursuant to Article 43(2) and the level of write-down based on the preliminary valuation according to Article 36 is found to exceed requirements when assessed against the definitive valuation according to Article 36(10), a write-up mechanism may be applied to reimburse creditors and then shareholders to the extent necessary.

4. Resolution authorities shall establish and maintain arrangements to ensure that the assessment and valuation is based on information about the assets and liabilities of the institution under resolution that is as up to date and comprehensive as is reasonably possible.

#### Article 47

##### Treatment of shareholders in bail-in or write down or conversion of capital instruments

1. Member States shall ensure that, when applying the bail-in tool in Article 43(2) or the write down or conversion of capital instruments in Article 59, resolution authorities take in respect of shareholders and holders of other instruments of ownership one or both of the following actions:

- (a) cancel existing shares or other instruments of ownership or transfer them to bailed-in creditors;
- (b) provided that, in accordance to the valuation carried out under Article 36, the institution under resolution has a positive net value, dilute existing shareholders and holders of other instruments of ownership as a result of the conversion into shares or other instruments of ownership of:
  - (i) relevant capital instruments issued by the institution pursuant to the power referred to in Article 59(2); or
  - (ii) eligible liabilities issued by the institution under resolution pursuant to the power referred to in point (f) of Article 63(1).

With regard to point (b) of the first subparagraph, the conversion shall be conducted at a rate of conversion that severely dilutes existing holdings of shares or other instruments of ownership.

2. The actions referred to in paragraph 1 shall also be taken in respect of shareholders and holders of other instruments of ownership where the shares or other instruments of ownership in question were issued or conferred in the following circumstances:

- (a) pursuant to conversion of debt instruments to shares or other instruments of ownership in accordance with contractual terms of the original debt instruments on the occurrence of an event that preceded or occurred at the same time as the assessment by the resolution authority that the institution or entity referred to in point (b), (c) or (d) of Article 1(1) met the conditions for resolution;
- (b) pursuant to the conversion of relevant capital instruments to Common Equity Tier 1 instruments pursuant to Article 60.

3. When considering which action to take in accordance with paragraph 1, resolution authorities shall have regard to:

- (a) the valuation carried out in accordance with Article 36;
- (b) the amount by which the resolution authority has assessed that Common Equity Tier 1 items must be reduced and relevant capital instruments must be written down or converted pursuant to Article 60(1); and
- (c) the aggregate amount assessed by the resolution authority pursuant to Article 46.

4. By way of derogation from Articles 22 to 25 of Directive 2013/36/EU, the requirement to give a notice in Article 26 of Directive 2013/36/EU, Article 10(3), Article 11(1) and(2) and Articles 12 and 13 of Directive 2014/65/EU and the requirement to give a notice in Article 11(3) of Directive 2014/65/EU, where the application of the bail-in tool or the conversion of capital instruments would result in the acquisition of or increase in a qualifying holding in an institution as referred to in Article 22(1) of Directive 2013/36/EU or Article 11(1) of Directive 2014/65/EU, competent authorities shall carry out the assessment required under those Articles in a timely manner that does not delay the application of the bail-in tool or the conversion of capital instruments, or prevent resolution action from achieving the relevant resolution objectives.

5. If the competent authority of that institution has not completed the assessment required under paragraph 4 on the date of application of the bail-in tool or the conversion of capital instruments, Article 38(9) shall apply to any acquisition of or increase in a qualifying holding by an acquirer resulting from the application of the bail-in tool or the conversion of capital instruments.

6. EBA shall, by 3 July 2016, issue guidelines, in accordance with Article 16 of Regulation (EU) No 1093/2010, on the circumstances in which each of the actions referred to in paragraph 1 of this Article would be appropriate, having regard to the factors specified in paragraph 3 of this Article.

## Article 48

### Sequence of write down and conversion

1. Member States shall ensure that, when applying the bail-in tool, resolution authorities exercise the write down and conversion powers, subject to any exclusions under Article 44(2) and (3), meeting the following requirements:

- (a) Common Equity Tier 1 items are reduced in accordance with point (a) of Article 60(1);
- (b) if, and only if, the total reduction pursuant to point (a) is less than the sum of the amounts referred to in points (b) and (c) of Article 47(3), authorities reduce the principal amount of Additional Tier 1 instruments to the extent required and to the extent of their capacity;

- (c) if, and only if, the total reduction pursuant to points (a) and (b) is less than the sum of the amounts referred to in points (b) and (c) of Article 47(3), authorities reduce the principal amount of Tier 2 instruments to the extent required and to the extent of their capacity;
- (d) if, and only if, the total reduction of shares or other instruments of ownership and relevant capital instruments pursuant to points (a), (b) and (c) is less than the sum of the amounts referred to in points (b) and (c) of Article 47(3), authorities reduce to the extent required the principal amount of subordinated debt that is not Additional Tier 1 or Tier 2 capital in accordance with the hierarchy of claims in normal insolvency proceedings, in conjunction with the write down pursuant to points (a), (b) and (c) to produce the sum of the amounts referred to in points (b) and (c) of Article 47(3);
- (e) if, and only if, the total reduction of shares or other instruments of ownership, relevant capital instruments and eligible liabilities pursuant to points (a) to (d) of this paragraph is less than the sum of the amounts referred to in points (b) and (d) of Article 47(3), authorities reduce to the extent required the principal amount of, or outstanding amount payable in respect of, the rest of eligible liabilities in accordance with the hierarchy of claims in normal insolvency proceedings, including the ranking of deposits provided for in Article 108, pursuant to Article 44, in conjunction with the write down pursuant to points (a), (b), (c) and (d) of this paragraph to produce the sum of the amounts referred to in points (b) and (c) of Article 47(3).

2. When applying the write down or conversion powers, resolution authorities shall allocate the losses represented by the sum of the amounts referred to in points (b) and (c) of Article 47(3) equally between shares or other instruments of ownership and eligible liabilities of the same rank by reducing the principal amount of, or outstanding amount payable in respect of, those shares or other instruments of ownership and eligible liabilities to the same extent pro rata to their value except where a different allocation of losses amongst liabilities of the same rank is allowed in the circumstances specified in Article 44(3).

This paragraph shall not prevent liabilities which have been excluded from bail-in in accordance with Article 44(2) and (3) from receiving more favourable treatment than eligible liabilities which are of the same rank in normal insolvency proceedings.

3. Before applying the write down or conversion referred to in point (e) of paragraph 1, resolution authorities shall convert or reduce the principal amount on instruments referred to in points (b), (c) and (d) of paragraph 1 when those instruments contain the following terms and have not already been converted:

- (a) terms that provide for the principal amount of the instrument to be reduced on the occurrence of any event that refers to the financial situation, solvency or levels of own funds of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (b) terms that provide for the conversion of the instruments to shares or other instruments of ownership on the occurrence of any such event.

4. Where the principal amount of an instrument has been reduced, but not to zero, in accordance with terms of the kind referred to in point (a) of paragraph 3 before the application of the bail-in pursuant to paragraph 1, resolution authorities shall apply the write-down and conversion powers to the residual amount of that principal in accordance with paragraph 1.

5. When deciding on whether liabilities are to be written down or converted into equity, resolution authorities shall not convert one class of liabilities, while a class of liabilities that is subordinated to that class remains substantially unconverted into equity or not written down, unless otherwise permitted under Article 44(2) and (3).

6. For the purposes of this Article, EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 for any interpretation relating to the interrelationship between the provisions of this Directive and those of Regulation (EU) No 575/2013 and Directive 2013/36/EU.

*Article 49*

**Derivatives**

1. Member States shall ensure that this Article is complied with when resolution authorities apply the write-down and conversion powers to liabilities arising from derivatives.

2. Resolution authorities shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or after closing-out the derivatives. Upon entry into resolution, resolution authorities shall be empowered to terminate and close out any derivative contract for that purpose.

Where a derivative liability has been excluded from the application of the bail-in tool under Article 44(3), resolution authorities shall not be obliged to terminate or close out the derivative contract.

3. Where derivative transactions are subject to a netting agreement, the resolution authority or an independent valuer shall determine as part of the valuation under Article 36 the liability arising from those transactions on a net basis in accordance with the terms of the agreement.

4. Resolution authorities shall determine the value of liabilities arising from derivatives in accordance with the following:

(a) appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;

(b) principles for establishing the relevant point in time at which the value of a derivative position should be established; and

(c) appropriate methodologies for comparing the destruction in value that would arise from the close out and bail-in of derivatives with the amount of losses that would be borne by derivatives in a bail-in.

5. EBA, after consulting the European Supervisory Authority (European Securities and Markets Authority) ('ESMA'), established by Regulation (EU) No 1095/2010, shall develop draft regulatory technical standards specifying methodologies and the principles referred to in points (a), (b) and (c) of paragraph 4 on the valuation of liabilities arising from derivatives.

In relation to derivative transactions that are subject to a netting agreement, EBA shall take into account the methodology for close-out set out in the netting agreement.

EBA shall submit those draft regulatory technical standards to the Commission by 3 January 2016.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

*Article 50***Rate of conversion of debt to equity**

1. Member States shall ensure that, when resolution authorities exercise the powers specified in Article 59(3) and point (f) of Article 63(1), they may apply a different conversion rate to different classes of capital instruments and liabilities in accordance with one or both of the principles referred to in paragraphs 2 and 3 of this Article.
2. The conversion rate shall represent appropriate compensation to the affected creditor for any loss incurred by virtue of the exercise of the write down and conversion powers.
3. When different conversion rates are applied according to paragraph 1, the conversion rate applicable to liabilities that are considered to be senior under applicable insolvency law shall be higher than the conversion rate applicable to subordinated liabilities.
4. EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 on the setting of conversion rates.

Those guidelines shall indicate, in particular, how affected creditors may be appropriately compensated by means of the conversion rate, and the relative conversion rates that might be appropriate to reflect the priority of senior liabilities under applicable insolvency law.

*Article 51***Recovery and reorganisation measures to accompany bail-in**

1. Member States shall ensure that, where resolution authorities apply the bail-in tool to recapitalise an institution or entity referred to in point (b), (c) or (d) of Article 1(1) in accordance with point (a) of Article 43(2), arrangements are adopted to ensure that a business reorganisation plan for that institution or entity is drawn up and implemented in accordance with Article 52.
2. The arrangements referred to in paragraph 1 of this Article may include the appointment by the resolution authority of a person or persons appointed in accordance with Article 72(1) with the objective of drawing up and implementing the business reorganisation plan required by Article 52.

*Article 52***Business reorganisation plan**

1. Member States shall require that, within one month after the application of the bail-in tool to an institution or entity referred to in point (b), (c) or (d) of Article 1(1) in accordance with point (a) of Article 43(2), the management body or the person or persons appointed in accordance with Article 72(1) shall draw up and submit to the resolution authority, a business reorganisation plan that satisfies the requirements of paragraphs 4 and 5 of this Article. Where the Union State aid framework is applicable, Member States shall ensure that such a plan is compatible with the restructuring plan that the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is required to submit to the Commission under that framework.
2. When the bail-in tool in point (a) of Article 43(2) is applied to two or more group entities, the business reorganisation plan shall be prepared by the Union parent institution and cover all of the institutions in the group in accordance with the procedure specified in Articles 7 and 8 and shall be submitted to the group-level resolution authority. The group-level resolution authority shall communicate the plan to other resolution authorities concerned and to EBA.
3. In exceptional circumstances, and if it is necessary for achieving the resolution objectives, the resolution authority may extend the period in paragraph 1 up to a maximum of two months since the application of the bail-in tool.

Where the business reorganisation plan is required to be notified within the Union State aid framework, the resolution authority may extend the period in paragraph 1 up to a maximum of two months since the application of the bail-in tool or until the deadline laid down by the Union State aid framework, whichever occurs earlier.

4. A business reorganisation plan shall set out measures aiming to restore the long-term viability of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) or parts of its business within a reasonable timescale. Those measures shall be based on realistic assumptions as to the economic and financial market conditions under which the institution or entity referred to in point (b), (c) or (d) of Article 1(1) will operate.

The business reorganisation plan shall take account, inter alia, of the current state and future prospects of the financial markets, reflecting best-case and worst-case assumptions, including a combination of events allowing the identification of the institution's main vulnerabilities. Assumptions shall be compared with appropriate sector-wide benchmarks.

5. A business reorganisation plan shall include at least the following elements:

- (a) a detailed diagnosis of the factors and problems that caused the institution or entity referred to in point (b), (c) or (d) of Article 1(1) to fail or to be likely to fail, and the circumstances that led to its difficulties;
- (b) a description of the measures aiming to restore the long-term viability of the institution or entity referred to in point (b), (c) or (d) of Article 1(1) that are to be adopted;
- (c) a timetable for the implementation of those measures.

6. Measures aiming to restore the long-term viability of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) may include:

- (a) the reorganisation of the activities of the institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (b) changes to the operational systems and infrastructure within the institution;
- (c) the withdrawal from loss-making activities;
- (d) the restructuring of existing activities that can be made competitive;
- (e) the sale of assets or of business lines.

7. Within one month of the date of submission of the business reorganisation plan, the relevant resolution authority shall assess the likelihood that the plan, if implemented, will restore the long-term viability of the institution or entity referred to in point (b), (c) or (d) of Article 1(1). The assessment shall be completed in agreement with the relevant competent authority.

If the resolution authority and the competent authority are satisfied that the plan would achieve that objective, the resolution authority shall approve the plan.

8. If the resolution authority is not satisfied that the plan would achieve the objective referred to in paragraph 7, the resolution authority, in agreement with the competent authority, shall notify the management body or the person or persons appointed in accordance with Article 72(1) of its concerns and require the amendment of the plan in a way that addresses those concerns.

9. Within two weeks from the date of receipt of the notification referred to in paragraph 8, the management body or the person or persons appointed in accordance with Article 72(1) shall submit an amended plan to the resolution authority for approval. The resolution authority shall assess the amended plan, and shall notify the management body or the person or persons appointed in accordance with Article 72(1) within one week whether it is satisfied that the plan, as amended, addresses the concerns notified or whether further amendment is required.

10. The management body or the person or persons appointed in accordance with Article 72(1) shall implement the reorganisation plan as agreed by the resolution authority and competent authority, and shall submit a report to the resolution authority at least every six months on progress in the implementation of the plan.

11. The management body or the person or persons appointed in accordance with Article 72(1) shall revise the plan if, in the opinion of the resolution authority with the agreement of the competent authority, it is necessary to achieve the aim referred to in paragraph 4, and shall submit any such revision to the resolution authority for approval.

12. EBA shall develop draft regulatory technical standards to specify further:

- (a) the minimum elements that should be included in a business reorganisation plan pursuant to paragraph 5; and
- (b) the minimum contents of the reports pursuant to paragraph 10.

EBA shall submit those draft regulatory technical standards to the Commission by 3 January 2016.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

13. EBA shall, by 3 January 2016, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 7.

14. Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 13, EBA may develop draft regulatory technical standards in order to specify further the minimum criteria that a business reorganisation plan is to fulfil for approval by the resolution authority pursuant to paragraph 7.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### Subsection 4

##### Bail-in tool: ancillary provisions

###### Article 53

###### Effect of bail-in

1. Member States shall ensure that where a resolution authority exercises a power referred to in Article 59(2) and in points (e) to (i) of Article 63(1), the reduction of principal or outstanding amount due, conversion or cancellation takes effect and is immediately binding on the institution under resolution and affected creditors and shareholders.

2. Member States shall ensure that the resolution authority shall have the power to complete or require the completion of all the administrative and procedural tasks necessary to give effect to the exercise of a power referred to in Article 59(2) and in points (e) to (i) of Article 63(1), including:

- (a) the amendment of all relevant registers;
- (b) the delisting or removal from trading of shares or other instruments of ownership or debt instruments;
- (c) the listing or admission to trading of new shares or other instruments of ownership;
- (d) the relisting or readmission of any debt instruments which have been written down, without the requirement for the issuing of a prospectus pursuant to Directive 2003/71/EC of the European Parliament and of the Council<sup>(1)</sup>.

3. Where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (e) of Article 63(1), that liability and any obligations or claims arising in relation to it that are not accrued at the time when the power is exercised shall be treated as discharged for all purposes, and shall not be provable in any subsequent proceedings in relation to the institution under resolution or any successor entity in any subsequent winding up.

4. Where a resolution authority reduces in part, but not in full, the principal amount of, or outstanding amount payable in respect of, a liability by means of the power referred to in point (e) of Article 63(1):

- (a) the liability shall be discharged to the extent of the amount reduced;
- (b) the relevant instrument or agreement that created the original liability shall continue to apply in relation to the residual principal amount of, or outstanding amount payable in respect of the liability, subject to any modification of the amount of interest payable to reflect the reduction of the principal amount, and any further modification of the terms that the resolution authority might make by means of the power referred to in point (j) of Article 63(1).

#### Article 54

##### **Removal of procedural impediments to bail-in**

1. Without prejudice to point (i) of Article 63(1), Member States shall, where applicable, require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to maintain at all times a sufficient amount of authorised share capital or of other Common Equity Tier 1 instruments, so that, in the event that the resolution authority exercises the powers referred to in points (e) and (f) of Article 63(1) in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or any of its subsidiaries, the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is not prevented from issuing sufficient new shares or other instruments of ownership to ensure that the conversion of liabilities into shares or other instruments of ownership could be carried out effectively.

2. Resolution authorities shall assess whether it is appropriate to impose the requirement laid down in paragraph 1 in the case of a particular institution or entity referred to in point (b), (c) or (d) of Article 1(1) in the context of the development and maintenance of the resolution plan for that institution or group, having regard, in particular, to the resolution actions contemplated in that plan. If the resolution plan provides for the possible application of the bail-in tool, authorities shall verify that the authorised share capital or other Common Equity Tier 1 instruments is sufficient to cover the sum of the amounts referred to in points (b) and (c) of Article 47(3).

<sup>(1)</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

3. Member States shall ensure that there are no procedural impediments to the conversion of liabilities to shares or other instruments of ownership existing by virtue of their instruments of incorporation or statutes, including pre-emption rights for shareholders or requirements for the consent of shareholders to an increase in capital.

4. This Article is without prejudice to the amendments to Directives 82/891/EEC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU and Directive 2012/30/EU set out in Title X of this Directive.

## Article 55

### **Contractual recognition of bail-in**

1. Member States shall require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to include a contractual term by which the creditor or party to the agreement creating the liability recognises that liability may be subject to the write-down and conversion powers and agrees to be bound by any reduction of the principal or outstanding amount due, conversion or cancellation that is effected by the exercise of those powers by a resolution authority, provided that such liability is:

- (a) not excluded under Article 44(2);
- (b) not a deposit referred to in point (a) of Article 108;
- (c) governed by the law of a third country; and
- (d) issued or entered into after the date on which a Member State applies the provisions adopted in order to transpose this Section.

The first subparagraph shall not apply where the resolution authority of a Member State determines that the liabilities or instruments referred to in the first subparagraph can be subject to write down and conversion powers by the resolution authority of a Member State pursuant to the law of the third country or to a binding agreement concluded with that third country.

Member States shall ensure that resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to provide authorities with a legal opinion relating to the legal enforceability and effectiveness of such a term.

2. If an institution or entity referred to in point (b), (c) or (d) of Article 1(1) fails to include in the contractual provisions governing a relevant liability a term required in accordance paragraph 1, that failure shall not prevent the resolution authority from exercising the write down and conversion powers in relation to that liability.

3. EBA shall develop draft regulatory technical standards in order to further determine the list of liabilities to which the exclusion in paragraph 1 applies, and the contents of the term required in that paragraph, taking into account banks' different business models.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

*Article 56***Government financial stabilisation tools**

1. Member States may provide extraordinary public financial support through additional financial stabilisation tools in accordance with paragraph 3 of this Article, Article 37(10) and with Union State aid framework, for the purpose of participating in the resolution of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1), including by intervening directly in order to avoid its winding up, with a view to meeting the objectives for resolution referred to in Article 31(2) in relation to the Member State or the Union as a whole. Such an action shall be carried out under the leadership of the competent ministry or the government in close cooperation with the resolution authority.

2. In order to give effect to the government financial stabilisation tools, Member States shall ensure that their competent ministries or governments have the relevant resolution powers specified in Articles 63 to 72, and shall ensure that Articles 66, 68, 83 and 117 apply.

3. The government financial stabilisation tools shall be used as a last resort after having assessed and exploited the other resolution tools to the maximum extent practicable whilst maintaining financial stability, as determined by the competent ministry or the government after consulting the resolution authority.

4. When applying the government financial stabilisation tools, Member States shall ensure that their competent ministries or governments and the resolution authority apply the tools only if all the conditions laid down in Article 32(1) as well as one of the following conditions are met:

- (a) the competent ministry or government and the resolution authority, after consulting the central bank and the competent authority, determine that the application of the resolution tools would not suffice to avoid a significant adverse effect on the financial system;
- (b) the competent ministry or government and the resolution authority determine that the application of the resolution tools would not suffice to protect the public interest, where extraordinary liquidity assistance from the central bank has previously been given to the institution;
- (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 the resolution tools would not suffice to protect the public interest, where public equity support through the equity support tool has previously been given to the institution.

5. The financial stabilisation tools shall consist of the following:

- (a) public equity support tool as referred to in Article 57;
- (b) temporary public ownership tool as referred to in Article 58.

*Article 57***Public equity support tool**

1. Member States may, while complying with national company law, participate in the recapitalisation of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive by providing capital to the latter in exchange for the following instruments, subject to the requirements of Regulation (EU) No 575/2013:

- (a) Common Equity Tier 1 instruments;
- (b) Additional Tier 1 instruments or Tier 2 instruments.

2. Member States shall ensure, to the extent that their shareholding in an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) permits, that such institutions or entities subject to public equity support tool in accordance with this Article are managed on a commercial and professional basis.

3. Where a Member State provides public equity support tool in accordance with this Article, it shall ensure that its holding in the institution or an entity referred to in point (b), (c) or (d) of Article 1(1) is transferred to the private sector as soon as commercial and financial circumstances allow.

#### *Article 58*

##### **Temporary public ownership tool**

1. Member States may take an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) into temporary public ownership.

2. For that purpose a Member State may make one or more share transfer orders in which the transferee is:

(a) a nominee of the Member State; or

(b) a company wholly owned by the Member State.

3. Member States shall ensure that institutions or entities referred to in point (b), (c) or (d) of Article 1(1) subject to the temporary public ownership tool in accordance with this Article are managed on a commercial and professional basis and that they are transferred to the private sector as soon as commercial and financial circumstances allow.

#### CHAPTER V

##### ***Write down of capital instruments***

#### *Article 59*

##### **Requirement to write down or convert capital instruments**

1. The power to write down or convert relevant capital instruments may be exercised either:

(a) independently of resolution action; or

(b) in combination with a resolution action, where the conditions for resolution specified in Articles 32 and 33 are met.

2. Member States shall ensure that the resolution authorities have the power to write down or convert relevant capital instruments into shares or other instruments of ownership of institutions and entities referred to in points (b), (c) and (d) of Article 1(1).

3. Member States shall require that resolution authorities exercise the write down or conversion power, in accordance with Article 60 and without delay, in relation to relevant capital instruments issued by an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) when one or more of the following circumstances apply:

(a) where the determination has been made that conditions for resolution specified in Articles 32 and 33 have been met, before any resolution action is taken;

(b) the appropriate authority determines that unless that power is exercised in relation to the relevant capital instruments, the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) will no longer be viable;

- (c) in the case of relevant capital instruments issued by a subsidiary and where those capital instruments are recognised for the purposes of meeting own funds requirements on an individual and on a consolidated basis, the appropriate authority of the Member State of the consolidating supervisor and the appropriate authority of the Member State of the subsidiary make a joint determination taking the form of a joint decision in accordance with Article 92(3) and (4) that unless the write down or conversion power is exercised in relation to those instruments, the group will no longer be viable;
- (d) in the case of relevant capital instruments issued at the level of the parent undertaking and where those capital instruments are recognised for the purposes of meeting own funds requirements on an individual basis at the level of the parent undertaking or on a consolidated basis, and the appropriate authority of the Member State of the consolidating supervisor makes a determination that unless the write down or conversion power is exercised in relation to those instruments, the group will no longer be viable;
- (e) extraordinary public financial support is required by the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) except in any of the circumstances set out in point (d)(iii) of Article 32(4).

4. For the purposes of paragraph 3, an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or a group shall be deemed to be no longer viable only if both of the following conditions are met:

- (a) the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or the group is failing or likely to fail;
- (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any action, including alternative private sector measures or supervisory action (including early intervention measures), other than the write down or conversion of capital instruments, independently or in combination with a resolution action, would prevent the failure of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or the group within a reasonable timeframe.

5. For the purposes of point (a) of paragraph 4 of this Article, an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) shall be deemed to be failing or likely to fail where one or more of the circumstances set out in Article 32(4) occurs.

6. For the purposes of point (a) of paragraph 4, a group shall be deemed to be failing or likely to fail where the group infringes or there are objective elements to support a determination that the group, in the near future, will infringe its consolidated prudential requirements in a way that would justify action by the competent authority including but not limited to because the group has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds.

7. A relevant capital instrument issued by a subsidiary shall not be written down to a greater extent or converted on worse terms pursuant to point (c) of paragraph 3 than equally ranked capital instruments at the level of the parent undertaking which have been written down or converted.

8. Where an appropriate authority makes a determination referred to in paragraph 3 of this Article, it shall immediately notify the resolution authority responsible for the institution or for the entity referred to in point (b), (c) or (d) of Article 1(1) in question, if different.

9. Before making a determination referred to in point (c) of paragraph 3 of this Article in relation to a subsidiary that issues relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual and on a consolidated basis, the appropriate authority shall comply with the notification and consultation requirements laid down in Article 62.

10. Before exercising the power to write down or convert capital instruments, resolution authorities shall ensure that a valuation of the assets and liabilities of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) is carried out in accordance with Article 36. That valuation shall form the basis of the calculation of the write down to be applied to the relevant capital instruments in order to absorb losses and the level of conversion to be applied to relevant capital instruments in order to recapitalise the institution or the entity referred to in point (b), (c) or (d) of Article 1(1).

#### *Article 60*

##### **Provisions governing the write down or conversion of capital instruments**

1. When complying with the requirement laid down in Article 59, resolution authorities shall exercise the write down or conversion power in accordance with the priority of claims under normal insolvency proceedings, in a way that produces the following results:

- (a) Common Equity Tier 1 items are reduced first in proportion to the losses and to the extent of their capacity and the resolution authority takes one or both of the actions specified in Article 47(1) in respect of holders of Common Equity Tier 1 instruments;
- (b) the principal amount of Additional Tier 1 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 31 or to the extent of the capacity of the relevant capital instruments, whichever is lower;
- (c) the principal amount of Tier 2 instruments is written down or converted into Common Equity Tier 1 instruments or both, to the extent required to achieve the resolution objectives set out in Article 31 or to the extent of the capacity of the relevant capital instruments, whichever is lower.

2. Where the principal amount of a relevant capital instrument is written down:

- (a) the reduction of that principal amount shall be permanent, subject to any write up in accordance with the reimbursement mechanism in Article 46(3);
- (b) no liability to the holder of the relevant capital instrument shall remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power;
- (c) no compensation is paid to any holder of the relevant capital instruments other than in accordance with paragraph 3.

Point (b) shall not prevent the provision of Common Equity Tier 1 instruments to a holder of relevant capital instruments in accordance with paragraph 3.

3. In order to effect a conversion of relevant capital instruments under point (b) of paragraph 1 of this Article, resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to issue Common Equity Tier 1 instruments to the holders of the relevant capital instruments. Relevant capital instruments may only be converted where the following conditions are met:

- (a) those Common Equity Tier 1 instruments are issued by the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or by a parent undertaking of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1), with the agreement of the resolution authority of the institution or the entity referred to in points (b), (c) or (d) of Article 1(1) or, where relevant, of the resolution authority of the parent undertaking;

- (b) those Common Equity Tier 1 instruments are issued prior to any issuance of shares or other instruments of ownership by that institution or that entity referred to in point (b), (c) or (d) of Article 1(1) for the purposes of provision of own funds by the State or a government entity;
- (c) those Common Equity Tier 1 instruments are awarded and transferred without delay following the exercise of the conversion power;
- (d) the conversion rate that determines the number of Common Equity Tier 1 instruments that are provided in respect of each relevant capital instrument complies with the principles set out in Article 50 and any guidelines developed by EBA pursuant to Article 50(4).

4. For the purposes of the provision of Common Equity Tier 1 instruments in accordance with paragraph 3, resolution authorities may require institutions and entities referred to in points (b), (c) and (d) of Article 1(1) to maintain at all times the necessary prior authorisation to issue the relevant number of Common Equity Tier 1 instruments.

5. Where an institution meets the conditions for resolution and the resolution authority decides to apply a resolution tool to that institution, the resolution authority shall comply with the requirement laid down in Article 59(3) before applying the resolution tool.

## *Article 61*

### **Authorities responsible for determination**

- 1. Member States shall ensure that the authorities responsible for making the determinations referred to in Article 59(3) are those set out in this Article.
- 2. Each Member State shall designate in national law the appropriate authority which shall be responsible for making determinations pursuant to Article 59. The appropriate authority may be the competent authority or the resolution authority, in accordance with Article 32.
- 3. Where the relevant capital instruments are recognised for the purposes of meeting the own funds requirements in accordance with Article 92 of Regulation (EU) No 575/2013 on an individual basis, the authority responsible for making the determination referred to in Article 59(3) of this Directive shall be the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) has been authorised in accordance with Title III of Directive 2013/36/EU.
- 4. Where relevant capital instruments are issued by an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) that is a subsidiary and are recognised for the purposes of meeting the own funds requirements on an individual and on a consolidated basis, the authority responsible for making the determinations referred to in Articles 59(3) shall be the following:
  - (a) the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that issued those instruments has been established in accordance with Title III of Directive 2013/36/EU shall be responsible for making the determinations referred to in (b) of Article 59(3) of this Directive;

- (a) the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that issued those instruments has been established in accordance with Title III of Directive 2013/36/EU shall be responsible for making the determinations referred to in (b) of Article 59(3) of this Directive;

- (b) the appropriate authority of the Member State of the consolidating supervisor and the appropriate authority of the Member State where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive that issued those instruments has been established in accordance with Title III of Directive 2013/36/EU shall be responsible for making the joint determination taking the form of a joint decision referred to in point (c) of Article 59(3) of this Directive.

## Article 62

### **Consolidated application: procedure for determination**

1. Member States shall ensure that, before making a determination referred to in point (b), (c), (d) or (e) of Article 59(3) in relation to a subsidiary that issues relevant capital instruments that are recognised for the purposes of meeting the own funds requirements on an individual and a consolidated basis, appropriate authorities comply with the following requirements:

- (a) an appropriate authority that is considering whether to make a determination referred to in point (b), (c), (d) or (e) of Article 59(3) notifies, without delay, the consolidating supervisor and, if different, the appropriate authority in the Member State where the consolidating supervisor is located;
- (b) an appropriate authority that is considering whether to make a determination referred to in point (c) of Article 59(3) notifies, without delay, the competent authority responsible for each institution or entity referred to in point (b), (c) or (d) of Article 1(1) that has issued the relevant capital instruments in relation to which the write down or conversion power is to be exercised if that determination were made, and, if different, the appropriate authorities in the Member States where those competent authorities and the consolidating supervisor are located.

2. When making a determination referred to in point (c), (d) or (e) of Article 59(3) in the case of an institution or of a group with cross-border activity, the appropriate authorities shall take into account the potential impact of the resolution in all the Member States where the institution or the group operate.

3. An appropriate authority shall accompany a notification made pursuant to paragraph 1 with an explanation of the reasons why it is considering making the determination in question.

4. Where a notification has been made pursuant to paragraph 1, the appropriate authority, after consulting the authorities notified, shall assess the following matters:

- (a) whether an alternative measure to the exercise of the write down or conversion power in accordance with Article 59(3) is available;
- (b) if such an alternative measure is available, whether it can feasibly be applied;
- (c) if such an alternative measure could feasibly be applied, whether there is a realistic prospect that it would address, in an adequate timeframe, the circumstances that would otherwise require a determination referred to in Article 59(3) to be made.

5. For the purposes of paragraph 4 of this Article, alternative measures mean early intervention measures referred to in Article 27 of this Directive, measures referred to in Article 104(1) of Directive 2013/36/EU or a transfer of funds or capital from the parent undertaking.

6. Where, pursuant to paragraph 4, the appropriate authority, after consulting the notified authorities, assesses that one or more alternative measures are available, can feasibly be applied and would deliver the outcome referred to in point (c) of that paragraph, it shall ensure that those measures are applied.

7. Where, in a case referred to in point (a) of paragraph 1, and pursuant to paragraph 4 of this Article, the appropriate authority, after consulting the notified authorities, assesses that no alternative measures are available that would deliver the outcome referred to in point (c) of paragraph 4, the appropriate authority shall decide whether the determination referred to in Article 59(3) under consideration is appropriate.

8. Where an appropriate authority decides to make a determination under point (c) of Article 59(3), it shall immediately notify the appropriate authorities of the Member States in which the affected subsidiaries are located and the determination shall take the form of a joint decision as set out in Article 92(3) and (4). In the absence of a joint decision no determination under point (c) of Article 59(3) shall be made.

9. The resolution authorities of the Member States where each of the affected subsidiaries are located shall promptly implement a decision to write down or convert capital instruments made in accordance with this Article having due regard to the urgency of the circumstances.

## CHAPTER VI

### ***Resolution powers***

#### *Article 63*

##### **General powers**

1. Member States shall ensure that the resolution authorities have all the powers necessary to apply the resolution tools to institutions and to entities referred to in points (b), (c) and (d) of Article 1(1) that meet the applicable conditions for resolution. In particular, the resolution authorities shall have the following resolution powers, which they may exercise individually or in any combination:

- (a) the power to require any person to provide any information required for the resolution authority to decide upon and prepare a resolution action, including updates and supplements of information provided in the resolution plans and including requiring information to be provided through on-site inspections;
- (b) the power to take control of an institution under resolution and exercise all the rights and powers conferred upon the shareholders, other owners and the management body of the institution under resolution;
- (c) the power to transfer shares or other instruments of ownership issued by an institution under resolution;
- (d) the power to transfer to another entity, with the consent of that entity, rights, assets or liabilities of an institution under resolution;
- (e) the power to reduce, including to reduce to zero, the principal amount of or outstanding amount due in respect of eligible liabilities, of an institution under resolution;
- (f) the power to convert eligible liabilities of an institution under resolution into ordinary shares or other instruments of ownership of that institution or entity referred to in point (b), (c) or (d) of Article 1(1), a relevant parent institution or a bridge institution to which assets, rights or liabilities of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) are transferred;
- (g) the power to cancel debt instruments issued by an institution under resolution except for secured liabilities subject to Article 44(2);
- (h) the power to reduce, including to reduce to zero, the nominal amount of shares or other instruments of ownership of an institution under resolution and to cancel such shares or other instruments of ownership;
- (i) the power to require an institution under resolution or a relevant parent institution to issue new shares or other instruments of ownership or other capital instruments, including preference shares and contingent convertible instruments;

- (j) the power to amend or alter the maturity of debt instruments and other eligible liabilities issued by an institution under resolution or amend the amount of interest payable under such instruments and other eligible liabilities, or the date on which the interest becomes payable, including by suspending payment for a temporary period, except for secured liabilities subject to Article 44(2);
- (k) the power to close out and terminate financial contracts or derivatives contracts for the purposes of applying Article 49;
- (l) the power to remove or replace the management body and senior management of an institution under resolution;
- (m) the power to require the competent authority to assess the buyer of a qualifying holding in a timely manner by way of derogation from the time-limits laid down in Article 22 of Directive 2013/36/EU and Article 12 of Directive 2014/65/EU.

2. Member States shall take all necessary measures to ensure that, when applying the resolution tools and exercising the resolution powers, resolution authorities are not subject to any of the following requirements that would otherwise apply by virtue of national law or contract or otherwise:

- (a) subject to Article 3(6) and Article 85(1), requirements to obtain approval or consent from any person either public or private, including the shareholders or creditors of the institution under resolution;
- (b) prior to the exercise of the power, procedural requirements to notify any person including any requirement to publish any notice or prospectus or to file or register any document with any other authority.

In particular, Member States shall ensure that resolution authorities can exercise the powers under this Article irrespective of any restriction on, or requirement for consent for, transfer of the financial instruments, rights, assets or liabilities in question that might otherwise apply.

Point (b) of the first subparagraph is without prejudice to the requirements laid down in Articles 81 and 83 and any notification requirements under the Union State aid framework.

3. Member States shall ensure that, to the extent that any of the powers listed in paragraph 1 of this Article is not applicable to an entity within the scope of Article 1(1) of this Directive as a result of its specific legal form, resolution authorities shall have powers which are as similar as possible including in terms of their effects.

4. Member States shall ensure that, when resolution authorities exercise the powers pursuant to paragraph 3 the safeguards provided for in this Directive, or safeguards that deliver the same effect, shall be applied to the persons affected, including shareholders, creditors and counterparties.

#### Article 64

##### Ancillary powers

1. Member States shall ensure that, when exercising a resolution power, resolution authorities have the power to:
  - (a) subject to Article 78, provide for a transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred; for that purpose, any right of compensation in accordance with this Directive shall not be considered to be a liability or an encumbrance;

- (b) remove rights to acquire further shares or other instruments of ownership;
- (c) require the relevant authority to discontinue or suspend the admission to trading on a regulated market or the official listing of financial instruments pursuant to Directive 2001/34/EC of the European Parliament and of the Council (<sup>1</sup>);
- (d) provide for the recipient to be treated as if it were the institution under resolution for the purposes of any rights or obligations of, or actions taken by, the institution under resolution, including, subject to Articles 38 and 40, any rights or obligations relating to participation in a market infrastructure;
- (e) require the institution under resolution or the recipient to provide the other with information and assistance; and
- (f) cancel or modify the terms of a contract to which the institution under resolution is a party or substitute a recipient as a party.

2. Resolution authorities shall exercise the powers specified in paragraph 1 where it is considered by the resolution authority to be appropriate to help to ensure that a resolution action is effective or to achieve one or more resolution objectives.

3. Member States shall ensure that, when exercising a resolution power, resolution authorities have the power to provide for continuity arrangements necessary to ensure that the resolution action is effective and, where relevant, the business transferred may be operated by the recipient. Such continuity arrangements shall include, in particular:

- (a) the continuity of contracts entered into by the institution under resolution, so that the recipient assumes the rights and liabilities of the institution under resolution relating to any financial instrument, right, asset or liability that has been transferred and is substituted for the institution under resolution, expressly or implicitly in all relevant contractual documents;
- (b) the substitution of the recipient for the institution under resolution in any legal proceedings relating to any financial instrument, right, asset or liability that has been transferred.

4. The powers in point (d) of paragraph 1 and point (b) of paragraph 3 shall not affect the following:

- (a) the right of an employee of the institution under resolution to terminate a contract of employment;
- (b) subject to Articles 69, 70 and 71, any right of a party to a contract to exercise rights under the contract, including the right to terminate, where entitled to do so in accordance with the terms of the contract by virtue of an act or omission by the institution under resolution prior to the relevant transfer, or by the recipient after the relevant transfer.

#### Article 65

##### **Power to require the provision of services and facilities**

1. Member States shall ensure that resolution authorities have the power to require an institution under resolution, or any of its group entities, to provide any services or facilities that are necessary to enable a recipient to operate effectively the business transferred to it.

The first subparagraph shall apply including where the institution under resolution or relevant group entity has entered into normal insolvency proceedings.

<sup>(1)</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. Member States shall ensure that their resolution authorities have powers to enforce obligations imposed, pursuant to paragraph 1, on group entities established in their territory by resolution authorities in other Member States.

3. The services and facilities referred to in paragraphs 1 and 2 are restricted to operational services and facilities and do not include any form of financial support.

4. The services and facilities provided in accordance with paragraphs 1 and 2 shall be on the following terms:

(a) where the services and facilities were provided under an agreement to the institution under resolution immediately before the resolution action was taken and for the duration of that agreement, on the same terms;

(b) where there is no agreement or where the agreement has expired, on reasonable terms.

5. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify the minimum list of services or facilities that are necessary to enable a recipient to effectively operate a business transferred to it.

#### Article 66

##### **Power to enforce crisis management measures or crisis prevention measures by other Member States**

1. Member States shall ensure that, where a transfer of shares, other instruments of ownership, or assets, rights or liabilities includes assets that are located in a Member State other than the State of the resolution authority or rights or liabilities under the law of a Member State other than the State of the resolution authority, the transfer has effect in or under the law of that other Member State.

2. Member States shall provide the resolution authority that has made or intends to make the transfer with all reasonable assistance to ensure that the shares or other instruments of ownership or assets, rights or liabilities are transferred to the recipient in accordance with any applicable requirements of national law.

3. Member States shall ensure that shareholders, creditors and third parties that are affected by the transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 are not entitled to prevent, challenge, or set aside the transfer under any provision of law of the Member State where the assets are located or of the law governing the shares, other instruments of ownership, rights or liabilities.

4. Where a resolution authority of a Member State (Member State A) exercises the write-down or conversion powers, including in relation to capital instruments in accordance with Article 59, and the eligible liabilities or relevant capital instruments of the institution under resolution include the following:

(a) instruments or liabilities that are governed by the law of a Member State other than the State of the resolution authority that exercised the write down or conversion powers (Member State B);

(b) liabilities owed to creditors located in Member State B.

Member State B shall ensure that the principal amount of those liabilities or instruments is reduced, or liabilities or instruments are converted, in accordance with the exercise of the write-down or conversion powers by the resolution authority of Member State A,

5. Member States shall ensure that creditors that are affected by the exercise of write-down or conversion powers referred to in paragraph 4 are not entitled to challenge the reduction of the principal amount of the instrument or liability or its conversion, as the case may be, under any provision of law of Member State B.

6. Each Member State shall ensure that the following are determined in accordance with the law of the Member State of the resolution authority:

- (a) the right for shareholders, creditors and third parties to challenge, by way of appeal pursuant to Article 85, a transfer of shares, other instruments of ownership, assets, rights or liabilities referred to in paragraph 1 of this Article;
- (b) the right for creditors to challenge, by way of appeal pursuant to Article 85, the reduction of the principal amount, or the conversion, of an instrument or liability covered by points (a) or (b) of paragraph 4 of this Article;
- (c) the safeguards for partial transfers, as referred to in Chapter VII, in relation to assets, rights or liabilities referred to in paragraph 1.

#### *Article 67*

#### **Power in respect of assets, rights, liabilities, shares and other instruments of ownership located in third countries**

1. Member States shall provide that, in cases in which resolution action involves action taken in respect of assets located in a third country or shares, other instruments of ownership, rights or liabilities governed by the law of a third country, resolution authorities may require that:

- (a) the administrator, receiver or other person exercising control of the institution under resolution and the recipient take all necessary steps to ensure that the transfer, write down, conversion or action becomes effective;
- (b) the administrator, receiver or other person exercising control of the institution under resolution hold the shares, other instruments of ownership, assets or rights or discharge the liabilities on behalf of the recipient until the transfer, write down, conversion or 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 met in any of the ways referred to in Article 37(7).

2. Where the resolution authority assesses that, in spite of all the necessary steps taken by the administrator, receiver or other person in accordance with paragraph 1(a), it is highly unlikely that the transfer, conversion or action will become effective in relation to certain assets located in a third country or certain shares, other instruments of ownership, rights or liabilities under the law of a third country, the resolution authority shall not proceed with the transfer, write down, conversion or action. If it has already ordered the transfer, write down, conversion or action, that order shall be void in relation to the assets, shares, instruments of ownership, rights or liabilities concerned.

#### *Article 68*

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

1. A crisis prevention measure or a crisis management measure taken in relation to an entity in accordance with this Directive, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, under a contract entered into by the entity, be deemed to be an enforcement event within the meaning of Directive 2002/47/EC or as insolvency proceedings within the meaning of Directive 98/26/EC provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed.

In addition, a crisis prevention measure or crisis management measure shall not, per se, be deemed to be an enforcement event or insolvency proceedings under a contract entered into by:

(a) a subsidiary, the obligations under which are guaranteed or otherwise supported by the parent undertaking or by any group entity; or

(b) any entity of a group which includes cross-default provisions.

2. Where third country resolution proceedings are recognised pursuant to Article 94, or otherwise where a resolution authority so decides, such proceedings shall for the purposes of this Article constitute a crisis management measure.

3. Provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed, a crisis prevention measure or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, make it possible for anyone to:

(a) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by:

(i) a subsidiary, the obligations under which are guaranteed or otherwise supported by a group entity;

(ii) any group entity which includes cross-default provisions;

(b) obtain possession, exercise control or enforce any security over any property of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) concerned or any group entity in relation to a contract which includes cross-default provisions;

(c) affect any contractual rights of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) concerned or any group entity in relation to a contract which includes cross-default provisions.

4. This Article shall not affect the right of a person to take an action referred to in paragraph 3 where that right arises by virtue of an event other than the crisis prevention measure, the crisis management measure or the occurrence of any event directly linked to the application of such a measure.

5. A suspension or restriction under Article 69, 70 or 71 shall not constitute non-performance of a contractual obligation for the purposes of paragraphs 1 and 2 of this Article.

6. The provisions contained in this Article shall be considered to be overriding mandatory provisions within the meaning of Article 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council (<sup>1</sup>).

## Article 69

### Power to suspend certain obligations

1. Member States shall ensure that resolution authorities have the power to suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension in accordance with Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication.

<sup>(1)</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

2. When 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. If an institution under resolution's payment or delivery obligations under a contract are suspended under paragraph 1, the payment or delivery obligations of the institution under resolution's counterparties under that contract shall be suspended for the same period of time.

4. Any suspension under paragraph 1 shall not apply to:

(a) eligible deposits;

(b) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, and central banks;

(c) eligible claims for the purpose of Directive 97/9/EC.

5. When exercising a power under this Article, resolution authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.

#### *Article 70*

#### **Power to restrict the enforcement of security interests**

1. Member States shall ensure that resolution authorities have the power to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution under resolution from the publication of a notice of the restriction in accordance with Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication.

2. Resolution authorities 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, central counterparties, and central banks over assets pledged or provided by way of margin or collateral by the institution under resolution.

3. Where Article 80 applies, resolution authorities shall ensure that any restrictions imposed pursuant to the power referred to in paragraph 1 of this Article are consistent for all group entities in relation to which a resolution action is taken.

4. When exercising a power under this Article, resolution authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets.

#### *Article 71*

#### **Power to temporarily suspend termination rights**

1. Member States shall ensure that resolution authorities have the power to suspend the termination rights of any party to a contract with an institution under resolution from the publication of the notice pursuant to Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

2. Member States shall ensure that resolution authorities have the power to suspend the termination rights of any party to a contract with a subsidiary of an institution under resolution where:

(a) the obligations under that contract are guaranteed or are otherwise supported by the institution under resolution;

- (b) the termination rights under that contract are based solely on the insolvency or financial condition of the institution under resolution; and
- (c) in the case of a transfer power that has been or may be exercised in relation to the institution under resolution, either:
  - (i) all the assets and liabilities of the subsidiary relating to that contract have been or may be transferred to and assumed by the recipient; or
  - (ii) the resolution authority provides in any other way adequate protection for such obligations.

The suspension shall take effect from the publication of the notice pursuant to Article 83(4) until midnight in the Member State where the subsidiary of the institution under resolution is established on the business day following that publication.

3. Any suspension under paragraph 1 or 2 shall not apply to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, or central banks.

4. A person may exercise a termination right under a contract before the end of the period referred to in paragraph 1 or 2 if that person 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 or conversion on the application of the bail-in tool in accordance with point (a) of Article 43(2).

5. Where a resolution authority exercises the power specified in paragraph 1 or 2 of this Article to suspend termination rights, and where no notice has been given pursuant to paragraph 4 of this Article, those rights may be exercised on the expiry of the period of suspension, subject to Article 68, as follows:

(a) if 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 on the occurrence of any continuing or subsequent enforcement event by the recipient entity;

(b) if the rights and liabilities covered by the contract remain with the institution under resolution and the resolution authority has not applied the bail-in tool in accordance with Article 43(2)(a) to that contract, a counterparty may exercise termination rights in accordance with the terms of that contract on the expiry of a suspension under paragraph 1.

6. When exercising a power under this Article, resolution authorities shall have regard to the impact the exercise of that power might have on the orderly functioning of the financial markets.

7. Competent authorities or resolution authorities may require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) to maintain detailed records of financial contracts.

Upon the request of a competent authority or a resolution authority, a trade repository shall make the necessary information available to competent authorities or resolution authorities to enable them to fulfil their respective responsibilities and mandates in accordance with Article 81 of Regulation (EU) No 648/2012.

8. EBA shall develop draft regulatory technical standards specifying the following elements for the purposes of paragraph 7:

- (a) a minimum set of the information on financial contracts that should be contained in the detailed records; and
- (b) the circumstances in which the requirement should be imposed.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

## Article 72

### **Exercise of the resolution powers**

1. Member States shall ensure that, in order to take a resolution action, resolution authorities are able to exercise control over the institution under resolution, so as to:

- (a) operate and conduct the activities and services of the institution under resolution with all the powers of its shareholders and management body; and
- (b) manage and dispose of the assets and property of the institution under resolution.

The control referred to in the first subparagraph may be exercised directly by the resolution authority or indirectly by a person or persons appointed by the resolution authority. Member States shall ensure that voting rights conferred by shares or other instruments of ownership of the institution under resolution cannot be exercised during the period of resolution.

2. Subject to Article 85(1), Member States shall ensure that resolution authorities are able to take a resolution action through executive order in accordance with national administrative competences and procedures, without exercising control over the institution under resolution.

3. Resolution authorities shall decide in each particular case whether it is appropriate to carry out the resolution action through the means specified in paragraph 1 or in paragraph 2, having regard to the resolution objectives and the general principles governing resolution, the specific circumstances of the institution under resolution in question and the need to facilitate the effective resolution of cross-border groups.

4. Resolution authorities shall not be deemed to be shadow directors or de facto directors under national law.

## CHAPTER VII

### **Safeguards**

## Article 73

### **Treatment of shareholders and creditors in the case of partial transfers and application of the bail-in tool**

Member States shall ensure that, where one or more resolution tools have been applied and, in particular for the purposes of Article 75:

- (a) except where point (b) applies, where resolution authorities transfer only parts of the rights, assets and liabilities of the institution under resolution, the shareholders and those creditors whose claims have not been transferred, receive in satisfaction of their claims at least as much as what they would have received if the institution under resolution had been wound up under normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;

- (b) where resolution authorities apply the bail-in tool, the shareholders and creditors whose claims have been written down or converted to equity do not incur greater losses than they would have incurred if the institution under resolution had been wound up under normal insolvency proceedings immediately at the time when the decision referred to in Article 82 was taken.

#### Article 74

##### **Valuation of difference in treatment**

1. For the purposes of assessing whether shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings, including but not limited to for the purpose of Article 73, Member States 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. That valuation shall be distinct from the valuation carried out under Article 36.

2. The valuation in paragraph 1 shall determine:

- (a) the treatment that shareholders and creditors, or the relevant deposit guarantee schemes, would have received if the institution under resolution with respect to which the resolution action or actions have been effected had entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;
- (b) the actual treatment that shareholders and creditors have received, in the resolution of the institution under resolution; and
- (c) if there is any difference between the treatment referred to in point (a) and the treatment referred to in point (b).

3. The valuation shall:

- (a) assume that the institution under resolution with respect to which the resolution action or actions have been effected, would have entered normal insolvency proceedings at the time when the decision referred to in Article 82 was taken;
- (b) assume that the resolution action or actions had not been effected;
- (c) disregard any provision of extraordinary public financial support to the institution under resolution.

4. EBA may develop draft regulatory technical standards specifying the methodology for carrying out the valuation in this Article, in particular the methodology for assessing the treatment that shareholders and creditors would have received if the institution under resolution had entered insolvency proceedings at the time when the decision referred to in Article 82 was taken.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### Article 75

##### **Safeguard for shareholders and creditors**

Member States shall ensure that if the valuation carried out under Article 74 determines that any shareholder or creditor referred to in Article 73, or the deposit guarantee scheme in accordance with Article 109(1), has incurred greater losses than it would have incurred in a winding up under normal insolvency proceedings, it is entitled to the payment of the difference from the resolution financing arrangements.

*Article 76***Safeguard for counterparties in partial transfers**

1. Member States shall ensure that the protections specified in paragraph 2 apply in the following circumstances:

(a) a resolution authority transfers some but not all of the assets, rights or liabilities of an institution under resolution to another entity or, in the exercise of a resolution tool, from a bridge institution or asset management vehicle to another person;

(b) a resolution authority exercises the powers specified in point (f) of Article 64(1).

2. Member States shall ensure appropriate protection of the following arrangements and of the counterparties to the following arrangements:

(a) security arrangements, under which a person has by way of security an actual or contingent interest in the assets or rights that are subject to transfer, irrespective of whether that interest is secured by specific assets or rights or by way of a floating charge or similar arrangement;

(b) title transfer financial collateral arrangements under which collateral to secure or cover the performance of specified obligations is provided by a transfer of full ownership of assets from the collateral provider to the collateral taker, on terms providing for the collateral taker to transfer assets if those specified obligations are performed;

(c) set-off arrangements under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other;

(d) netting arrangements;

(e) covered bonds;

(f) structured finance arrangements, including 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.

The form of protection that is appropriate, for the classes of arrangements specified in points (a) to (f) of this paragraph is further specified in Articles 77 to 80, and shall be subject to the restrictions specified in Articles 68 to 71.

3. The requirement under paragraph 2 applies irrespective of the number of parties involved in the arrangements and of whether the arrangements:

(a) are created by contract, trusts or other means, or arise automatically by operation of law;

(b) arise under or are governed in whole or in part by the law of another Member State or of a third country.

4. The Commission shall adopt delegated acts in accordance with Article 115 further specifying the classes of arrangement that fall within the scope of points (a) to (f) of paragraph 2 of this Article.

### Article 77

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

1. Member States shall ensure that there is appropriate protection for title transfer financial collateral arrangements and set-off and netting arrangements so as to prevent the transfer of some, but not all, of the rights and liabilities that are protected under a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement between the institution under resolution and another person and the modification or termination of rights and liabilities that are protected under such a title transfer financial collateral arrangement, a set-off arrangement or a netting arrangement through the use of ancillary powers.

For the purposes of the first subparagraph, rights and liabilities are to be treated as protected under such an arrangement if the parties to the arrangement are entitled to set-off or net those rights and liabilities.

2. Notwithstanding paragraph 1, where necessary in order to ensure availability of the covered deposits the resolution authority may:

- (a) transfer covered deposits which are part of any of the arrangements mentioned in paragraph 1 without transferring other assets, rights or liabilities that are part of the same arrangement; and
- (b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

### Article 78

#### **Protection for security arrangements**

1. Member States shall ensure that there is appropriate protection for liabilities secured under a security arrangement so as to prevent one of the following:

- (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 are also transferred;
- (c) the transfer of the benefit of the security unless the secured liability is also transferred; or
- (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.

2. Notwithstanding paragraph 1, where necessary in order to ensure availability of the covered deposits the resolution authority may:

- (a) transfer covered deposits which are part of any of the arrangements mentioned in paragraph 1 without transferring other assets, rights or liabilities that are part of the same arrangement; and
- (b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits

### Article 79

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

1. Member States shall ensure that there is appropriate protection for structured finance arrangements including arrangements referred to in points (e) and (f) of Article 76(2) so as to prevent either of the following:

- (a) the transfer of some, but not all, of the assets, rights and liabilities which constitute or form part of a structured finance arrangement, including arrangements referred to in points (e) and (f) of Article 76(2), to which the institution under resolution is a party;

(b) the termination or modification through the use of ancillary powers of the assets, rights and liabilities which constitute or form part of a structured finance arrangement, including arrangements referred to in points (e) and (f) of Article 76(2), to which the institution under resolution is a party.

2. Notwithstanding paragraph 1, where necessary in order to ensure availability of the covered deposits the resolution authority may:

(a) transfer covered deposits which are part of any of the arrangements mentioned in paragraph 1 without transferring other assets, rights or liabilities that are part of the same arrangement, and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

#### *Article 80*

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

1. Member States 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 or liabilities of an institution under resolution to another entity; or

(b) uses powers under Article 64 to cancel or amend the terms of a contract to which the institution under resolution is a party or to substitute a recipient as a party.

2. In particular, a transfer, cancellation or amendment as referred to in paragraph 1 of this Article shall not revoke a transfer order in contravention of Article 5 of Directive 98/26/EC; and shall not modify or negate the enforceability of transfer orders and netting as required by Articles 3 and 5 of that Directive, the use of funds, securities or credit facilities as required by Article 4 thereof or protection of collateral security as required by Article 9 thereof.

#### *CHAPTER VIII*

#### ***Procedural obligations***

#### *Article 81*

#### **Notification requirements**

1. Member States shall require the management body of an institution or any entity referred to in point (b), (c) or (d) of Article 1(1) to notify the competent authority where they consider that the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) is failing or likely to fail, within the meaning specified in Article 32(4).

2. Competent authorities shall inform the relevant resolution authorities of any notifications received under paragraph 1 of this Article, and of any crisis prevention measures, or any actions referred to in Article 104 of Directive 2013/36/EU they require an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive to take.

3. Where a competent authority or resolution authority determines that the conditions referred to in points (a) and (b) of Article 32(1) are met in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1), it shall communicate that determination without delay to the following authorities, if different:

(a) the resolution authority for that institution or entity referred to in point (b), (c) or (d) of Article 1(1);

(b) the competent authority for that institution or entity referred to in point (b), (c) or (d) of Article 1(1);

- (c) the competent authority of any branch of that institution or entity referred to in point (b), (c) or (d) of Article 1(1);
- (d) the resolution authority of any branch of that institution or entity referred to in point (b), (c) or (d) of Article 1, (1)
- (e) the central bank;
- (f) the deposit guarantee scheme to which a credit institution is affiliated where necessary to enable the functions of the deposit guarantee scheme to be discharged;
- (g) the body in charge of the resolution financing arrangements where necessary to enable the functions of the resolution financing arrangements to be discharged;
- (h) where applicable, the group-level resolution authority;
- (i) the competent ministry;
- (j) where the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) of this Directive is subject to supervision on consolidated basis under Chapter 3 of Title VII of Directive 2013/36/EU, the consolidating supervisor; and
- (k) the ESRB and the designated national macro-prudential authority.

4. Where the transmission of information referred to in paragraphs 3(f) and 3(g) does not guarantee the appropriate level of confidentiality, the competent authority or resolution authority shall establish alternative communication procedures that achieve the same objectives while ensuring the appropriate level of confidentiality.

#### *Article 82*

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

1. On receiving a communication from the competent authority pursuant to paragraph 3 of Article 81, or on its own initiative, the resolution authority shall determine, in accordance with Article 32(1) and Article 33, whether the conditions of that paragraph are met in respect of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) in question.

2. A decision whether or not to take resolution action in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) shall contain the following information:

- (a) the reasons for that decision, including the determination that the institution meets or does not meet the conditions for resolution;
- (b) the action that the resolution authority intends to take including, where appropriate, the determination to apply for winding up, the appointment of an administrator or any other measure under applicable normal insolvency proceedings or, subject to Article 37(9), under national law.

3. EBA shall develop draft regulatory technical standards in order to specify the procedures and contents relating to the following requirements:

- (a) the notifications referred to in Article 81(1), (2) and (3);

- (b) the notice of suspension referred to in Article 83.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

### *Article 83*

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

1. Member States shall ensure that, as soon as reasonably practicable after taking a resolution action, resolution authorities comply with the requirements laid down in paragraphs 2, 3 and 4.

2. The resolution authority shall notify the institution under resolution and the following authorities, if different:

- (a) the competent authority for the institution under resolution;
- (b) the competent authority of any branch of the institution under resolution;
- (c) the central bank;
- (d) the deposit guarantee scheme to which the credit institution under resolution is affiliated;
- (e) the body in charge of the resolution financing arrangements;
- (f) where applicable, the group-level resolution authority;
- (g) the competent ministry;
- (h) where the institution under resolution is subject to supervision on a consolidated basis under Chapter 3 of Title VII of Directive 2013/36/EU, the consolidating supervisor;
- (i) the designated national macroprudential authority and the ESRB;
- (j) the Commission, the European Central Bank, ESMA, the European Supervisory Authority (European Investment and Occupational Pensions Authority) ('EIOPA') established by Regulation (EU) No 1094/2010 and EBA;
- (k) where the institution under resolution is an institution as defined in Article 2(b) of Directive 98/26/EC, the operators of the systems in which it participates.

3. The notification referred to in paragraph 2 shall include a copy of any order or instrument by which the relevant powers are exercised and indicate the date from which the resolution action or actions are effective.

4. The resolution authority shall publish or ensure the publication of 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 in particular the effects on retail customers and, if applicable, the terms and period of suspension or restriction referred to in Articles 69, 70 and 71, by the following means:

- (a) on its official website;

- (b) on the website of the competent authority, if different from the resolution authority, and on the website of EBA;
- (c) on the website of the institution under resolution;
- (d) where the shares, other instruments of ownership or debt instruments of the institution under resolution are admitted to trading on a regulated market, the means used for the disclosure of regulated information concerning the institution under resolution in accordance with Article 21(1) of Directive 2004/109/EC of the European Parliament and of the Council (<sup>(1)</sup>).

5. If the shares, 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 instruments referred to in paragraph 4 are sent to the shareholders and creditors of the institution under resolution that are known through the registers or databases of the institution under resolution which are available to the resolution authority.

#### Article 84

##### **Confidentiality**

- 1. The requirements of professional secrecy shall be binding in respect of the following persons:
  - (a) resolution authorities;
  - (b) competent authorities and EBA;
  - (c) competent ministries;
  - (d) special managers or temporary administrators appointed under this Directive;
  - (e) potential acquirers that are contacted by the competent authorities or solicited by the resolution authorities, irrespective of whether that contact or solicitation was made as preparation for the use of the sale of business tool, and irrespective of whether the solicitation resulted in an acquisition;
  - (f) auditors, accountants, legal and professional advisors, valuers and other experts directly or indirectly engaged by the resolution authorities, competent authorities, competent ministries or by the potential acquirers referred to in point (e);
  - (g) bodies which administer deposit guarantee schemes;
  - (h) bodies which administer investor compensation schemes;
  - (i) the body in charge of the resolution financing arrangements;
  - (j) central banks and other authorities involved in the resolution process;
  - (k) a bridge institution or an asset management vehicle;
  - (l) any other persons who provide or have provided services directly or indirectly, permanently or occasionally, to persons referred to in points (a) to (k);

<sup>(1)</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).

(m) senior management, members of the management body, and employees of the bodies or entities referred to in points (a) to (k) before, during and after their appointment.

2. With a view to ensuring that the confidentiality requirements laid down in paragraphs 1 and 3 are complied with, the persons in points (a), (b), (c), (g), (h), (j) and (k) of paragraph 1 shall ensure that there are internal rules in place, including rules to secure secrecy of information between persons directly involved in the resolution process.

3. Without prejudice to the generality of the requirements under paragraph 1, the persons referred to in that paragraph 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 its functions under this Directive, to any person or authority unless it is in the exercise of their functions under this Directive or in summary or collective form such that individual institutions or entities referred to in point (b), (c) or (d) of Article 1(1) cannot be identified or with the express and prior consent of the authority or the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) which provided the information.

Member States shall ensure that no confidential information is disclosed by the persons referred to in paragraph 1 and that the possible effects of disclosing information 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, are assessed.

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 plan as referred to in Articles 5, 7, 10, 11 and 12 and the result of any assessment carried out under Articles 6, 8 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. This Article shall not prevent:

- (a) employees and experts of the bodies or entities referred to in points (a) to (j) of paragraph 1 from sharing information among themselves within each body or entity; or
- (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, deposit guarantee schemes, investor compensation schemes, 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, or, subject to Article 98, 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.

5. Notwithstanding any other provision of this Article, Member States may authorise the exchange of information with any of the following:

- (a) subject to strict confidentiality requirements, 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, under appropriate conditions; and

(c) national authorities responsible for overseeing payment systems, the authorities responsible for normal insolvency proceedings, the authorities entrusted with the public duty of supervising other financial sector entities, the authorities responsible for the supervision of financial markets and insurance undertakings and inspectors acting on their behalf, the authorities of Member States responsible for maintaining the stability of the financial system in Member States through the use of macroprudential rules, the authorities responsible for protecting the stability of the financial system, and persons charged carrying out statutory audits;

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.

7. EBA shall, by 3 July 2015, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 to specify how information should be provided in summary or collective form for the purposes of paragraph 3.

## CHAPTER IX

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

#### **Article 85**

##### **Ex-ante judicial approval and rights to challenge decisions**

1. Member States may require that a decision to take a crisis prevention measure or a crisis management measure is subject to *ex-ante* judicial approval, provided that in respect of a decision to take a crisis management measure, according to national law, the procedure relating to the application for approval and the court's consideration are expeditious.

2. Member States shall provide in national law for a right of appeal against a decision to take a crisis prevention measure or a decision to exercise any power, other than a crisis management measure, under this Directive.

3. Member States shall ensure that all persons affected by a decision to take a crisis management measure, have the right to appeal against that decision. Member States shall ensure that the review is expeditious and that national courts use the complex economic assessments of the facts carried out by the resolution authority as a basis for their own assessment.

4. The right to appeal referred to in paragraph 3 shall be subject to the following provisions:

(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.

Where it is necessary to protect the interests of third parties acting in good faith who have acquired shares, other instruments of ownership, assets, rights or liabilities of an institution under resolution by virtue of the use of resolution tools or exercise of resolution powers by a resolution authority, 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. In that case, remedies for a wrongful decision or action by the resolution authorities shall be limited to compensation for the loss suffered by the applicant as a result of the decision or act.

#### **Article 86**

##### **Restrictions on other proceedings**

1. Without prejudice to point (b) of Article 82(2), Member States shall ensure with respect to an institution under resolution or an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) in relation to which the conditions for resolution have been determined to be met, that normal insolvency proceedings shall not be commenced except at the initiative of the resolution authority and that a decision placing an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) into normal insolvency proceedings shall be taken only with the consent of the resolution authority.

2. For the purposes of paragraph 1, Member States shall ensure that:

- (a) competent authorities and resolution authorities are notified without delay of any application for the opening of normal insolvency proceedings in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1), irrespective of whether the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) is under resolution or a decision has been made public in accordance with Article 83(4) and (5);
- (b) the application is not determined unless the notifications referred to in point (a) have been made and either of the following occurs:
  - (i) the resolution authority has notified the authorities responsible for normal insolvency proceedings that it does not intend to take any resolution action in relation to the institution or the entity referred to in point (b), (c) or (d) of Article 1(1);
  - (ii) a period of seven days beginning with the date on which the notifications referred to in point (a) were made has expired.

3. Without prejudice to any restriction on the enforcement of security interests imposed pursuant to Article 70, Member States shall ensure that, if necessary for the effective application of the resolution tools and powers, resolution authorities may request the court to apply a stay for an appropriate period of time in accordance with the objective pursued, on any judicial action or proceeding in which an institution under resolution is or becomes a party.

## TITLE V

### CROSS-BORDER GROUP RESOLUTION

#### Article 87

##### **General principles regarding decision-making involving more than one Member State**

Member States shall ensure that, when making decisions or taking action pursuant to this Directive which may have an impact in one or more other Member States, their authorities have regard to the following general principles:

- (a) the imperatives of efficacy of decision-making and of keeping resolution costs as low as possible when taking resolution action;
- (b) that decisions are made and action is taken in a timely manner and with due urgency when required;
- (c) that resolution authorities, competent authorities and other authorities cooperate with each other to ensure that decisions are made and action is taken in a coordinated and efficient manner;
- (d) that the roles and responsibilities of relevant authorities within each Member State are clearly defined;
- (e) that due consideration is given to the interests of the Member States where the Union parent undertakings are established, in particular the impact of any decision or action or inaction on the financial stability, fiscal resources, resolution fund, deposit guarantee scheme or investor compensation scheme of those Member States;
- (f) that due consideration is given to the interests of each individual Member State where a subsidiary is established, in particular the impact of any decision or action or inaction on the financial stability, fiscal resources, resolution fund, deposit guarantee scheme or investor compensation scheme of those Member States;
- (g) that due consideration is given to the interests of each Member State where significant branches are located, in particular the impact of any decision or action or inaction on the financial stability of those Member States;

- (h) that due consideration is given to the objectives of balancing the interests of the various Member States involved and of avoiding unfairly prejudicing or unfairly protecting the interests of particular Member States, including avoiding unfair burden allocation across Member States;
- (i) that any obligation under this Directive to consult an authority before any decision or action is taken implies at least that such an obligation to consult that authority on those elements of the proposed decision or action which have or which are likely to have:
  - (i) an effect on the Union parent undertaking, the subsidiary or the branch; and
  - (ii) an impact on the stability of the Member State where the Union parent undertaking, the subsidiary or the branch, is established or located;
- (j) that resolution authorities, when taking resolution actions, take into account and follow the resolution plans referred to in Article 13 unless the resolution authorities consider, 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;
- (k) that the requirement for transparency whenever a proposed decision or action is likely to have implications on the financial stability, fiscal resources, resolution fund, deposit guarantee scheme or investor compensation scheme of any relevant Member State; and
- (l) recognition that coordination and cooperation are most likely to achieve a result which lowers the overall cost of resolution.

#### *Article 88*

#### **Resolution colleges**

1. Group-level resolution authorities shall establish resolution colleges to carry out the tasks referred to in Articles 12, 13, 16, 18, 45, 91 and 92, and, where appropriate, to ensure cooperation and coordination with third-country resolution authorities.

In particular, resolution colleges shall provide a framework for the group-level resolution authority, the other resolution authorities and, where appropriate, competent authorities and consolidating supervisors concerned to perform the following tasks:

- (a) exchanging information relevant for the development of group resolution plans, for the application to groups of preparatory and preventative powers and for group resolution;
- (b) developing group resolution plans pursuant to Articles 12 and 13;
- (c) assessing the resolvability of groups pursuant to Article 16;
- (d) exercising powers to address or remove impediments to the resolvability of groups pursuant to Article 18;
- (e) deciding on the need to establish a group resolution scheme as referred to in Article 91 or 92;
- (f) reaching the agreement on a group resolution scheme proposed in accordance with Article 91 or 92;
- (g) coordinating public communication of group resolution strategies and schemes;
- (h) coordinating the use of financing arrangements established under Title VII;

- (i) setting the minimum requirements for groups at consolidated and subsidiary level under Article 45.

In addition, resolution colleges may be used as a forum to discuss any issues relating to cross-border group resolution.

2. The following shall be members of the resolution college:

- (a) the group-level resolution authority;
- (b) the resolution authorities of each Member State in which a subsidiary covered by consolidated supervision is established;
- (c) the resolution authorities of Member States where a parent undertaking of one or more institutions of the group, that is an entity referred to in point (d) of Article 1(1), are established;
- (d) the resolution authorities of Member States in which significant branches are located;
- (e) the consolidating supervisor and the competent authorities of the Member States where the resolution authority is a member of the resolution college. Where the competent authority of a Member State is not the Member State's central bank, the competent authority may decide to be accompanied by a representative from the Member State's central bank;
- (f) the competent ministries, where the resolution authorities which are members of the resolution college are not the competent ministries;
- (g) the authority that is responsible for the deposit guarantee scheme of a Member State, where the resolution authority of that Member State is a member of a resolution college;
- (h) EBA, subject to paragraph 4.

3. The resolution authorities of third countries where a parent undertaking or an institution established in the Union has a subsidiary institution or a branch that would be considered to be significant were it located in the Union may, at their request, be invited to participate in the resolution college as observers, provided that they are subject to confidentiality requirements equivalent, in the opinion of the group-level resolution authority, to those established by Article 98.

4. EBA shall contribute to promoting and monitoring the efficient, effective and consistent functioning of resolution colleges, taking into account international standards. EBA shall be invited to attend the meetings of the resolution college for that purpose. EBA shall not have any voting rights to the extent that any voting takes place within the framework of resolution colleges.

5. The group-level resolution authority shall be the chair of the resolution college. In that capacity it shall:

- (a) establish written arrangements and procedures for the functioning of the resolution college, after consulting the other members of the resolution college;
- (b) coordinate all activities of the resolution college;
- (c) convene and chair all its meetings and keep all members of the resolution college fully informed in advance of the organisation of meetings of the resolution college, of the main issues to be discussed and of the items to be considered;
- (d) notify the members of the resolution college of any planned meetings so that they can request to participate;

- (e) decide which members and observers shall be invited to attend particular meetings of the resolution college, on the basis of specific needs, taking into account the relevance of the issue to be discussed for those members and observers, in particular the potential impact on financial stability in the Member States concerned;
- (f) keep all of the members of the college informed, in a timely manner, of the decisions and outcomes of those meetings.

The members participating in the resolution college shall cooperate closely.

Notwithstanding point (e), resolution authorities shall be entitled to participate in resolution college meetings whenever matters subject to joint decision-making or relating to a group entity located in their Member State are on the agenda.

6. Group-level resolution authorities are not obliged to establish a resolution college if other groups or colleges perform the same functions and carry out the same tasks specified in this Article and comply with all the conditions and procedures, including those covering membership and participation in resolution colleges, established in this Article and in Article 90. In such a case, all references to resolution colleges in this Directive shall also be understood as references to those other groups or colleges.

7. EBA shall, taking into account international standards, develop draft regulatory standards in order to specify the operational functioning of the resolution colleges for the performance of the tasks referred to in paragraph 1.

EBA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

Power is delegated to the Commission to adopt the regulatory standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

#### Article 89

##### **European resolution colleges**

1. Where a third country institution or third country parent undertaking has Union subsidiaries established in two or more Member States, or two or more Union branches that are regarded as significant by two or more Member States, the resolution authorities of Member States where those Union subsidiaries are established or where those significant branches are located shall establish a European resolution college.

2. The European resolution college shall perform the functions and carry out the tasks specified in Article 88 with respect to the subsidiary institutions and, in so far as those tasks are relevant, to branches.

3. Where the Union subsidiaries are held by, or the significant branches are of, a financial holding company established within the Union in accordance with the third subparagraph of Article 127(3) of Directive 2013/36/EU, the European resolution college shall be chaired by the resolution authority of the Member State where the consolidating supervisor is located for the purposes of consolidated supervision under that Directive.

Where the first subparagraph does not apply, the members of the European resolution college shall nominate and agree the chair.

4. Member States may, by mutual agreement of all the relevant parties, waive the requirement to establish a European resolution college if other groups or colleges, including a resolution college established under Article 88, perform the same functions and carry out the same tasks specified in this Article and comply with all the conditions and procedures, including those covering membership and participation in European resolution colleges, established in this Article and in Article 90. In such a case, all references to European resolution colleges in this Directive shall also be understood as references to those other groups or colleges.

5. Subject to paragraphs 3 and 4 of this Article, the European resolution college shall otherwise function in accordance with Article 88.

#### Article 90

##### **Information exchange**

1. Subject to Article 84, resolution authorities and competent authorities shall provide one another on request with all the information relevant for the exercise of the other authorities' tasks under this Directive.

2. The group-level resolution authority shall coordinate the flow of all relevant information between resolution authorities. In particular, the group-level resolution authority shall provide the resolution authorities in other Member States with all the relevant information in a timely manner with a view to facilitating the exercise of the tasks referred to in points (b) to (i) of the second subparagraph of Article 88(1).

3. Upon a request for information which has been provided by a third-country resolution authority, the resolution authority shall seek the consent of the third-country resolution authority for the onward transmission of that information, save where the third-country resolution authority has already consented to the onward transmission of that information.

Resolution authorities shall not be obliged to transmit information provided from a third-country resolution authority if the third-country resolution authority has not consented to its onward transmission.

4. Resolution authorities shall share information with the competent ministry when it relates to a decision or matter which requires notification, consultation or consent of the competent ministry or which may have implications for public funds.

#### Article 91

##### **Group resolution involving a subsidiary of the group**

1. Where a resolution authority decides that an institution or any entity referred to in point (b), (c) or (d) of Article 1(1) that is a subsidiary in a group meets the conditions referred to in Article 32 or 33, that authority shall notify the following information without delay to the group-level resolution authority, if different, to the consolidating supervisor, and to the members of the resolution college for the group in question:

(a) the decision that the institution or entity referred to in point (b), (c) or (d) of Article 1(1) meets the conditions referred to in Article 32 or 33;

(b) the resolution actions or insolvency measures that the resolution authority considers to be appropriate for that institution or that entity referred to in point (b), (c) or (d) of Article 1(1).

2. On receiving a notification under paragraph 1, the group-level resolution authority, after consulting the other members of the relevant resolution college, shall assess the likely impact of the resolution actions or other measures notified in accordance with point (b) of paragraph 1, on the group and on group entities in other Member States, and, in particular, whether the resolution actions or other measures would make it likely that the conditions for resolution would be satisfied in relation to a group entity in another Member State.

3. If the group-level resolution authority, after consulting the other members of the resolution college, assesses that the resolution actions or other measures notified in accordance with point (b) of paragraph 1, would not make it likely that the conditions laid down in Article 32 or 33 would be satisfied in relation to a group entity in another Member State, the resolution authority responsible for that institution or that entity referred to in point (b), (c) or (d) of Article 1(1) may take the resolution actions or other measures that it notified in accordance with point (b) of paragraph 1 of this Article.

4. If the group-level resolution authority, after consulting the other members of the resolution college, assesses that the resolution actions or other measures notified in accordance with point (b) of paragraph 1 of this Article, would make it likely that the conditions laid down in Article 32 or 33 would be satisfied in relation to a group entity in another Member State, the group-level resolution authority shall, no later than 24 hours after receiving the notification under paragraph 1, propose a group resolution scheme and submit it to the resolution college. That 24-hour period may be extended with the consent of the resolution authority which made the notification referred to in paragraph 1 of this Article.

5. In the absence of an assessment by the group-level resolution authority within 24 hours, or a longer period that has been agreed, after receiving the notification under paragraph 1, the resolution authority which made the notification referred to in paragraph 1 may take the resolution actions or other measures that it notified in accordance with point (b) of that paragraph.

6. A group resolution scheme required under paragraph 4 shall:

- (a) take into account and follow the resolution plans as referred to in Article 13 unless resolution authorities assess, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans;
- (b) outline the resolution actions that should be taken by the relevant resolution authorities in relation to the Union parent undertaking or particular group entities with the aim of meeting the resolution objectives and principles referred to in Articles 31 and 34;
- (c) specify how those resolution actions should be coordinated;
- (d) establish a financing plan which takes into account the group resolution plan, principles for sharing responsibility as established in accordance with point (f) of Article 12(3) and the mutualisation as referred to in Article 107.

7. Subject to paragraph 8, the group resolution scheme shall take the form of a joint decision of the group-level resolution authority and the resolution authorities responsible for the subsidiaries that are covered by the group resolution scheme.

EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

8. If any resolution authority disagrees with or departs from the group resolution scheme proposed by the group-level resolution authority or considers that it needs to take independent resolution actions or measures other than those proposed in the scheme in relation to an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) for reasons of financial stability, it shall set out in detail the reasons for the disagreement or the reasons to depart from the group resolution scheme, notify the group-level resolution authority and the other resolution authorities that are covered by the group resolution scheme of the reasons and inform them about the actions or measures it will take. When setting out the reasons for its disagreement, that resolution authority shall take into consideration the resolution plans as referred to in Article 13, the potential impact on financial stability in the Member States concerned as well as the potential effect of the actions or measures on other parts of the group.

9. The resolution authorities which did not disagree under paragraph 8 may reach a joint decision on a group resolution scheme covering group entities in their Member State.

10. The joint decision referred to in paragraph 7 or 9 and the decisions taken by the resolution authorities in the absence of a joint decision referred to in paragraph 8 shall be recognised as conclusive and applied by the resolution authorities in the Member States concerned.

11. Authorities shall perform all actions under this Article without delay, and with due regard to the urgency of the situation.

12. In any case where a group resolution scheme is not implemented and resolution authorities take resolution actions in relation to any group entity, those resolution authorities shall cooperate closely within the resolution college with a view to achieving a coordinated resolution strategy for all the group entities that are failing or likely to fail.

13. Resolution authorities that take any resolution action in relation to any group entity shall inform the members of the resolution college regularly and fully about those actions or measures and their on-going progress.

## Article 92

### **Group resolution**

1. Where a group-level resolution authority decides that a Union parent undertaking for which it is responsible meets the conditions referred to in Article 32 or 33 it shall notify the information referred to in points (a) and (b) of Article 91(1) without delay to the consolidating supervisor, if different, and to the other members of the resolution college of the group in question.

The resolution actions or insolvency measures for the purposes of point (b) of Article 91(1) may include the implementation of a group resolution scheme drawn up in accordance with Article 91(6) in any of the following circumstances:

- (a) resolution actions or other measures at parent level notified in accordance with point (b) of Article 91(1) make it likely that the conditions laid down in Article 32 or 33 would be fulfilled in relation to a group entity in another Member State;
- (b) resolution actions or other measures at parent level only are not sufficient to stabilise the situation or are not likely to provide an optimum outcome;
- (c) one or more subsidiaries meet the conditions referred to in Article 32 or 33 according to a determination by the resolution authorities responsible for those subsidiaries; or
- (d) resolution actions or other measures at group level will benefit the subsidiaries of the group in a way which makes a group resolution scheme appropriate.

2. Where the actions proposed by the group-level resolution authority under paragraph 1 do not include a group resolution scheme, the group-level resolution authority shall take its decision after consulting the members of the resolution college.

The decision of the group-level resolution authority shall take into account:

- (a) and follow the resolution plans as referred to in Article 13 unless resolution authorities assess, taking into account circumstances of the case, that resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plans;
- (b) the financial stability of the Member States concerned.

3. Where the actions proposed by the group-level resolution authority under paragraph 1 include a group resolution scheme, the group resolution scheme shall take the form of a joint decision of the group-level resolution authority and the resolution authorities responsible for the subsidiaries that are covered by the group resolution scheme.

EBA may, at the request of a resolution authority, assist the resolution authorities in reaching a joint decision in accordance with Article 31(c) of Regulation (EU) No 1093/2010.

4. If any resolution authority disagrees with or departs from the group resolution scheme proposed by the group-level resolution authority or considers that it needs to take independent resolution actions or measures other than those proposed in the scheme in relation to an institution or entity referred to in point (b), (c) or (d) of Article 1(1) for reasons of financial stability, it shall set out in detail the reasons for the disagreement or the reasons to depart from the group resolution scheme, notify the group-level resolution authority and the other resolution authorities that are covered by the group resolution scheme of the reasons and inform them about the actions or measures it intends to take. When setting out the reasons for its disagreement, that resolution authority shall give consideration to the resolution plans as referred to in Article 13, the potential impact on financial stability in the Member States concerned as well as the potential effect of the actions or measures on other parts of the group.

5. Resolution authorities which did not disagree with the group resolution scheme under the paragraph 4 may reach a joint decision on a group resolution scheme covering group entities in their Member State.

6. The joint decision referred to in paragraph 3 or 5 and the decisions taken by the resolution authorities in the absence of a joint decision referred to in paragraph 4 shall be recognised as conclusive and applied by the resolution authorities in the Member States concerned.

7. Authorities shall perform all actions under this Article without delay, and with due regard to the urgency of the situation.

In any case where a group resolution scheme is not implemented and resolution authorities take resolution action in relation to any group entity, those resolution authorities shall cooperate closely within the resolution college with a view to achieving a coordinated resolution strategy for all affected group entities.

Resolution authorities that take resolution action in relation to any group entity shall inform the members of the resolution college regularly and fully about those actions or measures and their on-going progress.

**TITLE VI**  
**RELATIONS WITH THIRD COUNTRIES**

*Article 93*

**Agreements with third countries**

1. In accordance with Article 218 TFEU, the Commission may submit to the Council proposals 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, *inter alia*, for the purpose of information sharing in connection with recovery and resolution planning in relation to institutions, financial institutions, parent undertakings and third country institutions, with regard to the following situations:

- (a) in cases where a third country parent undertaking has subsidiary institutions or branches where such branches are regarded as significant in two or more Member States;
- (b) in cases where a parent undertaking established in a Member State and which has a subsidiary or a significant branch in at least one other Member State has one or more third country subsidiary institutions;
- (c) in cases where an institution established in a Member State and which has a parent undertaking, a subsidiary or a significant branch in at least one other Member State has one or more branches in one or more third countries.

2. The agreements referred to in paragraph 1 shall, in particular, seek to ensure the establishment of processes and arrangements between resolution authorities and the relevant third country authorities for cooperation in carrying out some or all of the tasks and exercising some or all of the powers indicated in Article 97.

3. The agreements referred to in paragraph 1 shall not make provision in relation to individual institutions, financial institutions, parent undertakings or third country institutions.

4. Member States may enter into bilateral agreements with a third country regarding the matters referred to in paragraphs 1 and 2 until the entry into force of an agreement referred to in paragraph 1 with the relevant third country to the extent that such bilateral agreements are not inconsistent with this Title.

#### Article 94

##### **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 93(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 93(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. Where there is a European resolution college established in accordance with Article 89, it shall take a joint decision on whether to recognise, except as provided for in Article 95, third-country resolution proceedings relating to a third-country institution or a parent undertaking that:

- (a) has Union subsidiaries established in, or Union branches located in and regarded as significant by, two or more Member States; or
- (b) has assets, rights or liabilities located in two or more Member States or are governed by the law of those Member States.

Where the joint decision on the recognition of the third-country resolution proceedings is reached, respective national resolution authorities shall seek the enforcement of the recognised third-country resolution proceedings in accordance with their national law.

3. In the absence of a joint decision between the resolution authorities participating in the European resolution college, or in the absence of a European resolution college, each resolution authority concerned shall make its own decision on whether to recognise and enforce, except as provided for in Article 95, third-country resolution proceedings relating to a third-country institution or a parent undertaking.

The decision shall give due consideration to the interests of each individual Member State where a third-country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States.

4. Member States shall ensure that resolution authorities are, as a minimum, empowered to do the following:

- (a) exercise the resolution powers in relation to the following:

- (i) assets of a third-country institution or parent undertaking that are located in their Member State or governed by the law of their Member State;

- (ii) rights or liabilities of a third-country institution that are booked by the Union branch 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 shares or other instruments of ownership in a Union subsidiary established in the designating Member State;
- (c) exercise the powers in Article 69, 70 or 71 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 institution, parent undertaking of such entities or other group entities, 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.

5. Resolution authorities may take, where necessary in the public interest, resolution action with respect to a parent undertaking where the relevant third-country authority determines that an institution that is incorporated in that third country meets the conditions for resolution under the law of that third country. To that end, Member States shall ensure that resolution authorities are empowered to use any resolution power in respect of that parent undertaking, and Article 68 shall apply.

6. The recognition and enforcement of third-country resolution proceedings shall be without prejudice to any normal insolvency proceedings under national law applicable, where appropriate, in accordance with this Directive.

## Article 95

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

The resolution authority, after consulting other resolution authorities, where a European resolution college is established under Article 89, may refuse to recognise or to enforce third-country resolution proceedings pursuant to Article 94(2) if it considers:

- (a) that the third-country resolution proceedings would have adverse effects on financial stability in the Member State in which the resolution authority is based or that the proceedings would have adverse effects on financial stability in another Member State;
- (b) that independent resolution action under Article 96 in relation to a Union branch is necessary to achieve one or more of the resolution objectives;
- (c) that creditors, including in particular depositors located or payable in a Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;
- (d) that recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for the Member State; or
- (e) that the effects of such recognition or enforcement would be contrary to the national law.

*Article 96***Resolution of Union branches**

1. Member States shall ensure that resolution authorities have the powers necessary to act in relation to a Union branch that is not subject to any third-country resolution proceedings or that is subject to third-country proceedings and one of the circumstances referred to in Article 95 applies.

Member States shall ensure that Article 68 applies to the exercise of such powers.

2. Member States shall ensure that the powers required in paragraph 1 may be exercised by resolution authorities where the resolution authority considers that action is necessary in the public interest and one or more of the following conditions is met:

- (a) the Union branch no longer meets, or is likely not to meet, the conditions imposed by national law for its authorisation and operation within that Member State and there is no prospect that any private sector, supervisory or relevant third-country action would restore the branch to compliance or prevent failure in a reasonable timeframe;
- (b) the third-country institution is, in the opinion of the resolution authority, unable or unwilling, or is likely to be unable, to pay its obligations to Union creditors, or obligations that have been created or booked through the branch, as they fall due and the resolution authority is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in relation to that third-country institution in a reasonable timeframe;
- (c) the relevant third-country authority has initiated third-country resolution proceedings in relation to the third-country institution, or has notified to the resolution authority its intention to initiate such a proceeding.

3. Where a resolution authority takes an independent action in relation to a Union branch, it shall have regard to the resolution objectives and take the action in accordance with the following principles and requirements, insofar as they are relevant:

- (a) the principles set out in Article 34;
- (b) the requirements relating to the application of the resolution tools in Chapter III of Title IV.

*Article 97***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 93(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 93(1) with the relevant third country to the extent that the subject matter of this Article is not governed by that agreement.

2. EBA may conclude non-binding framework cooperation arrangements with the following relevant third-country authorities:

- (a) in cases where a Union subsidiary is established in two or more Member States, the relevant authorities of the third country where the parent undertaking or a company referred to in points (c) and (d) of Article 1(1) are established;
- (b) in cases where a third-country institution operates Union branches in two or more Member States, the relevant authority of the third country where that institution is established;

- (c) in cases where a parent undertaking or a company referred to in points (c) and (d) of Article 1(1) established in a Member State with a subsidiary institution or significant branch in another Member State also has one or more third-country subsidiary institutions, the relevant authorities of the third countries where those subsidiary institutions are established;
- (d) in cases where an institution with a subsidiary institution or significant branch in another Member State has established one or more branches in one or more third countries, the relevant authorities of the third countries where those branches are located.

The arrangements referred to in this paragraph shall not make provision in relation to specific institutions. They shall not impose legal obligations upon Member States.

3. The framework cooperation agreements referred to in paragraph 2 shall establish processes and arrangements between the participating authorities for sharing information necessary for and cooperation in carrying out some or all or the following tasks and exercising some or all of the following powers in relation to institutions referred to in points (a) to (d) of paragraph 2 or groups including such institutions:

- (a) the development of resolution plans in accordance with Articles 10 to 13 and similar requirements under the law of the relevant third countries;
- (b) the assessment of the resolvability of such institutions and groups, in accordance with Articles 15 and 16 and similar requirements under the law of the relevant third countries;
- (c) the application of powers to address or remove impediments to resolvability pursuant to Articles 17 and 18 and any similar powers under the law of the relevant third countries;
- (d) the application of early intervention measures pursuant to Article 27 and similar powers under the law of the relevant third countries;
- (e) the application of resolution tools and exercise of resolution powers and similar powers exercisable by the relevant third-country authorities.

4. Competent authorities or resolution authorities, where appropriate, shall conclude non-binding cooperation arrangements in line with EBA framework arrangement with the relevant third-country authorities indicated in paragraph 2.

This Article shall not prevent Member States or their competent authorities from concluding bilateral or multilateral arrangements with third countries, in accordance with Article 33 of Regulation (EU) No 1093/2010.

5. Cooperation arrangements concluded between resolution authorities of Member States and third countries in accordance with this Article may include provisions on the following matters:

- (a) the exchange of information necessary for the preparation and maintenance of resolution plans;
- (b) consultation and cooperation in the development of resolution plans, including principles for the exercise of powers under Articles 94 and 96 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 Directive or relevant third-country law affecting the institution or group to which the arrangement relates;
- (e) the coordination of public communication in the case of joint resolution actions;
- (f) procedures and arrangements for the exchange of information and cooperation under points (a) to (e), including, where appropriate, through the establishment and operation of crisis management groups.

6. Member States shall notify EBA of any cooperation arrangements that resolution authorities and competent authorities have concluded in accordance with this Article.

#### *Article 98*

##### **Exchange of confidential information**

1. Member States shall ensure that resolution authorities, competent authorities and competent ministries 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 84.

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.

- (b) the information is necessary for the performance by the relevant third-country authorities of their resolution functions under national law that are comparable to those under this Directive and, subject to point (a) of this paragraph, is not used for any other purposes.

2. 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 (the originating authority) agrees to that disclosure;
- (b) the information is disclosed only for the purposes permitted by the originating authority.

3. For the purposes of this Article, information is deemed to be confidential if it is subject to confidentiality requirements under Union law.

#### TITLE VII

##### **FINANCING ARRANGEMENTS**

#### *Article 99*

##### **European system of financing arrangements**

A European system of financing arrangements shall be established and shall consist of:

- (a) national financing arrangements established in accordance with Article 100;
- (b) the borrowing between national financing arrangements as specified in Article 106,

- (c) the mutualisation of national financing arrangements in the case of a group resolution as referred to in Article 107.

### Article 100

#### **Requirement to establish resolution financing arrangements**

1. Member States shall establish one or more financing arrangements for the purpose of ensuring the effective application by the resolution authority of the resolution tools and powers.

Member States shall ensure that the use of the financing arrangements may be triggered by a designated public authority or authority entrusted with public administrative powers.

The financing arrangements shall be used only in accordance with the resolution objectives and the principles set out in Articles 31 and 34.

2. Member States may use the same administrative structure as their financing arrangements for the purposes of their deposit guarantee scheme.

3. Member States shall ensure that the financing arrangements have adequate financial resources.

4. For the purpose of paragraph 3, financing arrangements shall in particular have the power to:

(a) raise *ex-ante* contributions as referred to in Article 103 with a view to reaching the target level specified in Article 102;

(b) raise *ex-post* extraordinary contributions as referred to in Article 104 where the contributions specified in point (a) are insufficient; and

(c) contract borrowings and other forms of support as referred to in Article 105.

5. Save where permitted under paragraph 6, each Member State shall establish its national financing arrangements through a fund, the use of which may be triggered by its resolution authority for the purposes set out in Article 101(1).

6. Notwithstanding paragraph 5 of this Article, a Member State may, for the purpose of fulfilling its obligations under paragraph 1 of this Article, establish its national financing arrangements through mandatory contributions from institutions which are authorised in its territory, which contributions are based on the criteria referred to in Article 103(7) and which are not held through a fund controlled by its resolution authority provided that all of the following conditions are met:

(a) the amount raised by contributions is at least equal to the amount that is required to be raised under Article 102;

(b) the Member State's resolution authority is entitled to an amount that is equal to the amount of such contributions, which the Member State makes immediately available to that resolution authority upon the latter's request, for use exclusively for the purposes set out in Article 101;

(c) the Member State notifies the Commission of its decision to avail itself of the discretion to structure its financing arrangements in accordance with this paragraph;

(d) the Member State notifies the Commission of the amount referred to in point (b) at least annually; and

(e) save as laid down in this paragraph, the financing arrangements comply with Articles 99 to 102, Article 103(1) to (4) and (6) and Articles 104 to 109.

For the purposes of this paragraph, the available financial means to be taken into account in order to reach the target level specified in Article 102 may include mandatory contributions from any scheme of mandatory contributions established by a Member State at any date between 17 June 2010 and 2 July 2014 from institutions in its territory for the purposes of covering the costs relating to systemic risk, failure and resolution of institutions, provided that the Member State complies with this Title. Contributions to deposit guarantee schemes shall not count towards the target level for resolution financing arrangements set out in Article 102.

## Article 101

### Use of the resolution financing arrangements

1. The financing arrangements established in accordance with Article 100 may be used by the resolution authority only to the extent necessary to ensure the effective application of the resolution tools, for the following purposes:

- (a) to guarantee the assets or the liabilities of the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;
- (b) to make loans to the institution under resolution, its subsidiaries, a bridge institution or an asset management vehicle;
- (c) to purchase assets of the institution under resolution;
- (d) to make contributions to a bridge institution and an asset management vehicle;
- (e) to pay compensation to shareholders or creditors in accordance with Article 75;
- (f) to make a contribution to the institution under resolution in lieu of the write down or conversion of liabilities of certain creditors, when the bail-in tool is applied and the resolution authority decides to exclude certain creditors from the scope of bail-in in accordance with Article 44(3) to (8);
- (g) to lend to other financing arrangements on a voluntary basis in accordance with Article 106;
- (h) to take any combination of the actions referred to in points (a) to (g).

The financing arrangements may be used to take the actions referred to in the first subparagraph also with respect to the purchaser in the context of the sale of business tool.

2. The resolution financing arrangement shall not be used directly to absorb the losses of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) or to recapitalise such an institution or an entity. In the event that the use of the resolution financing arrangement for the purposes in paragraph 1 of this Article indirectly results in part of the losses of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) being passed on to the resolution financing arrangement, the principles governing the use of the resolution financing arrangement set out in Article 44 shall apply.

## Article 102

### Target level

1. Member States shall ensure that, by 31 December 2024, the available financial means of their financing arrangements reach at least 1 % of the amount of covered deposits of all the institutions authorised in their territory. Member States may set target levels in excess of that amount.

2. During the initial period of time referred to in paragraph 1, contributions to the financing arrangements raised in accordance with Article 103 shall be spread out in time as evenly as possible until the target level is reached, but with due account of the phase of the business cycle and the impact pro-cyclical contributions may have on the financial position of contributing institutions.

Member States may extend the initial period of time for a maximum of four years if the financing arrangements have made cumulative disbursements in excess of 0,5 % of covered deposits of all the institutions authorised in their territory which are guaranteed under Directive 2014/49/EU.

3. If, after the initial period of time referred to in paragraph 1, the available financial means diminish below the target level specified in that paragraph, the regular contributions raised in accordance with Article 103 shall resume until the target level is reached. After the target level has been reached for the first time and where the available financial means have subsequently been reduced to less than two thirds of the target level, those contributions shall be set at a level allowing for reaching the target level within six years.

The regular contribution shall take due account of the phase of the business cycle, and the impact procyclical contributions may have when setting annual contributions in the context of this paragraph.

4. EBA shall submit a report to the Commission by 31 October 2016 with recommendations on the appropriate reference point for setting the target level for resolution financing arrangements, and in particular whether total liabilities constitute a more appropriate basis than covered deposits.

5. Based on the results of the report referred to in paragraph 4, the Commission shall, if appropriate, submit, by 31 December 2016, to the European Parliament and to the Council a legislative proposal on the basis for the target level for resolution financing arrangements.

## Article 103

### **Ex-ante contributions**

1. In order to reach the target level specified in Article 102, Member States shall ensure that contributions are raised at least annually from the institutions authorised in their territory including Union branches.

2. The contribution of each institution shall be pro rata to the amount of its liabilities (excluding own funds) less covered deposits, with respect to the aggregate liabilities (excluding own funds) less covered deposits of all the institutions authorised in the territory of the Member State.

Those contributions shall be adjusted in proportion to the risk profile of institutions, in accordance with the criteria adopted under paragraph 7.

3. The available financial means to be taken into account in order to reach the target level specified in Article 102 may include irrevocable payment commitments which are fully backed by collateral of low risk assets unencumbered by any third party rights, at the free disposal and earmarked for the exclusive use by the resolution authorities for the purposes specified in Article 101(1). The share of irrevocable payment commitments shall not exceed 30 % of the total amount of contributions raised in accordance with this Article.

4. Member States shall ensure that the obligation to pay the contributions specified in this Article is enforceable under national law, and that due contributions are fully paid.

Member States shall set up appropriate regulatory, accounting, reporting and other obligations to ensure that due contributions are fully paid. Member States shall ensure measures for the proper verification of whether the contributions have been paid correctly. Member States shall ensure measures to prevent evasion, avoidance and abuse.

5. The amounts raised in accordance with this Article shall only be used for the purposes specified in Article 101(1).

6. Subject to Articles 37, 38, 40, 41 and 42, the amounts received from the institution under resolution or the bridge institution, the interest and other earnings on investments and any other earnings may benefit the financing arrangements.

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 in order to specify the notion of adjusting contributions in proportion to the risk profile of institutions as referred to in paragraph 2 of this Article, taking into account all of the following:

- (a) the risk exposure of the institution, including the importance of its trading activities, its off-balance sheet exposures and its degree of leverage;
- (b) the stability and variety of the company's sources of funding and unencumbered highly liquid assets;
- (c) the financial condition of the institution;
- (d) the probability that the institution enters into resolution;
- (e) the extent to which the institution has previously benefited from extraordinary public financial support;
- (f) the complexity of the structure of the institution and its resolvability;
- (g) the importance of the institution to the stability of the financial system or economy of one or more Member States or of the Union;
- (h) the fact that the institution is part of an IPS.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 in order to specify:

- (a) the registration, accounting, reporting obligations and other obligations referred to in paragraph 4 intended to ensure that the contributions are in fact paid;
- (b) the measures referred to in paragraph 4 to ensure proper verification of whether the contributions have been paid correctly.

#### Article 104

##### **Extraordinary ex-post contributions**

1. Where the available financial means are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, Member States shall ensure that extraordinary *ex-post* contributions are raised from the institutions authorised in their territory, in order to cover the additional amounts. Those extraordinary *ex-post* contributions shall be allocated between institutions in accordance with the rules laid down in Article 103(2).

Extraordinary *ex-post* contributions shall not exceed three times the annual amount of contributions determined in accordance with Article 103.

2. Article 103(4) to (8) shall be applicable to the contributions raised under this Article.

3. The resolution authority may defer, in whole or in part, an institution's payment of extraordinary *ex-post* contributions to the resolution financing arrangement if the payment of those contributions would jeopardise the liquidity or solvency of the institution. Such a deferral shall not be granted for a period of longer than six months but may be renewed upon the request of the institution. The contributions deferred pursuant to this paragraph shall be paid when such a payment no longer jeopardises the institution's liquidity or solvency.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 115 to specify the circumstances and conditions under which the payment of contributions by an institution may be deferred pursuant to paragraph 3 of this Article.

#### Article 105

##### **Alternative funding means**

Member States shall ensure that financing arrangements under their jurisdiction are enabled to contract borrowings or other forms of support from institutions, financial institutions or other third parties in the event that the amounts raised in accordance with Article 103 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements, and the extraordinary *ex-post* contributions provided for in Article 104 are not immediately accessible or sufficient.

#### Article 106

##### **Borrowing between financing arrangements**

1. Member States shall ensure that financing arrangements under their jurisdiction may make a request to borrow from all other financing arrangements within the Union, in the event that:

(a) the amounts raised under Article 103 are not sufficient to cover the losses, costs or other expenses incurred by the use of the financing arrangements;

(b) the extraordinary *ex-post* contributions provided for in Article 104 are not immediately accessible; and

(c) the alternative funding means provided for in Article 105 are not immediately accessible on reasonable terms.

2. Member States shall ensure that financing arrangements under their jurisdiction have the power to lend to other financing arrangements within the Union in the circumstances specified in paragraph 1.

3. Following a request under paragraph 1, each of the other financing arrangements in the Union shall decide whether to lend to the financing arrangement which has made the request. Member States may require that that decision is taken after consulting, or with the consent of, the competent ministry or the government. The decision shall be taken with due urgency.

4. The rate of interest, repayment period and other terms and conditions of the loans shall be agreed between the borrowing financing arrangement and the other financing arrangements which have decided to participate. The loan of every participating financing arrangement shall have the same interest rate, repayment period and other terms and conditions, unless all participating financing arrangements agree otherwise.

5. The amount lent by each participating resolution financing arrangement shall be pro rata to the amount of covered deposits in the Member State of that resolution financing arrangement, with respect to the aggregate of covered deposits in the Member States of participating resolution financing arrangements. Those rates of contribution may vary upon agreement of all participating financing arrangements.

6. An outstanding loan to a resolution financing arrangement of another Member State under this Article shall be treated as an asset of the resolution financing arrangement which provided the loan and may be counted towards that financing arrangement's target level.

#### Article 107

##### **Mutualisation of national financing arrangements in the case of a group resolution**

1. Member States shall ensure that, in the case of a group resolution as referred to in Article 91 or Article 92, the national financing arrangement of each institution that is part of a group contributes to the financing of the group resolution in accordance with this Article.

2. For the purposes of paragraph 1, the group-level resolution authority, after consulting the resolution authorities of the institutions that are part of the group, shall propose, if necessary before taking any resolution action, a financing plan as part of the group resolution scheme provided for in Articles 91 and 92.

The financing plan shall be agreed in accordance with the decision-making procedure referred to in Articles 91 and 92.

3. The financing plan shall include:

- (a) a valuation in accordance with Article 36 in respect of the affected group entities;
- (b) the losses to be recognised by each affected group entity at the moment the resolution tools are exercised;
- (c) for each affected group entity, the losses that would be suffered by each class of shareholders and creditors;
- (d) any contribution that deposit guarantee schemes would be required to make in accordance with Article 109(1);
- (e) the total contribution by resolution financing arrangements and the purpose and form of the contribution;
- (f) the basis for calculating the amount that each of the national financing arrangements of the Member States where affected group entities are located is required to contribute to the financing of the group resolution in order to build up the total contribution referred to in point (e);
- (g) the amount that the national financing arrangement of each affected group entity is required to contribute to the financing of the group resolution and the form of those contributions;
- (h) the amount of borrowing that the financing arrangements of the Member States where the affected group entities are located, will contract from institutions, financial institutions and other third parties under Article 105;
- (i) a timeframe for the use of the financing arrangements of the Member States where the affected group entities are located, which should be capable of being extended where appropriate.

4. The basis for apportioning the contribution referred to in point (e) of paragraph 3 shall be consistent with paragraph 5 of this Article and with the principles set out in the group resolution plan in accordance with point (f) of Article 12(3), unless otherwise agreed in the financing plan.

5. Unless agreed otherwise in the financing plan, the basis for calculating the contribution of each national financing arrangement shall in particular have regard to:

- (a) the proportion of the group's risk-weighted assets held at institutions and entities referred to in points (b), (c) and (d) of Article 1(1) established in the Member State of that resolution financing arrangement;
- (b) the proportion of the group's assets held at institutions and entities referred to in points (b), (c) and (d) of Article 1(1) established in the Member State of that resolution financing arrangement;
- (c) the proportion of the losses, which have given rise to the need for group resolution, which originated in group entities under the supervision of competent authorities in the Member State of that resolution financing arrangement; and
- (d) the proportion of the resources of the group financing arrangements which, under the financing plan, are expected to be used to benefit group entities established in the Member State of that resolution financing arrangement directly.

6. Member States shall establish rules and procedures in advance to ensure that each national financing arrangement can effect its contribution to the financing of group resolution immediately without prejudice to paragraph 2.

7. For the purpose of this Article, Member States shall ensure that group financing arrangements are allowed, under the conditions laid down in Article 105, to contract borrowings or other forms of support, from institutions, financial institutions or other third parties.

8. Member States shall ensure that national financing arrangements under their jurisdiction may guarantee any borrowing contracted by the group financing arrangements in accordance with paragraph 7.

9. Member States shall ensure that any proceeds or benefits that arise from the use of the group financing arrangements are allocated to national financing arrangements in accordance with their contributions to the financing of the resolution as established in paragraph 2.

## Article 108

### Ranking of deposits in insolvency hierarchy

Member States shall ensure that in national law governing normal insolvency proceedings:

- (a) the following have the same priority ranking which is higher than the ranking provided for the claims of ordinary unsecured, non-preferred creditors:
  - (i) that part of eligible deposits from natural persons and micro, small and medium-sized enterprises which exceeds the coverage level provided for in Article 6 of Directive 2014/49/EU;
  - (ii) deposits that would be eligible deposits from natural persons, micro, small and medium-sized enterprises were they not made through branches located outside the Union of institutions established within the Union.

(b) the following have the same priority ranking which is higher than the ranking provided for under point (a):

(i) covered deposits;

(ii) deposit guarantee schemes subrogating to the rights and obligations of covered depositors in insolvency.

#### Article 109

##### **Use of deposit guarantee schemes in the context of resolution**

1. Member States shall ensure that, where the resolution authorities take resolution action, and provided that that action ensures that depositors continue to have access to their deposits, the deposit guarantee scheme to which the institution is affiliated is liable for:

(a) when the bail-in tool is applied, the amount by which covered deposits would have been written down in order to absorb the losses in the institution pursuant to point (a) of Article 46(1), had covered deposits been included within the scope of bail-in and been written down to the same extent as creditors with the same level of priority under the national law governing normal insolvency proceedings; or

(b) when one or more resolution tools other than the bail-in tool is applied, the amount of losses that covered depositors would have suffered, had covered depositors suffered losses in proportion to the losses suffered by creditors with the same level of priority under the national law governing normal insolvency proceedings.

In all cases, the liability of the deposit guarantee scheme shall not be greater than the amount of losses that it would have had to bear had the institution been wound up under normal insolvency proceedings.

When the bail-in tool is applied, the deposit guarantee scheme shall not be required to make any contribution towards the costs of recapitalising the institution or bridge institution pursuant to point (b) of Article 46(1).

Where it is determined by a valuation under Article 74 that the deposit guarantee scheme's contribution to resolution was greater than the net losses it would have incurred had the institution been wound up under normal insolvency proceedings, the deposit guarantee scheme shall be entitled to the payment of the difference from the resolution financing arrangement in accordance with Article 75.

2. Member States shall ensure that the determination of the amount by which the deposit guarantee scheme is liable in accordance with paragraph 1 of this Article complies with the conditions referred to in Article 36.

3. The contribution from the deposit guarantee scheme for the purpose of paragraph 1 shall be made in cash.

4. Where eligible deposits at an institution under resolution are transferred to another entity through the sale of business tool or the bridge institution tool, the depositors have no claim under Directive 2014/49/EU against the deposit guarantee scheme in relation to any part of their deposits at the institution under resolution that are not transferred, provided that the amount of funds transferred is equal to or more than the aggregate coverage level provided for in Article 6 of Directive 2014/49/EU.

5. Notwithstanding paragraphs 1 to 4, if the available financial means of a deposit guarantee scheme are used in accordance therewith and are subsequently reduced to less than two thirds of the target level of the deposit guarantee scheme, the regular contribution to the deposit guarantee scheme shall be set at a level allowing for reaching the target level within six years.

In all cases, the liability of a deposit guarantee scheme shall not be greater than the amount equal to 50 % of its target level pursuant to Article 10 of Directive 2014/49/EU. Member States, may, by taking into account the specificities of their national banking sector, set a percentage which is higher than 50 %.

In any circumstances, the deposit guarantee scheme's participation under this Directive shall not exceed the losses it would have incurred in a winding up under normal insolvency proceedings.

## TITLE VIII

### PENALTIES

#### *Article 110*

##### **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 the national provisions transposing this Directive have 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 for administrative penalties for infringements which are subject to national criminal law they shall communicate to the Commission the relevant criminal law provisions. The administrative penalties and other administrative measures shall be effective, proportionate and dissuasive.

2. Member States shall ensure that, where obligations referred to in the first paragraph apply to institutions, financial institutions and Union parent undertakings, in the event of an infringement, administrative penalties can be applied, subject to the conditions laid down in national law, to the members of the management body, and to other natural persons who under national law are responsible for the infringement.

3. The powers to impose administrative penalties provided for in this Directive 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 administrative powers to impose penalties in accordance with this Directive 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 111*

##### **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 and group recovery plans, infringing Article 5 or 7;

- (b) failure to notify an intention to provide group financial support to the competent authority infringing Article 25;
- (c) failure to provide all the information necessary for the development of resolution plans infringing Article 11;
- (d) failure of the management body of an institution or an entity referred to in point (b), (c) or (d) of Article 1(1) to notify the competent authority when the institution or entity referred to in point (b), (c) or (d) of Article 1(1) is failing or likely to fail, infringing Article 81(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, institution, financial institution, Union parent undertaking 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 any member of the management body or senior management of the institution or the entity referred to in point (b), (c) or (d) of Article 1(1) or any other natural person, who is held responsible, to exercise functions in institutions or entities referred to in point (b), (c) or (d) of Article 1(1);
- (d) in the case of a legal person, administrative fines of up to 10 % of the total annual net 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 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 2 July 2014;
- (f) administrative fines of up to twice the amount of the benefit derived from the infringement where that benefit can be determined.

## Article 112

### Publication of administrative penalties

1. Member States shall ensure that resolution authorities and competent authorities publish on their official website at least any administrative penalties imposed by them for infringing the national provisions transposing this Directive where such penalties have not been the subject of an appeal or where the right of appeal has been exhausted. Such publication shall be made without undue delay after the natural or legal person is informed of that penalty including information on the type and nature of the infringement and the identity of the natural or legal person on whom the penalty is imposed.

Where Member States permit publication of penalties 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 penalties 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 penalty 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;
- (c) where publication would cause, insofar as it can be determined, disproportionate damage to the institutions or entities referred to in point (b), (c) or (d) of Article 1(1) or natural persons involved.

Alternatively, in such cases, the publication of the data in question may be postponed for a reasonable period of time, 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 3 July 2016, EBA shall submit a report to the Commission on the publication of penalties 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 penalties under national law for Member States for publication of penalties.

#### Article 113

##### **Maintenance of central database by EBA**

1. Subject to the professional secrecy requirements referred to in Article 84, resolution authorities and competent authorities shall inform EBA of all administrative penalties imposed by them under Article 111 and of the status of that appeal and outcome thereof. EBA shall maintain a central database of 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. EBA shall maintain a central database of 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.

2. EBA shall maintain a webpage with links to each resolution authority's publication of penalties and each competent authority's publication of penalties under Article 112 and indicate the period for which each Member State publishes penalties.

#### Article 114

##### **Effective application of penalties and exercise of powers to impose penalties 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 IX

### POWERS OF EXECUTION

#### Article 115

##### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in the second paragraph of Article 2, Article 44(11), Article 76(4), Article 103(7) and (8) and Article 104(4) shall be conferred on the Commission for an indeterminate period of time from 2 July 2014.
3. The delegation of power referred to in the second paragraph of Article 2, Article 44(11), Article 76(4), Article 103(7) and (8) and Article 104(4) may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to in the second paragraph of Article 2, Article 44(11), Article 76(4), Article 103(7) and (8) or Article 104(4) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.
6. The Commission shall not adopt delegated acts where the scrutiny time of the European Parliament is reduced through recess to less than five months, including any extension.

## TITLE X

### **AMENDMENTS TO DIRECTIVES 82/891/EEC, 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 TO REGULATIONS (EU) NO 1093/2010 AND (EU) NO 648/2012**

#### Article 116

##### **Amendment to Directive 82/891/EEC**

Article 1(4) of Directive of 82/891/EEC is replaced by the following:

- ‘4. Article 1(2), (3) and (4) of Directive 2011/35/EU of the European Parliament and of the Council (\*) shall apply.

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(\*) Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p. 1.).

*Article 117***Amendments to Directive 2001/24/EC**

Directive 2001/24/EC is amended as follows:

(1) In Article 1, the following paragraphs are added:

'3. This Directive shall also apply to investment firms as defined in point (2) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council (\*) and their branches located in Member States other than those in which they have their head offices.

4. In the event of application of the resolution tools and exercise of the resolution powers provided for in Directive 2014/59/EU of the European Parliament and of the Council (\*\*), this Directive shall also apply to the financial institutions, firms and parent undertakings falling within the scope of Directive 2014/59/EU.

5. Articles 4 and 7 of this Directive shall not apply where Article 83 of Directive 2014/59/EU applies.

6. Article 33 of this Directive shall not apply where Article 84 of Directive 2014/59/EU applies.

(\*) 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).

(\*\*) 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).'

(2) Article 2 is replaced by the following:

*'Article 2***Definitions**

For the purposes of this Directive:

— 'home Member State' shall mean a home Member State as defined in Article 4(1)(43) of Regulation (EU) No 575/2013;

— 'host Member State' shall mean a host Member State as defined in Article 4(1)(44) of Regulation (EU) No 575/2013;

— 'branch' shall mean a branch as defined in Article 4(1)(17) of Regulation (EU) No 575/2013;

— 'competent authority' shall mean a competent authority as defined in Article 4(1)(40) of Regulation (EU) No 575/2013 or a resolution authority within the meaning of Article 2(1)(18) of Directive 2014/59/EU in respect of reorganisation measures taken pursuant to that Directive;

- ‘administrator’ shall mean any person or body appointed by the administrative or judicial authorities whose task is to administer reorganisation measures;
- ‘administrative or judicial authorities’ shall mean such administrative or judicial authorities of the Member States as are competent for the purposes of reorganisation measures or winding-up proceedings;
- ‘reorganisation measures’ shall mean measures which are intended to preserve or restore the financial situation of a credit institution or an investment firm as defined in Article 4(1), point (2) of Regulation (EU) No 575/2013 and which could affect third parties’ pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims; those measures include the application of the resolution tools and the exercise of resolution powers provided for in Directive 2014/59/EU;
- ‘liquidator’ shall mean any person or body appointed by the administrative or judicial authorities whose task is to administer winding-up proceedings;
- ‘winding-up proceedings’ shall mean collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure;
- ‘regulated market’ shall mean a regulated market as defined in Article 4(1), point (21) of Directive 2014/65/EU of the European Parliament and of the Council (\*);
- ‘instrument’ shall mean a financial instrument as defined in Article 4(1), point (50)(b) of Regulation (EU) No 575/2013.

(\*) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).’;

(3) Article 25 is replaced by the following:

‘Article 25

**Netting agreements**

Without prejudice to Articles 68 and 71 of Directive 2014/59/EU, netting agreements shall be governed solely by the law of the contract which governs such agreements.’;

(4) Article 26 is replaced by the following:

‘Article 26

**Repurchase agreements**

Without prejudice to Articles 68 and 71 of Directive 2014/59/EU and Article 24 of this Directive, repurchase agreements shall be governed solely by the law of the contract which governs such agreements.’;

**Article 118****Amendment to Directive 2002/47/EC**

Directive 2002/47/EC is amended as follows:

(1) In Article 1, the following paragraph is added:

'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 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 points (c)(iv) and (d) of paragraph 2 which is subject to safeguards at least equivalent to those set out in Title IV, Chapter VII of Directive 2014/59/EU.

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(\*) 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).'

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

'Article 9a

**Directives 2008/48/EC and 2014/59/EU**

This Directive shall be without prejudice to Directives 2008/48/EC and 2014/59/EU.'

**Article 119****Amendment to Directive 2004/25/EC**

In Article 4(5) of Directive 2004/25/EC, the following subparagraph is added:

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

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(\*) 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).'

**Article 120****Amendment to Directive 2005/56/EC**

In Article 3 of Directive 2005/56/EEC, the following paragraph is added:

'4. Member States shall ensure that this Directive does not apply to the company or companies that are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council (\*).

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(\*) 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).'

*Article 121***Amendments to Directive 2007/36/EC**

Directive 2007/36/EC is amended as follows:

(1) in Article 1, the following paragraph is added:

'4. Member States shall ensure that this Directive does not apply in the case of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU 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).';

(2) in Article 5, the following paragraphs are added:

'5. Member States shall ensure that for the purposes of Directive 2014/59/EU 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 are met, and that the capital increase is necessary to avoid the conditions for resolution laid down in Articles 32 and 33 of that Directive.

6. For the purposes of paragraph 5, the obligation on each Member State to set a single deadline in Article 6(3), the obligation to ensure timely availability of a revised agenda in Article 6(4) and the obligation on each Member State to set a single record date in Article 7(3) shall not apply.'

*Article 122***Amendment to Directive 2011/35/EU**

In Article 1 of Directive 2011/35/EU, the following paragraph is added:

'4. Member States shall ensure that this Directive does not apply to the company or companies which are the subject of the use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU 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).'

**Article 123****Amendment to Directive 2012/30/EU**

In Article 45 of Directive 2012/30/EU, the following paragraph is added:

'3. Member States shall ensure that Article 10, Article 19(1), Article 29(1), (2) and (3), the first subparagraph of Article 31(2), Articles 33 to 36 and Articles 40, 41 and 42 of this Directive do not apply in the case of use 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 (\*).'

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(\*) 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).'

**Article 124****Amendment to Directive 2013/36/EU**

In Article 74 of Directive 2013/36/EU, paragraph 4 is deleted.

**Article 125****Amendment to Regulation (EU) No 1093/2010**

Regulation (EU) No 1093/2010 is amended as follows:

(1) In Article 4, point (2) is replaced by the following:

'(2) 'competent authority' means:

(i) competent authority as defined in Article 4(1)(40) of Regulation (EU) No 575/2013, and within the meaning of Directives 2007/64/EC and 2009/110/EC;

(ii) with regard to Directives 2002/65/EC and 2005/60/EC, the authorities competent for ensuring compliance with the requirements of those Directives by credit and financial institutions;

(iii) with regard to Directive 2014/49/EU of the European Parliament and of the Council (\*), a designated authority as defined in Article 2(1)(18) of that Directive;

(iv) with regard to Directive 2014/59/EU of the European Parliament and of the Council (\*\*), a resolution authority as defined in Article 2(1)(18) of that Directive.

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(\*) Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes (OJ L 173, 12.6.2014, p. 149).

(\*\*) 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).'

(2) In Article 40(6), the following subparagraph is added:

'For the purpose of acting within the scope of Directive 2014/59/EU, 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 126

#### **Amendment to Regulation (EU) No 648/2012**

In Article 81(3) of Regulation (EU) No 648/2012, the following point is added:

'(k) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council (\*).

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(\* 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).'

#### TITLE XI

#### **FINAL PROVISIONS**

#### Article 127

#### **EBA Resolution Committee**

EBA shall create a permanent internal committee pursuant to Article 41 of Regulation (EU) No 1093/2010 for the purpose of preparing EBA decisions to be taken in accordance with Article 44 thereof, including decisions relating to draft regulatory technical standards and draft implementing technical standards, relating to tasks that have been conferred on resolution authorities as provided for in this Directive. In particular, in accordance with Article 38(1) of Regulation (EU) No 1093/2010, EBA shall ensure that no decision referred to in that article impinges in any way on the fiscal responsibilities of Member States. That internal committee shall be composed of the resolution authorities referred to in Article 3 of this Directive.

For the purposes of this Directive, EBA shall cooperate with EIOPA and ESMA within the framework of the Joint Committee of the European Supervisory Authorities established in Article 54 of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010.

For the purposes of this Directive, EBA shall ensure structural separation between the resolution committee and other functions referred to in Regulation (EU) No 1093/2010. The resolution committee shall promote the development and coordination of resolution plans and develop methods for the resolution of failing financial institutions.

#### Article 128

#### **Cooperation with EBA**

The competent and resolution authorities shall cooperate with EBA for the purposes of this Directive in accordance with Regulation (EU) No 1093/2010.

The competent and resolution authorities shall, without delay, provide EBA with all the information necessary to carry out its duties in accordance with Article 35 of Regulation (EU) No 1093/2010.

**Article 129****Review**

By 1 June 2018, the Commission shall review the implementation of this Directive and shall submit a report thereon to the European Parliament and to the Council. It shall assess in particular the following:

- (a) on the basis of the report from EBA referred to in Article 4(7), the need for any amendments with regard to minimising divergences at national level;
- (b) on the basis of the report from EBA referred to in Article 45(19), the need for any amendments with regard to minimising divergences at national level;
- (c) the functioning and efficiency of the role conferred on EBA in this Directive, including carrying out of mediation.

Where appropriate, that report shall be accompanied by a legislative proposal.

Notwithstanding the review provided for in the first subparagraph, the Commission shall, by 3 July 2017, specifically review the application of Articles 13, 18 and 45 as regards EBA's powers to conduct binding mediation to take account of future developments in financial services law. That report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council.

**Article 130****Transposition**

1. Member States shall adopt and publish by 31 December 2014 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

Member States shall apply those measures from 1 January 2015.

However, Member States shall apply provisions adopted in order to comply with Section 5 of Chapter IV of Title IV from 1 January 2016 at the latest.

2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

3. Member States shall communicate to the Commission and to EBA the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 131****Entry into force**

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

Article 124 shall enter into force on 1 January 2015.

**Article 132****Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 15 May 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

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## ANNEX

## SECTION A

**Information to be included in recovery plans**

The recovery plan shall include the following information:

- (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 institution since the most recently filed recovery plan;
- (3) a communication and disclosure plan outlining how the firm intends to manage any potentially negative market reactions;
- (4) a range of capital and liquidity actions required to maintain or restore the viability and financial position of the institution;
- (5) an estimation of the timeframe for executing each material aspect of the plan;
- (6) a detailed description of any material impediment to the effective and timely execution of the plan, including consideration of impact on the rest of the group, customers and counterparties;
- (7) identification of critical functions;
- (8) a detailed description of the processes for determining the value and marketability of the core business lines, operations and assets of the institution;
- (9) a detailed description of how recovery planning is integrated into the corporate governance structure of the institution as well as the policies and procedures governing the approval of the recovery plan and identification of the persons in the organisation responsible for preparing and implementing the plan;
- (10) arrangements and measures to conserve or restore the institution's own funds;
- (11) arrangements and measures to ensure that the institution has adequate access to contingency funding sources, including potential liquidity sources, an assessment of available collateral and an assessment of the possibility to transfer liquidity across group entities and business lines, to ensure that it can continue to carry out its operations and meet its obligations as they fall due;
- (12) arrangements and measures to reduce risk and leverage;
- (13) arrangements and measures to restructure liabilities;
- (14) arrangements and measures to restructure business lines;
- (15) arrangements and measures necessary to maintain continuous access to financial markets infrastructures;
- (16) arrangements and measures necessary to maintain the continuous functioning of the institution's operational processes, including infrastructure and IT services;
- (17) preparatory arrangements to facilitate the sale of assets or business lines in a timeframe appropriate for the restoration of financial soundness;
- (18) other management actions or strategies to restore financial soundness and the anticipated financial effect of those actions or strategies;

- (19) preparatory measures that the institution 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 institution;
- (20) a framework of indicators which identifies the points at which appropriate actions referred to in the plan may be taken.

#### SECTION B

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

Resolution authorities may request institutions to provide for the purposes of drawing up and maintaining resolution plans at least the following information:

- (1) a detailed description of the institution'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 institution's critical operations and core business lines including material asset holdings and liabilities relating to such operations and business lines, by reference to legal persons;
- (5) a detailed description of the components of the institution's and all its legal entities' liabilities, separating, at a minimum by types and amounts of short term and long-term debt, secured, unsecured and subordinated liabilities;
- (6) details of those liabilities of the institution that are eligible liabilities;
- (7) an identification of the processes needed to determine to whom the institution has pledged collateral, the person that holds the collateral and the jurisdiction in which the collateral is located;
- (8) a description of the off balance sheet exposures of the institution and its legal entities, including a mapping to its critical operations and core business lines;
- (9) the material hedges of the institution including a mapping to legal persons;
- (10) identification of the major or most critical counterparties of the institution as well as an analysis of the impact of the failure of major counterparties in the institution's financial situation;
- (11) each system on which the institution conducts a material number or value amount of trades, including a mapping to the institution's legal persons, critical operations and core business lines;
- (12) each payment, clearing or settlement system of which the institution is directly or indirectly a member, including a mapping to the institution'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 institution including a mapping to the institution'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:

- common or shared personnel, facilities and systems;
- capital, funding or liquidity arrangements;
- existing or contingent credit exposures;
- cross guarantee agreements, cross-collateral arrangements, cross-default provisions and cross-affiliate netting arrangements;
- risks transfers and back-to-back trading arrangements; service level agreements;

(16) the competent and resolution authority for each legal person;

(17) the member of the management body responsible for providing the information necessary to prepare the resolution plan of the institution 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 institution 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 powers;

(19) all the agreements entered into by the institutions 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 an institution or group**

When assessing the resolvability of an institution or group, the resolution authority shall consider the following:

When assessing the resolvability of a group, references to an institution shall be deemed to include any institution or entity referred to in point (c) or (d) of Article 1(1) within a group:

- (1) the extent to which the institution 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 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;
- (4) the extent to which the service agreements that the institution maintains are fully enforceable in the event of resolution of the institution;
- (5) the extent to which the governance structure of the institution is adequate for managing and ensuring compliance with the institution's internal policies with respect to its service level agreements;

- (6) the extent to which the institution 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;
- (7) the extent to which there are contingency plans and measures in place to ensure continuity in access to payment and settlement systems;
- (8) 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;
- (9) the capacity of the management information systems to provide the information essential for the effective resolution of the institution at all times even under rapidly changing conditions;
- (10) the extent to which the institution has tested its management information systems under stress scenarios as defined by the resolution authority;
- (11) the extent to which the institution can ensure the continuity of its management information systems both for the affected institution and the new institution in the case that the critical operations and core business lines are separated from the rest of the operations and business lines;
- (12) the extent to which the institution has established adequate processes to ensure that it provides the resolution authorities with the information necessary to identify depositors and the amounts covered by the deposit guarantee schemes;
- (13) where the group uses intra-group guarantees, the extent to which those guarantees are provided at market conditions and the risk management systems concerning those guarantees are robust;
- (14) where the group engages in back-to-back transactions, the extent to which those transactions are performed at market conditions and the risk management systems concerning those transactions practices are robust;
- (15) the extent to which the use of intra-group guarantees or back-to-back booking transactions increases contagion across the group;
- (16) the extent to which the legal structure of the group 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;
- (17) the amount and type of eligible liabilities of the institution;
- (18) where the assessment involves a mixed activity holding company, the extent to which the resolution of group entities that are institutions or financial institutions could have a negative impact on the non-financial part of the group;
- (19) the existence and robustness of service level agreements;
- (20) 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;
- (21) the feasibility of using resolution tools in such a way which meets the resolution objectives, given the tools available and the institution's structure;
- (22) the extent to which the group structure allows the resolution authority to resolve the whole group or one or more of its group entities without causing a significant direct or indirect adverse effect on the financial system, market confidence or the economy and with a view to maximising the value of the group as a whole;

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- (23) the arrangements and means through which resolution could be facilitated in the cases of groups that have subsidiaries established in different jurisdictions;
  - (24) the credibility of using resolution tools in such a way which meets the resolution objectives, given possible impacts on creditors, counterparties, customers and employees and possible actions that third-country authorities may take;
  - (25) the extent to which the impact of the institution's resolution on the financial system and on financial market's confidence can be adequately evaluated;
  - (26) the extent to which the resolution of the institution could have a significant direct or indirect adverse effect on the financial system, market confidence or the economy;
  - (27) the extent to which contagion to other institutions or to the financial markets could be contained through the application of the resolution tools and powers;
  - (28) the extent to which the resolution of the institution could have a significant effect on the operation of payment and settlement systems.
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**DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 15 May 2014**

**on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU  
(recast)**

**(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 53(1) 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 Central Bank (¹),

Having regard to the opinion of the European Economic and Social Committee (²),

Acting in accordance with the ordinary legislative procedure (³),

Whereas:

- (1) Directive 2004/39/EC of the European Parliament and of the Council (⁴) has been substantially amended several times (⁵). Since further amendments are to be made, it should be recast in the interests of clarity.
- (2) Council Directive 93/22/EEC (⁶) sought to establish the conditions under which authorised investment firms and banks could provide specified services or establish branches in other Member States on the basis of home country authorisation and supervision. To that end, that Directive aimed to harmonise the initial authorisation and operating requirements for investment firms including conduct of business rules. It also provided for the harmonisation of some conditions governing the operation of regulated markets.
- (3) In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments. In view of those developments the legal framework of the Union should encompass the full range of investor-oriented activities. To that end, it is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Union, being an internal market, on the basis of home country supervision. Directive 93/22/EEC was therefore replaced by Directive 2004/39/EC.
- (4) The financial crisis has exposed weaknesses in the functioning and in the transparency of financial markets. The evolution of financial markets has exposed the need to strengthen the framework for the regulation of markets in financial instruments, including where trading in such markets takes place over-the-counter (OTC), in order to increase transparency, better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks.

(¹) OJ C 161, 7.6.2012, p. 3.

(²) OJ C 191, 29.6.2012, p. 80.

(³) Position of the European Parliament of 15 April 2014 (not yet published in the Official Journal) and decision of the Council of 13 May 2014.

(⁴) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

(⁵) See Annex III, Part A.

(⁶) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27).

- (5) There is agreement among regulatory bodies at international level that weaknesses in corporate governance in a number of financial institutions, including the absence of effective checks and balances within them, have been a contributory factor to the financial crisis. Excessive and imprudent risk taking may lead to the failure of individual financial institutions and systemic problems in Member States and globally. Incorrect conduct of firms providing services to clients may lead to investor detriment and loss of investor confidence. In order to address the potentially detrimental effect of those weaknesses in corporate governance arrangements, Directive 2004/39/EC should be supplemented by more detailed principles and minimum standards. Those principles and standards should apply taking into account the nature, scale and complexity of investment firms.
- (6) The High-Level Group on Financial Supervision in the EU invited the Union to develop a more harmonised set of financial regulation. In the context of the future European supervision architecture, the European Council of 18 and 19 June 2009 also stressed the need to establish a European single rulebook applicable to all financial institutions in the internal market.
- (7) Directive 2004/39/EC should therefore now partly be recast as this Directive and partly replaced by Regulation (EU) No 600/2014 of the European Parliament and the Council<sup>(1)</sup>. Together, both legal instruments should form the legal framework governing the requirements applicable to investment firms, regulated markets, data reporting services providers and third country firms providing investment services or activities in the Union. This Directive should therefore be read together with that Regulation. This Directive should contain the provisions governing the authorisation of the business, the acquisition of qualifying holding, the exercise of the freedom of establishment and of the freedom to provide services, the operating conditions for investment firms to ensure investor protection, the powers of supervisory authorities of home and host Member States and the regime for imposing sanctions. Since the main objective and subject-matter of this Directive is to harmonise national provisions concerning the areas referred to, it should be based on Article 53(1) of the Treaty on the Functioning of the European Union (TFEU). The form of a Directive is appropriate in order to enable the implementing provisions in the areas covered by this Directive, when necessary, to be adjusted to any existing specificities of the particular market and legal system in each Member State.
- (8) It is appropriate to include in the list of financial instruments commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments.
- (9) The scope of financial instruments will include physically settled energy contracts traded on an organised trading facility (OTF), except for those already regulated under Regulation (EU) No 1227/2011 of the European Parliament and the Council<sup>(2)</sup>. Several measures have been taken to mitigate the impact of such an inclusion on firms trading those products. Those firms are today exempt from own funds requirements under Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>(3)</sup> and that exemption will be the subject of a review under Article 493(1) of that Regulation before it expires at the latest at the end of 2017. Those contracts being financial instruments, financial markets law requirements would apply from the onset, thus position limits, transaction reporting and market abuse requirements would apply as from the date of entry into application of this Directive and of Regulation (EU) No 600/2014. However a phasing-in period of 42 months is provided for the application of the clearing obligation and the margining requirements set out in Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>(4)</sup>.
- (10) The limitation of the scope concerning commodity derivatives traded on an OTF and physically settled should be limited to avoid a loophole that may lead to regulatory arbitrage. It is therefore necessary to provide for a delegated act to further specify the meaning of the expression 'must be physically settled' taking into account at least the creation of an enforceable and binding obligation to physically deliver, which cannot be unwound and with no right to cash settle or offset transactions except in the case of force majeure, default or other bona fide inability to perform.

<sup>(1)</sup> Regulation (EU) No 600/2014 of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (see page 84 of this Official Journal).

<sup>(2)</sup> Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1).

<sup>(3)</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).

<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).

- (11) A range of fraudulent practices have occurred in spot secondary markets in emission allowances (EUA) which could undermine trust in the emissions trading scheme, set up by Directive 2003/87/EC of the European Parliament and of the Council (<sup>1</sup>), and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. In order to reinforce the integrity and safeguard the efficient functioning of those markets, including comprehensive supervision of trading activity, it is appropriate to complement measures taken under Directive 2003/87/EC by bringing emission allowances fully into the scope of this Directive and of Regulation (EU) No 600/2014 of the European Parliament and of the Council (<sup>2</sup>), by classifying them as financial instruments.
- (12) The purpose of this Directive is to cover undertakings the regular occupation or business of which is to provide investment services and/or perform investment activities on a professional basis. Its scope should therefore not cover any person with a different professional activity.
- (13) It is necessary to establish a comprehensive regulatory regime governing the execution of transactions in financial instruments irrespective of the trading methods used to conclude those transactions so as to ensure a high quality of execution of investor transactions and to uphold the integrity and overall efficiency of the financial system. A coherent and risk-sensitive framework for regulating the main types of order-execution arrangement currently active in the European financial marketplace should be provided for. It is necessary to recognise the emergence of a new generation of organised trading systems alongside regulated markets which should be subjected to obligations designed to preserve the efficient and orderly functioning of financial markets and to ensure that such organised trading systems do not benefit from regulatory loopholes.
- (14) All trading venues, namely regulated markets, multilateral trading facilities (MTFs), and OTFs, should lay down transparent and non-discriminatory rules governing access to the facility. However, while regulated markets and MTFs should continue to be subject to similar requirements regarding whom they may admit as members or participants, OTFs should be able to determine and restrict access based, inter alia, on the role and obligations which they have in relation to their clients. In that regard, trading venues should be able to specify parameters governing the system such as minimum latency provided that that is done in an open and transparent manner and does not involve discrimination by the platform operator.
- (15) A central counterparty (CCP) is defined in Regulation (EU) No 648/2012 as a legal person that interposes itself between the parties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer. CCPs are not covered by the term OTF as defined in this Directive.
- (16) Persons having access to regulated markets or MTFs are referred to as members or participants. Both terms may be used interchangeably. Those terms do not include users who only access the trading venues via direct electronic access.
- (17) Systematic internalisers should be defined as investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF. In order to ensure the objective and effective application of that definition to investment firms, any bilateral trading carried out with clients should be relevant and criteria should be developed for the identification of investment firms required to register as systematic internalisers. While trading venues are facilities in which multiple third party buying and selling interests interact in the system, a systematic internaliser should not be allowed to bring together third party buying and selling interests in functionally the same way as a trading venue.
- (18) Persons administering their own assets and undertakings, who do not provide investment services or perform investment activities other than dealing on own account in financial instruments which are not commodity derivatives, emission allowances or derivatives thereof, should not be covered by the scope of this Directive unless they are market makers, members or participants of a regulated market or an MTF or have direct electronic access to a trading venue, apply a high-frequency algorithmic trading technique, or deal on own account when executing client orders.

(<sup>1</sup>) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

(<sup>2</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 (see page 1 of this Official Journal).

- (19) The communiqué of the G20 finance ministers and central bank governors of 15 April 2011 states that participants on commodity derivatives markets should be subject to appropriate regulation and supervision and therefore certain exemptions from Directive 2004/39/EC are to be modified.
- (20) Persons who deal on own account, including market makers, in commodity derivatives, emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders, or who provide investment services in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business should not be covered by the scope of this Directive, provided that that activity is an ancillary activity to their main business on a group basis, and that main business is neither the provision of investment services within the meaning of this Directive nor of banking activities within the meaning of Directive 2013/36/EU of the European Parliament and of the Council (<sup>(1)</sup>), nor market making in commodity derivatives, and those persons do not apply a high-frequency algorithmic trading technique. Technical criteria for when an activity is ancillary to such a main business should be clarified in regulatory technical standards, taking into account the criteria specified in this Directive.

Those criteria should ensure that non-financial firms dealing in financial instruments in a disproportionate manner compared with the level of investment in the main business are covered by the scope of this Directive. In doing so, those criteria should take at least into consideration, the need for ancillary activities to constitute a minority of activities at group level and the size of their trading activity compared to the overall market trading activity in that asset class. It is appropriate that where the obligation to provide liquidity on a venue is required by regulatory authorities in accordance with Union or national laws, regulations and administrative provisions or by trading venues, the transactions entered into to meet such an obligation should be excluded in the assessment of whether the activity is ancillary.

- (21) For the purposes of this Directive and of Regulation (EU) No 600/2014, which regulate both OTC and exchange-traded derivatives within the meaning of Regulation (EU) No 600/2014, activities that are deemed to be objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity and intragroup transactions should be considered in a consistent way with Regulation (EU) No 648/2012.
- (22) Persons that deal in commodity derivatives, emission allowance and derivatives thereof may also deal in other financial instruments as part of their commercial treasury risk management activities to protect themselves against risks, such as exchange rate risks. Therefore, it is important to clarify that exemptions apply cumulatively. For example, the exemption in point (j) of Article 2(1) can be used in conjunction with the exemption in point (d) of Article 2(1).
- (23) However, in order to avoid any potential misuse of exemptions, market makers in financial instruments, other than market makers in commodity derivatives, emission allowances or derivatives thereof provided that their market making activity is ancillary to their main business considered on a group basis and provided that they do not apply a high-frequency algorithmic trading technique, should be covered by the scope of this Directive and should not benefit from any exemption. Persons dealing on own account when executing client orders or applying a high-frequency algorithmic trading technique should also be covered by the scope of this Directive and should not benefit from any exemption.
- (24) Dealing on own account when executing client orders should include firms executing orders from different clients by matching them on a matched principal basis (back-to-back trading), which should be regarded as acting as principal and should be subject to the provisions of this Directive covering both the execution of orders on behalf of clients and dealing on own account.
- (25) The execution of orders in financial instruments as an ancillary activity between two persons whose main business, on a group basis, is neither the provision of investment services within the meaning of this Directive nor of banking activities within the meaning of Directive 2013/36/EU should not be considered to be dealing on own account when executing client orders.

<sup>(1)</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 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).

- (26) References in the text to persons should be understood as including both natural and legal persons.
- (27) Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to Directive 2009/138/EC of the European Parliament and of the Council (<sup>(1)</sup>) should be excluded from the scope of this Directive when carrying out the activities referred to in that Directive.
- (28) Persons who do not provide services for third parties but whose business consists in providing investment services solely for their parent undertakings, for their subsidiaries, or for other subsidiaries of their parent undertakings should not be covered by this Directive.
- (29) Some local energy utilities and some operators of industrial installations covered by the EU Emissions Trading Scheme bundle and out-source their trading activities for hedging commercial risks to non-consolidated subsidiaries. Those joint venture companies do not provide any other services and perform exactly the same function as the persons referred to in Recital 28. In order to ensure a level playing field, it should also be possible to exclude joint venture companies from the scope of this Directive if they are jointly held by local energy utilities or operators falling within point (f) of Article 3 of Directive 2003/87/EC who do not provide any services other than investment services for local energy utilities or operators falling within point (f) of Article 3 of Directive 2003/87/EC, and provided that those local energy utilities or those operators will be exempt under point (j) of Article 2(1) should they carry out those investment services themselves. However, in order to ensure that the appropriate safeguards are in place and that investors are adequately protected, Member States that choose to exempt such joint ventures should subject them to requirements at least analogous to the ones laid down in this Directive, in particular during the phase of authorisation, in the assessment of their reputation and experience and of the suitability of any shareholders, in the review of the conditions for initial authorisation and on-going supervision as well as on conduct of business obligations.
- (30) Persons who provide investment services only on an incidental basis in the course of professional activity should also be excluded from the scope of this Directive, provided that that activity is regulated and the relevant rules do not prohibit the provision, on an incidental basis, of investment services.
- (31) Persons who provide investment services consisting exclusively in the administration of employee-participation schemes and who therefore do not provide investment services for third parties should not be covered by this Directive.
- (32) It is necessary to exclude from the scope of this Directive central banks and other bodies performing similar functions as well as public bodies charged with or intervening in the management of public debt, which concept covers the investment thereof, with the exception of bodies that are partly or wholly state-owned the role of which is commercial or linked to the acquisition of holdings.
- (33) In order to clarify the regime of exemptions for the European System of Central Banks (ESCB), other national bodies performing similar functions and bodies intervening in the management of public debt, it is appropriate to limit such exemptions to the bodies and institutions performing their functions in accordance with the law of one Member State or in accordance with the Union law, as well as to international bodies of which two or more Member States are members and which have the purpose of mobilising funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems, such as the European Stability Mechanism.
- (34) It is necessary to exclude from the scope of this Directive collective investment undertakings and pension funds whether or not coordinated at Union level, and the depositaries or managers of such undertakings, since they are subject to specific rules directly adapted to their activities.

<sup>(1)</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

- (35) It is necessary to exclude from the scope of this Directive transmission system operators as defined in Article 2(4) of Directive 2009/72/EC of the European Parliament and of the Council<sup>(1)</sup> or Article 2(4) of Directive 2009/73/EC of the European Parliament and of the Council<sup>(2)</sup> when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009 of the European Parliament and of the Council<sup>(3)</sup>, under Regulation (EC) No 715/2009 of the European Parliament and of the Council<sup>(4)</sup> or under network codes or guidelines adopted pursuant to those legislative acts. In accordance with those legislative acts, transmission system operators have specific obligations and responsibilities, are subject to specific certification and are supervised by sector specific competent authorities. Transmission system operators should also benefit from such an exemption where they use other persons acting as service providers on their behalf to carry out their task under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations. Transmission system operators should not be able to benefit from such an exemption when providing investment services or activities in financial instruments, including when operating a platform for secondary trading in financial transmission rights.
- (36) In order to benefit from the exemptions from this Directive, the person concerned should comply on a continuous basis with the conditions laid down for such exemptions. In particular, if a person provides investment services or performs investment activities and is exempt from this Directive because such services or activities are ancillary to that person's main business, when considered on a group basis, that person should no longer be covered by the exemption relating to ancillary services where the provision of those services or activities ceases to be ancillary to that person's main business.
- (37) Persons who provide the investment services and/or perform investment activities covered by this Directive should be subject to authorisation by their home Member States in order to protect investors and the stability of the financial system.
- (38) Credit institutions that are authorised under Directive 2013/36/EU should not need another authorisation under this Directive in order to provide investment services or perform investment activities. When a credit institution decides to provide investment services or perform investment activities the competent authorities, before granting an authorisation under Directive 2013/36/EU, should verify that it complies with the relevant provisions of this Directive.
- (39) Structured deposits have emerged as a form of investment product but are not covered under any legislative act for the protection of investors at Union level, while other structured investments are covered by such legislative acts. It is therefore appropriate to strengthen the confidence of investors and to make regulatory treatment concerning the distribution of different packaged retail investment products more uniform in order to ensure an adequate level of investor protection across the Union. For that reason, it is appropriate to include in the scope of this Directive structured deposits. In this regard, it is necessary to clarify that since structured deposits are a form of investment product, they do not include deposits linked solely to interest rates, such as Euribor or Libor, regardless of whether or not the interest rates are predetermined, or whether they are fixed or variable. Such deposits should therefore be excluded from the scope of this Directive.
- (40) The application of this Directive to investment firms and credit institutions when selling or advising clients in relation to structured deposits, should be understood as when acting as intermediaries for those products issued by credit institutions that can take deposits in accordance with Directive 2013/36/EU.
- (41) Central securities depositaries (CSDs) are systemically important institutions for financial markets that ensure the initial recording of securities, the maintenance of the accounts containing the securities issued and the settlement of virtually all trades of securities. CSDs are to be specifically regulated under Union law and subject, in particular, to authorisation and certain operating conditions. However, CSDs might, in addition to the core services referred to in other Union law, provide investment services and activities which are regulated under this Directive.

<sup>(1)</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

<sup>(2)</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

<sup>(3)</sup> Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211, 14.8.2009, p. 15).

<sup>(4)</sup> Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36).

In order to ensure that any entities providing investment services and activities are subject to the same regulatory framework, it is appropriate to ensure that such CSDs are not subject to the requirements of this Directive relating to authorisation and certain operating conditions but that Union law regulating CSDs as such should ensure that they are subject to the provisions of this Directive when they provide investment services or perform investment activities in addition to the services specified in that Union law.

- (42) In order to strengthen the protection of investors in the Union, it is appropriate to limit the conditions under which Member States may exclude the application of this Directive to persons providing investment services to clients who, as a result, are not protected under this Directive. In particular, it is appropriate to require Member States to apply requirements at least analogous to the ones laid down in this Directive to those persons, in particular during the phase of authorisation, in the assessment of their reputation and experience and of the suitability of any shareholders, in the review of the conditions for initial authorisation and on-going supervision as well as on conduct of business obligations.

In addition, persons excluded from the application of this Directive should be covered under an investor compensation scheme recognised in accordance with Directive 97/9/EC of the European Parliament and of the Council<sup>(1)</sup> or professional indemnity insurance ensuring equivalent protection to their clients in the situations covered under that Directive.

- (43) Where an investment firm provides one or more investment services not covered by its authorisation, or performs one or more investment activities not covered by its authorisation, on a non-regular basis it should not need an additional authorisation under this Directive.
- (44) For the purposes of this Directive, the business of reception and transmission of orders should also include bringing together two or more investors, thereby bringing about a transaction between those investors.
- (45) Investment firms and credit institutions distributing financial instruments they issue themselves should be subject to this Directive when they provide investment advice to their clients. In order to eliminate uncertainty and strengthen investor protection, it is appropriate to provide for the application of this Directive when, in the primary market, investment firms and credit institutions distribute financial instruments issued by them without providing any advice. To that end, the definition of the service of execution of orders on behalf of clients should be extended.
- (46) The principles of mutual recognition and of home Member State supervision require that the Member States' competent authorities should not grant or withdraw authorisation where factors such as the content of programmes of operations, the geographical distribution or the activities actually carried on indicate clearly that an investment firm has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry out or does carry out the greater part of its activities. An investment firm which is a legal person should be authorised in the Member State in which it has its registered office. An investment firm which is not a legal person should be authorised in the Member State in which it has its head office. In addition, Member States should require that an investment firm's head office is always situated in its home Member State and that it actually operates there.
- (47) Directive 2007/44/EC of the European Parliament and of the Council<sup>(2)</sup> has provided for detailed criteria for the prudential assessment of proposed acquisitions in an investment firm and for a procedure for their application. In order to provide legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof, it is appropriate to confirm the criteria and the process of prudential assessment laid down in that Directive.

<sup>(1)</sup> Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ L 84, 26.3.1997, p. 22).

<sup>(2)</sup> Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ L 247, 21.9.2007, p. 1).

In particular, competent authorities should appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria: the reputation of the proposed acquirer; the reputation and experience of any person who will direct the business of the investment firm as a result of the proposed acquisition; the financial soundness of the proposed acquirer; whether the investment firm will be able to comply with the prudential requirements based on this Directive and on other Directives, in particular, on Directives 2002/87/EC of the European Parliament and of the Council<sup>(1)</sup> and 2013/36/EU; whether there are reasonable grounds to suspect that money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council<sup>(2)</sup> is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

- (48) An investment firm authorised in its home Member State should be entitled to provide investment services or perform investment activities throughout the Union without the need to seek a separate authorisation from the competent authority in the Member State in which it wishes to provide such services or perform such activities.
- (49) Since certain investment firms are exempt from certain obligations imposed by Directive 2013/36/EU, they should be obliged to hold either a minimum amount of capital or professional indemnity insurance or a combination of both. The adjustments of the amounts of that insurance should take into account adjustments made in the framework of Directive 2002/92/EC of the European Parliament and of the Council<sup>(3)</sup>. That particular treatment for the purposes of capital adequacy should be without prejudice to any decisions regarding the appropriate treatment of those firms under future changes to Union law on capital adequacy.
- (50) Since the scope of prudential regulation should be limited to those entities which, by virtue of running a trading book on a professional basis, represent a source of a counterparty risk to other market participants, entities which deal on own account in financial instruments other than commodity derivatives, emission allowances or derivatives thereof, should be excluded from the scope of this Directive provided that they are not market makers, do not deal on own account when executing client orders, are not members or participants of a regulated market or MTF, do not have direct electronic access to a trading venue and do not apply a high-frequency algorithmic trading technique.
- (51) In order to protect an investor's ownership and other similar rights in respect of securities and the investor's rights in respect of funds entrusted to a firm, those rights should in particular be kept distinct from those of the firm. This principle should not, however, prevent a firm from doing business in its name but on behalf of the investor, where that is required by the very nature of the transaction and the investor is in agreement, for example stock lending.
- (52) The requirements concerning the protection of client assets are a crucial tool for the protection of clients in the provision of services and activities. Those requirements can be excluded when full ownership of funds and financial instrument is transferred to an investment firm to cover any present or future, actual or contingent or prospective obligations. That broad possibility may create uncertainty and jeopardise the effectiveness of the requirements concerning the safeguard of client assets. Thus, at least when retail client assets are involved, it is appropriate to limit the possibility of investment firms to conclude title transfer financial collateral arrangements as defined under Directive 2002/47/EC of the European Parliament and of the Council<sup>(4)</sup>, for the purpose of securing or otherwise covering their obligations.
- (53) It is necessary to strengthen the role of management bodies of investment firms, regulated markets and data reporting services providers in ensuring sound and prudent management of the firms, the promotion of the integrity of the market and the interest of investors. The management body of an investment firm, regulated markets and data reporting services providers should at all times commit sufficient time and possess adequate

<sup>(1)</sup> Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

<sup>(2)</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15).

<sup>(3)</sup> Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ L 9, 15.1.2003, p. 3).

<sup>(4)</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).

collective knowledge, skills and experience to be able to understand the firm's activities including the main risks. To avoid group thinking and facilitate independent opinions and critical challenge, management bodies should therefore be sufficiently diverse as regards age, gender, geographic provenance and educational and professional background to present a variety of views and experiences. Employee representation in management bodies could also, by adding a key perspective and genuine knowledge of the internal workings of firms, be seen as a positive way of enhancing diversity. Therefore, diversity should be one of the criteria for the composition of management bodies. Diversity should also be addressed in firms' recruitment policy more generally. That policy should, for instance, encourage firms to select candidates from shortlists including both genders. In the interests of a coherent approach to corporate governance it is desirable to align the requirements for investment firms as far as possible to those included in Directive 2013/36/EU.

- (54) In order to have an effective oversight and control over the activities of investment firms, regulated markets and data reporting services providers, the management body should be responsible and accountable for the overall strategy of the firm, taking into account the firm's business and risk profile. The management body should assume clear responsibilities across the business cycle of the firm, in the areas of the identification and definition of the strategic objectives, risk strategy and internal governance of the firm, of the approval of its internal organisation, including criteria for selection and training of personnel, of effective oversight of senior management, of the definition of the overall policies governing the provision of services and activities, including the remuneration of sales staff and the approval of new products for distribution to clients. Periodic monitoring and assessment of the strategic objectives of firms, their internal organisation and their policies for the provision of services and activities should ensure their continuous ability to deliver sound and prudent management, in the interest of the integrity of the markets and the protection of investors. Combining too high a number of directorships would preclude a member of the management body from spending adequate time on the performance of that oversight role.

Therefore, it is necessary to limit the number of directorships a member of the management body of an institution may hold at the same time in different entities. However, directorships in organisations which do not pursue predominantly commercial objectives, such as not-for-profit or charitable organisations, should not be taken into account for the purposes of applying such a limit.

- (55) Different governance structures are used across Member States. In most cases a unitary or a dual board structure is used. The definitions used in this Directive are intended to embrace all existing structures without advocating any particular structure. They are purely functional for the purpose of setting out rules aiming to achieve a particular outcome irrespective of the national company law applicable to an institution in each Member State. The definitions should therefore not interfere with the general allocation of competences in accordance with national company law.
- (56) The expanding range of activities that many investment firms undertake simultaneously has increased potential for conflicts of interest between those different activities and the interests of their clients. It is therefore necessary to provide for rules to ensure that such conflicts do not adversely affect the interests of their clients. Firms have a duty to take effective steps to identify and prevent or manage conflicts of interest and mitigate the potential impact of those risks as far as possible. Where some residual risk of detriment to the client's interests nonetheless remains, clear disclosure to the client of the general nature and/or sources of conflicts of interest to the client and the steps taken to mitigate those risks should be made before undertaking business on its behalf.
- (57) Commission Directive 2006/73/EC<sup>(1)</sup> allows Member States to require, in the context of organisational requirements for investment firms, the recording of telephone conversations or electronic communications involving client orders. Recording of telephone conversations or electronic communications involving client orders is compatible with the Charter of Fundamental Rights of the European Union (the Charter) and is justified in order to strengthen investor protection, to improve market surveillance and increase legal certainty in the interest of investment firms and their clients. The importance of such records is also referred to in the technical advice to the Commission, released by the Committee of European Securities Regulators on 29 July 2010. Such records should ensure that there is evidence to prove the terms of any orders given by clients and its correspondence with transactions executed by the investment firms, as well as to detect any behaviour that may have relevance in terms of market abuse, including when firms deal on own account.

<sup>(1)</sup> Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 26).

To that end records are needed for all conversations involving a firm's representatives when dealing, or intending to deal, on own account. Where orders are communicated by clients through other channels than by telephone, such communications should be made in a durable medium such as mails, faxes, emails, documentation of client orders made at meetings. For example, the content of relevant face-to-face conversations with a client could be recorded by using written minutes or notes. Such orders should be considered to be equivalent to orders received by telephone. Where minutes are taken of face-to-face conversations with clients, Member States should ensure that appropriate safeguards are in place to ensure that the client does not lose out as a result of the minutes inaccurately recording the communication between the parties. Such safeguards should not imply any assumption of liability by the client.

In order to provide legal certainty regarding the scope of the obligation, it is appropriate to apply it to all equipment provided by the firm or permitted to be used by the investment firm and to require the investment firms to take reasonable steps to ensure that no privately owned equipment is used in relation to transactions. Those records should be available to competent authorities in the fulfilment of their supervisory tasks and in the performance of enforcement actions under this Directive and under Regulation (EU) No 600/2014, Regulation (EU) No 596/2014 and Directive 2014/57/EU of the European Parliament and of the Council (<sup>1</sup>) in order to help competent authorities identify behaviours which are not compliant with the legal framework regulating the activity of investment firms. Those records should also be available to investment firms and to clients to demonstrate the development of their relationship with regard to orders transmitted by clients and transaction carried out by firms. For those reasons, it is appropriate to provide in this Directive for the principles of a general regime concerning the recording of telephone conversations or electronic communications involving client orders.

- (58) In line with Council conclusions on strengthening European financial supervision of June 2009, and in order to contribute to the establishment of a single rulebook for Union financial markets, to help further develop a level playing field for Member States and market participants, to enhance investor protection and to improve supervision and enforcement, the Union is committed to minimising, where appropriate, discretions available to Member States across Union financial services law. In addition to the introduction in this Directive of a common regime for the recording of telephone conversations or electronic communications involving client orders, it is appropriate to reduce the possibility of competent authorities to delegate supervisory tasks in certain cases, to limit discretions in the requirements applicable to tied agents and to the reporting from branches.
- (59) The use of trading technology has evolved significantly in the past decade and is now extensively used by market participants. Many market participants now make use of algorithmic trading where a computer algorithm automatically determines aspects of an order with minimal or no human intervention. Risks arising from algorithmic trading should be regulated. However, the use of algorithms in post-trade processing of executed transactions does not constitute algorithmic trading. An investment firm that engages in algorithmic trading pursuing a market making strategy should carry out that market making continuously during a specified proportion of the trading venue's trading hours. Regulatory technical standards should clarify what constitutes specified proportion of the trading venue's trading hours by ensuring that such specified proportion is significant in comparison to the total trading hours, taking into account the liquidity, scale and nature of the specific market and the characteristics of the financial instrument traded.
- (60) Investment firms that engage in algorithmic trading pursuing a market making strategy should have in place appropriate systems and controls for that activity. Such an activity should be understood in a way specific to its context and purpose. The definition of such an activity is therefore independent from definitions such as that of 'market making activities' in Regulation (EU) No 236/2012 of the European Parliament and of the Council (<sup>2</sup>).
- (61) A specific subset of algorithmic trading is high-frequency algorithmic trading where a trading system analyses data or signals from the market at high speed and then sends or updates large numbers of orders within a very short time period in response to that analysis. In particular, high-frequency algorithmic trading may contain elements such as order initiation, generating, routing and execution which are determined by the system without human intervention for each individual trade or order, short time-frame for establishing and liquidating positions, high daily portfolio turnover, high order-to-trade ratio intraday and ending the trading day at or close to a flat position. High-frequency algorithmic trading is characterised, among others, by high message intra-day rates which

(<sup>1</sup>) Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse Directive) (see page 179 of this Official Journal).

(<sup>2</sup>) Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

constitute orders, quotes or cancellations. In determining what constitutes high message intra-day rates, the identity of the client ultimately behind the activity, the length of the observation period, the comparison with the overall market activity during that period and the relative concentration or fragmentation of activity should be taken into account. High-frequency algorithmic trading is typically done by the traders using their own capital to trade and rather than being a strategy in itself is usually the use of sophisticated technology to implement more traditional trading strategies such as market making or arbitrage.

- (62) Technical advances have enabled high-frequency trading and an evolution of business models. High-frequency trading is facilitated by the co-location of market participants' facilities in close physical proximity to a trading venue's matching engine. In order to ensure orderly and fair trading conditions, it is essential to require trading venues to provide such co-location services on a non-discriminatory, fair and transparent basis. The use of trading technology has increased the speed, capacity and complexity of how investors trade. It has also enabled market participants to facilitate direct electronic access by their clients to markets through the use of their trading facilities, through direct market access or sponsored access. Trading technology has provided benefits to the market and market participants generally such as wider participation in markets, increased liquidity, narrower spreads, reduced short term volatility and the means to obtain better execution of orders for clients. Yet that trading technology also gives rise to a number of potential risks such as an increased risk of the overloading of the systems of trading venues due to large volumes of orders, risks of algorithmic trading generating duplicative or erroneous orders or otherwise malfunctioning in a way that may create a disorderly market.

In addition, there is the risk of algorithmic trading systems overreacting to other market events which can exacerbate volatility if there is a pre-existing market problem. Finally, algorithmic trading or high-frequency algorithmic trading techniques can, like any other form of trading, lend themselves to certain forms of behaviour which is prohibited under Regulation (EU) No 596/2014. High-frequency trading may also, because of the information advantage provided to high-frequency traders, prompt investors to choose to execute trades in venues where they can avoid interaction with high-frequency traders. It is appropriate to subject high-frequency algorithmic trading techniques which rely on certain specified characteristics to particular regulatory scrutiny. While those are predominantly techniques which rely on trading on own account such scrutiny should also apply where the execution of the technique is structured in such a way as to avoid the execution taking place on own account.

- (63) Those potential risks from increased use of technology are best mitigated by a combination of measures and specific risk controls directed at firms that engage in algorithmic trading or high-frequency algorithmic trading techniques, those that provide direct electronic access, and other measures directed at operators of trading venues that are accessed by such firms. In order to strengthen the resilience of markets in the light of technological developments, those measures should reflect and build on the technical guidelines issued by the European Supervisory Authority (European Securities and Markets Authority) ('ESMA'), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council (<sup>(1)</sup>) in February 2012 on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities (ESMA/2012/122). It is desirable to ensure that all high-frequency algorithmic trading firms be authorised. Such authorisation should ensure those firms are subject to organisational requirements under this Directive and that they are properly supervised. However, entities which are authorised and supervised under Union law regulating the financial sector and are exempt from this Directive, but which engage in algorithmic trading or high-frequency algorithmic trading techniques, should not be required to obtain an authorisation under this Directive and should only be subject to the measures and controls aiming to tackle the specific risk arising from those types of trading. In that respect, ESMA should play an important coordinating role by defining appropriate tick sizes in order to ensure orderly markets at Union level.
- (64) Both investment firms and trading venues should ensure robust measures are in place to ensure that algorithmic trading or high-frequency algorithmic trading techniques do not create a disorderly market and cannot be used for abusive purposes. Trading venues should also ensure their trading systems are resilient and properly tested to deal with increased order flows or market stresses and that circuit breakers are in place on trading venues to temporarily halt trading or constrain it if there are sudden unexpected price movements.
- (65) It is also necessary to ensure that the fee structures of trading venues are transparent, non-discriminatory and fair and that they are not structured in such a way as to promote disorderly market conditions. It is therefore

<sup>(1)</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).

appropriate to allow for trading venues to adjust their fees for cancelled orders according to the length of time for which the order was maintained and to calibrate the fees to each financial instrument to which they apply. Member States should also be able to allow trading venues to impose higher fees for placing orders that are subsequently cancelled or on participants placing a high ratio of cancelled orders and on those operating a high-frequency algorithmic trading technique in order to reflect the additional burden on system capacity without necessarily benefitting other market participants.

- (66) In addition to measures relating to algorithmic and high-frequency algorithmic trading techniques it is appropriate to ban the provision of direct electronic access to markets by investment firms for their clients where such access is not subject to proper systems and controls. Irrespective of the form of the direct electronic access provided, firms providing such access should assess and review the suitability of clients using that service and ensure that risk controls are imposed on the use of the service and that those firms retain responsibility for trading submitted by their clients through the use of their systems or using their trading codes. It is appropriate that detailed organisational requirements regarding those new forms of trading should be prescribed in more detail in regulatory technical standards. This should ensure that requirements can be amended where necessary to deal with further innovation and developments in that area.
- (67) In order to ensure effective supervision and in order to enable the competent authorities to take appropriate measures against defective or rogue algorithmic strategies in due time it is necessary to flag all orders generated by algorithmic trading. By means of flagging, competent authorities should be enabled to identify and distinguish orders originating from different algorithms and to reconstruct efficiently and evaluate the strategies that algorithmic traders employ. This should mitigate the risk that orders are not unambiguously attributed to an algorithmic strategy and a trader. The flagging permits the competent authorities to react efficiently and effectively against algorithmic trading strategies that behave in an abusive manner or pose risks to the orderly functioning of the market.
- (68) In order to ensure that market integrity is maintained in the light of technological developments in financial markets, ESMA should regularly seek input from national experts on developments relating to trading technology including high-frequency trading and new practices which could constitute market abuse, so as to identify and promote effective strategies for preventing and addressing such abuse.
- (69) There is a multitude of trading venues currently operating in the Union, among which a number are trading identical financial instruments. In order to address potential risks to the interests of investors it is necessary to formalise and further coordinate the processes on the consequences for trading on other trading venues if an investment firm or a market operator operating a trading venue decides to suspend or remove a financial instrument from trading. In the interest of legal certainty and to adequately address conflicts of interests when deciding to suspend or to remove financial instruments from trading, it should be ensured that if an investment firm or a market operator operating a trading venue stops trading due to non-compliance with their rules, the others follow that decision if it is decided so by their competent authorities unless continuing trading may be justified due to exceptional circumstances. In addition, it is necessary to formalise and improve the exchange of information and the cooperation between the competent authorities in relation to suspension and removal of financial instruments from trading on a trading venue. Those arrangements should be applied in such a way as to prevent trading venues using information transmitted in the context of a suspension or removal of a financial instrument from trading for commercial purposes.
- (70) More investors have become active in the financial markets and are offered a more complex wide-ranging set of services and instruments and, in view of those developments, it is necessary to provide for a degree of harmonisation to offer investors a high level of protection across the Union. When Directive 2004/39/EC was adopted, the increasing dependence of investors on personal recommendations required to include the provision of investment advice as an investment service subject to authorisation and to specific conduct of business obligations. The continuous relevance of personal recommendations for clients and the increasing complexity of services and instruments require enhancing the conduct of business obligations in order to strengthen the protection of investors.
- (71) Member States should ensure that investment firms act in accordance with the best interests of their clients and are able to comply with their obligations under this Directive. Investment firms should accordingly understand the features of the financial instruments offered or recommended and establish and review effective policies and

arrangements to identify the category of clients to whom products and services are to be provided. Member States should ensure that the investment firms which manufacture financial instruments ensure that those products are manufactured to meet the needs of an identified target market of end clients within the relevant category of clients, take reasonable steps to ensure that the financial instruments are distributed to the identified target market and periodically review the identification of the target market of and the performance of the products they offer. Investment firms that offer or recommend to clients financial instruments not manufactured by them should also have appropriate arrangements in place to obtain and understand the relevant information concerning the product approval process, including the identified target market and the characteristics of the product they offer or recommend. That obligation should apply without prejudice to any assessment of appropriateness or suitability to be subsequently carried out by the investment firm in the provision of investment services to each client, on the basis of their personal needs, characteristics and objectives.

In order to ensure that financial instruments will be offered or recommended only when in the interest of the client, investment firms offering or recommending the product manufactured by firms which are not subject to the product governance requirements set out in this Directive or manufactured by third-country firms should also have appropriate arrangements to obtain sufficient information about the financial instruments.

- (72) In order to give all relevant information to investors, it is appropriate to require investment firms providing investment advice to disclose the cost of the advice, to clarify the basis of the advice they provide, in particular the range of products they consider in providing personal recommendations to clients, whether they provide investment advice on an independent basis and whether they provide the clients with the periodic assessment of the suitability of the financial instruments recommended to them. It is also appropriate to require investment firms to explain to their clients the reasons for the advice provided to them.
- (73) In order to further establish the regulatory framework for the provision of investment advice, while at the same time leaving choice to investment firms and clients, it is appropriate to establish the conditions for the provisions of that service when firms inform clients that the service is provided on an independent basis. When advice is provided on an independent basis a sufficient range of different product providers' products should be assessed prior to making a personal recommendation. It is not necessary for the advisor to assess investment products available on the market by all product providers or issuers, but the range of financial instruments should not be limited to financial instruments issued or provided by entities with close links with the investment firm or with other legal or economic relationships, such as a contractual relationship, that are so close as to put at risk the independent basis of the advice provided.
- (74) In order to strengthen the protection of investors and increase clarity to clients as to the service they receive, it is also appropriate to further restrict the possibility for firms providing the service of investment advice on an independent basis and the service of portfolio management to accept and retain fees, commissions or any monetary and non-monetary benefits from third parties, and particularly from issuers or product providers. This implies that all fees, commissions and any monetary benefits paid or provided by a third party must be returned in full to the client as soon as possible after receipt of those payments by the firm and the firm should not be allowed to offset any third-party payments from the fees due by the client to the firm. The client should be accurately and, where relevant, periodically, informed about all fees, commissions and benefits the firm has received in connection with the investment service provided to the client and transferred to him. Firms providing independent advice or portfolio management should also set up a policy, as part of their organisational requirements, to ensure that third party payments received are allocated and transferred to the clients. Only minor non-monetary benefits should be allowed, provided that they are clearly disclosed to the client, that they are capable of enhancing the quality of the service provided and that they could not be judged to impair the ability of investment firms to act in the best interest of their clients.
- (75) When providing the service of investment advice on an independent basis and the service of portfolio management, fees, commissions or non-monetary benefits paid or provided by a person on behalf of the client should be allowed only as far as the person is aware that such payments have been made on that person's behalf and that the amount and frequency of any payment is agreed between the client and the investment firm and not determined by a third party. Cases which would satisfy that requirement include where a client pays a firm's invoice directly or it is paid by an independent third party who has no connection with the investment firm regarding the investment service provided to the client and is acting only on the instructions of the client and cases where the client negotiates a fee for a service provided by an investment firm and pays that fee. This would generally be the case for accountants or lawyers acting under a clear payment instruction from the client or where a person is acting as a mere conduit for the payment.

- (76) This Directive provides for conditions and procedures for Member States to comply with when planning to impose additional requirements. Such requirements may include prohibiting or further restricting the offer or acceptance of fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of service to clients.
- (77) To further protect consumers, it is also appropriate to ensure that investment firms do not remunerate or assess the performance of their own staff in a way that conflicts with the firm's duty to act in the best interests of their clients, for example through remuneration, sales targets or otherwise which provide an incentive for recommending or selling a particular financial instrument when another product may better meet the client's needs.
- (78) Where sufficient information in relation to the costs and associated charges or to the risks in respect of the financial instrument itself is provided in accordance with other Union law that information should be regarded as appropriate for the purposes of providing information to clients under this Directive. However, investment firms or credit institutions distributing that financial instrument should additionally inform their clients about all the other costs and associated charges relating to their provision of investment services in relation to that financial instrument.
- (79) Given the complexity of investment products and the continuous innovation in their design, it is also important to ensure that staff who advise on or sell investment products to retail clients possess an appropriate level of knowledge and competence in relation to the products offered. Investment firms should allow their staff sufficient time and resources to achieve that knowledge and competence and to apply it in providing services to clients.
- (80) Investment firms are allowed to provide investment services that consist only of execution and/or of the reception and transmission of client orders, without the need to obtain information regarding the knowledge and experience of the client in order to assess the appropriateness of the service or the financial instrument for the client. Since those services entail a relevant reduction of client protection, it is appropriate to improve the conditions for their provision. In particular, it is appropriate to exclude the possibility to provide those services in conjunction with the ancillary service consisting of granting credits or loans to investors to allow them to carry out a transaction in which the investment firm is involved, since this increases the complexity of the transaction and makes more difficult the understanding of the risk involved. It is also appropriate to better define the criteria for the selection of the financial instruments to which those services should relate in order to exclude certain financial instruments, including those which embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved, shares in undertakings that are not undertakings for collective investment in transferable securities (UCITS) (non-UCITS collective investment undertakings) and structured UCITS as referred to in the second subparagraph of Article 36(1) of Commission Regulation (EU) No 583/2010<sup>(1)</sup>. The treatment of certain UCITS as complex products should be without prejudice to future Union law defining the scope of and the rules applicable to such products.
- (81) Cross-selling practices are a common strategy for retail financial service providers throughout the Union. They can provide benefits to retail clients but can also represent practices where the interest of the client is not adequately considered. For instance, certain forms of cross-selling practices, namely tying practices where two or more financial services are sold together in a package and at least one of those services is not available separately, can distort competition and negatively affect client mobility and their ability to make informed choices. An example of tying practices can be the necessary opening of current accounts when an investment service is provided to a retail client. While practices of bundling, where two or more financial services are sold together in a package, but each of the services can also be purchased separately, may also distort competition and negatively affect customer mobility and the ability of clients to make informed choices, they at least leave choice to the client and may therefore pose less risk to the compliance of investment firms with their obligations under this Directive. The use of such practices should be carefully assessed in order to promote competition and consumer choice.
- (82) When providing investment advice, the investment firm should specify in a written statement on suitability how the advice given meets the preferences, needs and other characteristics of the retail client. The statement should be provided in a durable medium including in an electronic form. The responsibility to undertake the suitability

<sup>(1)</sup> Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website (OJ L 176, 10.7.2010, p. 1).

assessment and to provide an accurate suitability report to the client lies with the investment firm and appropriate safeguards should be in place to ensure that the client does not incur a loss out as a result of the report presenting in an inaccurate or unfair manner the personal recommendation, including how the recommendation provided is suitable for the client and the disadvantages of the recommended course of action.

- (83) In determining what constitutes the provision of information in good time before a time specified in this Directive, an investment firm should take into account, having regard to the urgency of the situation, the client's need for sufficient time to read and understand it before taking an investment decision. A client is likely to require more time to review information given on a complex or unfamiliar product or service, or a product or service a client has no experience with than a client considering a simpler or more familiar product or service, or where the client has relevant prior experience.
- (84) Nothing in this Directive should oblige investment firms to provide all required information about the investment firm, financial instruments, costs and associated charges, or concerning the safeguarding of client financial instruments or client funds immediately and at the same time, provided that they comply with the general obligation to provide the relevant information in good time before the time specified in this Directive. Provided that the information is communicated to the client in good time before the provision of the service, nothing in this Directive obliges firms to provide it either separately or by incorporating the information in a client agreement.
- (85) A service should be considered to be provided at the initiative of a client unless the client demands it in response to a personalised communication from or on behalf of the firm to that particular client, which contains an invitation or is intended to influence the client in respect of a specific financial instrument or specific transaction. A service can be considered to be provided at the initiative of the client notwithstanding that the client demands it on the basis of any communication containing a promotion or offer of financial instruments made by any means that by its very nature is general and addressed to the public or a larger group or category of clients or potential clients.
- (86) One of the objectives of this Directive is to protect investors. Measures to protect investors should be adapted to the particularities of each category of investors (retail, professional and counterparties). However, in order to enhance the regulatory framework applicable to the provision of services irrespective of the categories of clients concerned, it is appropriate to make it clear that principles to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading apply to the relationship with any clients.
- (87) Investments that involve contracts of insurance are often made available to customers as potential alternatives or substitutes to financial instruments subject to this Directive. To deliver consistent protection for retail clients and ensure a level playing field between similar products, it is important that insurance-based investment products are subject to appropriate requirements. Whereas the investor protection requirements in this Directive should therefore be applied equally to those investments packaged under insurance contracts, their different market structures and product characteristics make it more appropriate that detailed requirements are set out in the ongoing review of Directive 2002/92/EC rather than setting them in this Directive. Future Union law regulating the activities of insurance intermediaries and insurance undertakings should thus appropriately ensure a consistent regulatory approach concerning the distribution of different financial products which satisfy similar investor needs and therefore raise comparable investor protection challenges. The European Supervisory Authority (European Investment and Occupational Pensions Authority) ('EIOPA'), established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council (<sup>(1)</sup>) and ESMA should work together to achieve as much consistency as possible in the conduct of business standards for those investment products. Those new requirements for insurance-based investment products should be laid down in Directive 2002/92/EC.
- (88) In order to align the rules pertaining to conflicts of interests, general principles and information to customers and to allow Member States to place restrictions on the remuneration of insurance intermediaries, Directive 2002/92/EC should be amended accordingly.

<sup>(1)</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Investment 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).

- (89) Insurance-based investment products that do not offer investment opportunities and deposits solely exposed to interest rates should be excluded from the scope of this Directive. Individual and occupational pension products, having the primary purpose of providing the investor an income in retirement, should be excluded from the scope of this Directive, in consideration of their particularities and objectives.
- (90) By way of derogation from the principle of home Member State authorisation, supervision and enforcement of obligations in respect of the operation of branches, it is appropriate for the competent authority of the host Member State to assume responsibility for enforcing certain obligations specified in this Directive in relation to business conducted through a branch within the territory where the branch is located, since that authority is closest to the branch, and is better placed to detect and intervene in respect of infringements of rules governing the operations of the branch.
- (91) It is necessary to impose an effective 'best execution' obligation to ensure that investment firms execute client orders on terms that are most favourable to the client. That obligation should apply where a firm owes contractual or agency obligations to the client.
- (92) Given that a wider range of execution venues are now available in the Union, it is appropriate to enhance the best execution framework for retail investors. Advances in technology for monitoring best execution should be considered when applying the best execution framework in accordance with the second and third subparagraph of Article 27(1).
- (93) For the purposes of determining best execution when executing retail client orders, the costs relating to execution should include an investment firm's own commissions or fees charged to the client for limited purposes, where more than one venue listed in the firm's execution policy is capable of executing a particular order. In such cases, the firm's own commissions and costs for executing the order on each of the eligible execution venues should be taken into account in order to assess and compare the results for the client that would be achieved by executing the order on each such venue. However, it is not intended to require a firm to compare the results that would be achieved for its client on the basis of its own execution policy and its own commissions and fees, with results that might be achieved for the same client by any other investment firm on the basis of a different execution policy or a different structure of commissions or fees. Nor is it intended to require a firm to compare the differences in its own commissions which are attributable to differences in the nature of the services that the firm provides to clients.
- (94) The provisions of this Directive that provide that costs of execution should include an investment firm's own commissions or fees charged to the client for the provision of an investment service should not apply for the purpose of determining what execution venues should be included in the firm's execution policy for the purposes of Article 27(5) of this Directive.
- (95) An investment firm should be considered to be structuring or charging its commissions in a way which discriminates unfairly between execution venues if it charges a different commission or spread to clients for execution on different execution venues and that difference does not reflect actual differences in the cost to the firm of executing on those venues.
- (96) In order to enhance the conditions under which investment firms comply with their obligation to execute orders on terms most favourable to their clients in accordance with this Directive, it is appropriate to require that for financial instruments subject to the trading obligation in Articles 23 and 28 of Regulation (EU) No 600/2014 that each trading venue and systematic internaliser and for other financial instruments that each execution venue to make available to the public data relating to the quality of execution of transactions on each venue.
- (97) Information provided by investment firms to clients in relation to their execution policy often are generic and standard and do not allow clients to understand how an order will be executed and to verify firms' compliance with their obligation to execute orders on term most favourable to their clients. In order to enhance investor protection it is appropriate to specify the principles concerning the information given by investment firms to their clients on the execution policy and to require firms to make public, on an annual basis, for each class of financial instruments, the top five execution venues where they executed client orders in the preceding year and to take account of that information and information published by execution venues on execution quality in their policies on best execution.

- (98) When establishing the business relationship with the client the investment firm might ask the client or potential client to consent at the same time to the execution policy as well as to the possibility that that person's orders may be executed outside a trading venue.
- (99) Persons who provide investment services on behalf of more than one investment firm should not be considered to be tied agents but as investment firms when they fall under the definition provided in this Directive, with the exception of certain persons who may be exempt.
- (100) This Directive should be without prejudice to the right of tied agents to undertake activities covered by other Directives and related activities in respect of financial services or products not covered by this Directive, including on behalf of parts of the same financial group.
- (101) The conditions for conducting activities outside the premises of the investment firm (door-to-door selling) should not be covered by this Directive.
- (102) Member States' competent authorities should not register or should withdraw the registration where the activities actually carried on indicate clearly that a tied agent has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry out or does carry out the greater part of its activities.
- (103) For the purposes of this Directive eligible counterparties should be considered to be acting as clients.
- (104) The financial crisis has shown limits in the ability of non-retail clients to appreciate the risk of their investments. While it should be confirmed that conduct of business rules should be enforced in respect of those investors most in need of protection, it is appropriate to better calibrate the requirements applicable to different categories of clients. To that extent, it is appropriate to extend some information and reporting requirements to the relationship with eligible counterparties. In particular, the relevant requirements should relate to the safeguarding of client financial instruments and funds as well as information and reporting requirements concerning more complex financial instruments and transactions. In order to better define the classification of municipalities and local public authorities, it is appropriate to clearly exclude them from the list of eligible counterparties and of clients who are considered to be professionals while still allowing those clients to ask for treatment as professional clients on request.
- (105) In respect of transactions executed between eligible counterparties, the obligation to disclose client limit orders should only apply where the counterparty is explicitly sending a limit order to an investment firm for its execution.
- (106) Member States should ensure the respect of the right to the protection of personal data in accordance with Directive 95/46/EC of the European Parliament and of the Council (<sup>(1)</sup>) and Directive 2002/58/EC of the European Parliament and of the Council (<sup>(2)</sup>) which govern the processing of personal data carried out in application of this Directive. Processing of personal data by ESMA in the application of this Directive is subject to Regulation (EU) No 45/2001 of the European Parliament and of the Council (<sup>(3)</sup>).
- (107) Investment firms should all have the same opportunities of joining or having access to regulated markets throughout the Union. Regardless of the manner in which transactions are at present organised in the Member States, it is important to abolish the technical and legal restrictions on access to regulated markets.

<sup>(1)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

<sup>(2)</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

<sup>(3)</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

- (108) In order to facilitate the finalisation of cross-border transactions, it is appropriate to provide for access to clearing and settlement systems throughout the Union by investment firms, irrespective of whether transactions have been concluded through regulated markets in the Member State concerned. Investment firms which wish to participate directly in other Member States' settlement systems should comply with the relevant operational and commercial requirements for membership and the prudential measures to uphold the smooth and orderly functioning of the financial markets.
- (109) The provision of services by third country firms in the Union is subject to national regimes and requirements. Firms authorised in accordance with them do not enjoy the freedom to provide services and the right of establishment in Member States other than the one where they are established. Where a Member State considers that the appropriate level of protection for its retail clients or retail clients who have requested to be treated as professional clients can be achieved by the establishment of a branch by the third-country firm it is appropriate to introduce a minimum common regulatory framework at Union level with respect to the requirements applicable to those branches and in light of the principle that third-country firms should not be treated in a more favourable way than Union firms.
- (110) When implementing the provisions of this Directive, Member States should take due account of the recommendations by the Financial Action Task Force (FATF) on jurisdictions that have strategic anti-money laundering and countering the financing of terrorism deficiencies and to which counter-measures apply or jurisdictions with strategic anti-money laundering and countering the financing of terrorism deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies.
- (111) The provision of this Directive regulating the provision of investment services or activities by third-country firms in the Union should not affect the possibility for persons established in the Union to receive investment services by a third country firm at their own exclusive initiative. Where a third-country firm provides services at the own exclusive initiative of a person established in the Union, the services should not be deemed as provided in the territory of the Union. Where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client.
- (112) The authorisation to operate a regulated market should extend to all activities which are directly relating to the display, processing, execution, confirmation and reporting of orders from the point at which such orders are received by the regulated market to the point at which they are transmitted for subsequent finalisation, and to activities relating to the admission of financial instruments to trading. This should also include transactions concluded through the medium of designated market makers appointed by the regulated market which are undertaken under its systems and in accordance with the rules that govern those systems. Not all transactions concluded by members or participants of the regulated market, MTF or OTF are to be considered to be concluded within the systems of a regulated market, MTF or OTF. Transactions which members or participants conclude on a bilateral basis and which do not comply with all the obligations established for a regulated market, an MTF or an OTF under this Directive should be considered to be transactions concluded outside a regulated market, an MTF or an OTF for the purposes of the definition of systematic internaliser. In such a case the obligation for investment firms to make public firm quotes should apply if the conditions established by this Directive and by Regulation (EU) No 600/2014 are met.
- (113) Given the importance of liquidity provision to the orderly and efficient functioning of markets, investment firms that engage in algorithmic trading to pursue a market making strategy should have written agreements in place with trading venues clarifying their obligations to provide liquidity to the market.
- (114) Nothing in this Directive should require competent authorities to approve or examine the content of the written agreement between the regulated market and the investment firm that is required from the participation in a market making scheme. However, neither does it prevent them from doing so, insofar as any such approval or examination is based only on the regulated markets' compliance with their obligations under Article 48.

- (115) The provision of core market data services which are pivotal for users to be able to obtain a desired overview of trading activity across Union financial markets and for competent authorities to receive accurate and comprehensive information on relevant transactions should be subject to authorisation and regulation to ensure the necessary level of quality.
- (116) The introduction of approved publication arrangements (APAs) should improve the quality of trade transparency information published in the OTC space and contribute significantly to ensuring that such data is published in a way facilitating its consolidation with data published by trading venues.
- (117) Now that a market structure is in place which allows for competition between multiple trading venues it is essential that an effective and comprehensive consolidated tape is in operation as soon as possible. The introduction of a commercial solution for a consolidated tape for equities and equity-like financial instruments should contribute to creating a more integrated European market and make it easier for market participants to gain access to a consolidated view of trade transparency information that is available. The envisaged solution is based on an authorisation of providers working along pre-defined and supervised parameters which are in competition with each other in order to achieve technically highly sophisticated and innovative solutions, serving the market to the greatest extent possible and ensuring that consistent and accurate market data is made available. By requiring all consolidated tape providers (CTPs) to consolidate data from all APAs and trading venues it will be assured that competition will take place on the basis of quality of service to clients rather than breadth of data covered. Nevertheless it is appropriate to make provision now for a consolidated tape to be put in place through a public procurement process if the mechanism envisaged does not lead to the timely delivery of an effective and comprehensive consolidated tape for equities and equity-like financial instruments.
- (118) The establishment of a consolidated tape for non-equity financial instruments is deemed to be more difficult to implement than the consolidated tape for equity financial instruments and potential providers should be able to gain experience with the latter before constructing it. In order to facilitate the proper establishment of the consolidated tape for non-equity financial instruments, it is therefore appropriate to provide for an extended date of application of the national measures transposing the relevant provision. Nevertheless it is appropriate to make provision now for a consolidated tape to be put in place through a public procurement process if the mechanism envisaged does not lead to the timely delivery of an effective and comprehensive consolidated tape for non-equity financial instruments.
- (119) When determining, as regards non-equity financial instruments, the trading venues and APAs which need to be included in the post-trade information to be disseminated by CTPs, ESMA should ensure that the objective of the establishment of an integrated Union market for those financial instruments will be achieved and should ensure non-discriminatory treatment of APAs and trading venues.
- (120) Union law on own funds requirements should fix the minimum capital requirements with which regulated markets should comply in order to be authorised, and in so doing should take into account the specific nature of the risks associated with such markets.
- (121) Operators of a regulated market should also be able to operate an MTF or an OTF in accordance with the relevant provisions of this Directive.
- (122) The provisions of this Directive concerning the admission of financial instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council (<sup>(1)</sup>) and of Directive 2003/71/EC of the European Parliament and of the Council (<sup>(2)</sup>). A regulated market should not be prevented from applying more stringent requirements in respect of the issuers of financial instruments which it is considering for admission to trading than are imposed pursuant to this Directive.

<sup>(1)</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).

<sup>(2)</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (OJ L 345, 31.12.2003, p. 64).

- (123) Member States should be able to designate different competent authorities to enforce the wide-ranging obligations laid down in this Directive. Such authorities should be of a public nature guaranteeing their independence from economic actors and avoiding conflicts of interest. In accordance with national law, Member States should ensure appropriate financing of the competent authority. The designation of public authorities should not exclude delegation under the responsibility of the competent authority.
- (124) In order to ensure that the communication between competent authorities of suspensions, removals, disruptions, disorderly trading conditions and circumstances that may indicate market abuse is achieved in an efficient and timely way, an effective communication and coordination process between national competent authorities is necessary, which will be achieved via arrangements developed by ESMA.
- (125) The G20 summit in Pittsburgh on 25 September 2009 agreed to improve the regulation, functioning and transparency of financial and commodity markets to address excessive commodity price volatility. The Commission Communications of 28 October 2009 on 'A Better Functioning Food Supply Chain in Europe', and of 2 February 2011 on 'Tackling the Challenges in Commodity Markets and Raw Materials' outlined measures that fall to be taken in the context of the review of Directive 2004/39/EC. In September 2011, the International Organization of Securities Commissions published Principles for the Regulation and Supervision of Commodity Derivatives Markets. Those principles were endorsed by the G20 summit in Cannes on 4 November 2011 which called for market regulators to have formal position management powers, including the power to set *ex ante* position limits as appropriate.
- (126) The powers made available to competent authorities should be complemented with explicit powers to obtain information from any person regarding the size and purpose of a position in derivative contracts relating to commodities and to request the person to take steps to reduce the size of the position in the derivative contracts.
- (127) A harmonised position limits regime is needed to ensure greater coordination and consistency in the application of the G20 agreement, especially for contracts that are traded across the Union. Therefore, explicit powers should be granted to competent authorities to establish limits, on the basis of a methodology determined by ESMA, on the positions any person can hold, at an aggregate group level, in a derivative contract in relation to a commodity at all times in order to prevent market abuse, including cornering the market, and to support orderly pricing and settlement conditions including the prevention of market distorting positions. Such limits should promote integrity of the market for the derivative and the underlying commodity without prejudice to price discovery on the market for the underlying commodity and should not apply to positions which objectively reduce risks directly relating to commercial activities in relation to the commodity. The distinction between spot contracts for commodities and commodity derivative contracts should also be clarified. In order to achieve the harmonised regime, it is also appropriate for ESMA to monitor the implementation of the position limits and for competent authorities to put in place cooperation arrangements, including exchange of relevant data with each other and to enable the monitoring and enforcement of the limits.
- (128) All venues which offer trading in commodity derivatives should have in place appropriate position management controls, providing the necessary powers at least to monitor and access information about commodity derivative positions, to require the reduction or termination of such positions and to require that liquidity is provided back on the market to mitigate the effects of a large or dominant position. ESMA should maintain and publish a list containing summaries of all position limits and position management controls in force. Those limits and arrangements should be applied in a consistent manner and take account of the specific characteristics of the market in question. They should be clearly spelled out as regards to how they apply and to the relevant quantitative thresholds which constitute the limits or which may trigger other obligations.
- (129) Trading venues should publish an aggregated weekly breakdown of the positions held by different categories of persons for the different commodity derivative contracts, emission allowances and derivatives thereof traded on their platforms. A comprehensive and detailed breakdown of the positions held by all persons should be made available to the competent authority at least daily. Arrangement for reporting under this Directive should take into account, where applicable, reporting requirements already imposed under Article 8 of Regulation (EU) No 1227/2011.

- (130) While the methodology used for calculation of position limits should not create barriers to the development of new commodity derivatives, ESMA should ensure when determining the methodology for calculation that the development of new commodity derivatives cannot be used to circumvent the position limits regime.
- (131) Position limits should be set for each individual commodity derivative contract. In order to avoid circumvention of the position limits regime through the ongoing development of new commodity derivative contracts, ESMA should ensure that the methodology for calculation prevents any circumvention by taking into account the overall open interest in other commodity derivatives with the same underlying commodity.
- (132) It is desirable to facilitate access to capital for smaller and medium-sized enterprises (SMEs) and to facilitate the further development of specialist markets that aim to cater for the needs of smaller and medium-sized issuers. Those markets which are usually operated under this Directive as MTFs are commonly known as SME growth markets, growth markets or junior markets. The creation within the MTF category of a new sub category of SME growth market and the registration of those markets should raise their visibility and profile and aid the development of common regulatory standards in the Union for those markets. Attention should be focused on how future regulation should further foster and promote the use of that market so as to make it attractive for investors, and provide a lessening of administrative burdens and further incentives for SMEs to access capital markets through SME growth markets.
- (133) The requirements applying to that new category of markets need to provide sufficient flexibility to be able to take into account the current range of successful market models that exist across Europe. They also need to strike the correct balance between maintaining high levels of investor protection, which are essential to fostering investor confidence in issuers on those markets, while reducing unnecessary administrative burdens for issuers on those markets. It is proposed that more details about SME growth market requirements such as those relating to criteria for admission to trading on such a market would be further prescribed in delegated acts or technical standards.
- (134) Given the importance of not adversely affecting existing successful markets the option should remain for operators of markets aimed at smaller and medium-sized issuers to choose to continue to operate such a market in accordance with the requirements under this Directive without seeking registration as an SME growth market. An issuer that is an SME should not be obliged to apply to have its financial instruments admitted to trading on an SME growth market.
- (135) In order for that new category of markets to benefit SMEs, at least 50 % of the issuers whose financial instruments are traded on a SME growth market should be SMEs. That assessment should be made on an annual basis. That 50 % criterion should be implemented in a flexible way. A temporary failure to meet that criterion should not mean that the trading venue will have to be immediately deregistered or refused to be registered as an SME growth market if it has a reasonable prospect of meeting the 50 % criterion from the subsequent year. With respect to the assessment to determine whether an issuer is an SME enterprise, it should be made based on the market capitalisation of the previous three calendar years. This should ensure a smoother transition for those issuers from those specialist markets to the main markets.
- (136) Any confidential information received by the contact point of one Member State through the contact point of another Member State should not be regarded as purely domestic.
- (137) It is necessary to enhance convergence of powers at the disposal of competent authorities so as to pave the way towards an equivalent intensity of enforcement across the integrated financial market. A common minimum set of powers coupled with adequate resources should guarantee supervisory effectiveness. This Directive should therefore provide for a minimum set of supervisory and investigative powers competent authorities of Member States should be entrusted with in accordance with national law. Those powers should be exercised, where the national law so requires, by application to the competent judicial authorities. When exercising their powers under this Directive, competent authorities should act objectively and impartially and remain autonomous in their decision making.
- (138) While this Directive specifies a minimum set of powers competent authorities should have, those powers are to be exercised within a complete system of national law which guarantees the respect for fundamental rights, including the right to privacy. For the exercise of those powers, which may amount to serious interferences with the right to

respect private and family life, home and communications, Member States should have in place adequate and effective safeguards against any abuse, for instance, where appropriate prior authorisation from the judicial authorities of a Member State concerned. Member States should allow the possibility for competent authorities to exercise such intrusive powers to the extent necessary for the proper investigation of serious cases where there are no equivalent means for effectively achieving the same result.

- (139) No action taken by any competent authority or ESMA in the performance of their duties should directly or indirectly discriminate against any Member State or group of Member States as a venue for the provision of investment services and activities in any currency.
- (140) In view of the significant impact and market share acquired by various MTFs, it is appropriate to ensure that adequate cooperation arrangements are established between the competent authority of the MTF and that of the jurisdiction in which the MTF is providing services. In order to anticipate any similar developments, this should be extended to OTFs.
- (141) In order to ensure compliance by investment firms, market operators authorised to operate an MTF or OTF, regulated markets, APAs, CTPs or approved reporting mechanisms (ARMs), those who effectively control their business and the members of the investment firms and regulated markets' management body with the obligations deriving from this Directive and from Regulation (EU) No 600/2014 and to ensure that they are subject to similar treatment across the Union, Member States should be required to provide for sanctions and measures which are effective, proportionate and dissuasive. Administrative sanctions and measures set out by Member States should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or measure, publication, key powers to impose sanctions and levels of administrative fines.
- (142) In particular, competent authorities should be empowered to impose fines which are sufficiently high to offset the benefits that can be expected and to be dissuasive even for larger institutions and their managers.
- (143) It is also necessary for competent authorities to have, in accordance with national law and with the Charter, the ability to access the premises of natural and legal persons. Access to such premises is necessary when there is reasonable suspicion that documents and other data relating to the subject matter of an investigation exist and may be relevant to prove an infringement of this Directive or of Regulation (EU) No 600/2014. Additionally, access to such premises is necessary where the person to whom a demand for information has already been made, fails to comply with such demand wholly or in part; or where there are reasonable grounds for believing that if a demand were to be made, it would not be complied with, or that the documents or information to which the information requirement relates, would be removed, tampered with or destroyed. If prior authorisation is needed from the judicial authority of the Member State concerned, in accordance with national law, such power for access into premises should be used after having obtained that prior judicial authorisation.
- (144) Existing recordings of telephone conversations and data traffic records from investment firms executing and documenting the executions of transactions, as well as existing telephone and data traffic records from telecommunications operators constitute crucial, and sometimes the only, evidence to detect and prove the existence of market abuse as well as verify compliance by firms with investor protection and other requirements set out in this Directive or in Regulation (EU) No 600/2014. Therefore, competent authorities should be able to require existing recordings of telephone conversations, electronic communications and data traffic records held by an investment firm or credit. Access to data and telephone records is necessary for the detection and penalising of market abuse or of infringements of requirements set out in this Directive or in Regulation (EU) No 600/2014.

In order to introduce a level playing field in the Union in relation to the access to telephone and existing data traffic records held by a telecommunication operator or the existing recordings of telephone conversations and data traffic held by an investment firm, competent authorities should, in accordance with national law, be able to require existing telephone and existing data traffic records held by a telecommunication operator insofar as permitted under national law and existing recordings of telephone conversations as well as data traffic held by an investment firm, in those cases where a reasonable suspicion exists that such records relating to the subject-matter of the inspection or investigation may be relevant to prove behaviour that is prohibited under Regulation (EU) No 596/2014 or infringements of the requirements of this Directive or of Regulation (EU) No 600/2014. Access to telephone and data traffic records held by a telecommunications operator should not encompass the content of voice communications by telephone.

- (145) In order to ensure a consistent application of sanctions across the Union, Member States should be required to ensure that when determining the type of administrative sanctions or measures and the level of administrative fines, the competent authorities take into account all relevant circumstances.
- (146) In order to ensure that decisions made by competent authorities have a dissuasive effect on the public at large, they should normally be published. The publication of decisions is also an important tool for competent authorities to inform market participants of what behaviour is considered to infringe this Directive and to promote wider good behaviour amongst market participants. If such publication causes disproportionate damage to the persons involved, jeopardises the stability of financial markets or an ongoing investigation the competent authority should publish the sanctions and measures on an anonymous basis in a manner which complies with national law or delay the publication.

Competent authorities should have the option not to publish sanctions where anonymous or delayed publication is considered to be insufficient to ensure that the stability of financial markets will not be jeopardised. Competent authorities should not be required to publish measures which are deemed to be of a minor nature where publication would be disproportionate. It is appropriate to provide a mechanism for reporting unpublished sanctions to ESMA so that competent authorities can take them into account in their ongoing supervision. This Directive does not require but should not prevent the publication of criminal sanctions imposed for infringements of this Directive or of Regulation (EU) No 600/2014.

- (147) In order to detect potential infringements, competent authorities should have the necessary investigatory powers, and should establish effective and reliable mechanisms to encourage reporting of potential or actual infringements, including protection of employees reporting infringements within their own institution. Those mechanisms should be without prejudice to adequate safeguards for accused persons. Appropriate procedures should be established to ensure appropriate protection of an accused person, particularly with regard to the right to the protection of personal data of that person and procedures to ensure the right of the accused person of defence and to be heard before the adoption of a decision concerning him as well as the right to seek effective remedy before a court against a decision concerning him.
- (148) This Directive should refer to sanctions and measures in order to cover all actions applied after an infringement, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or a measure under national law.
- (149) This Directive should be without prejudice to any provisions in the law of Member States relating to criminal sanctions.
- (150) Even though nothing prevents Member States from laying down rules for administrative and criminal sanctions for the same infringements, Member States should not be required to lay down rules for administrative sanctions for the infringements of this Directive or of Regulation (EU) No 600/2014 which are subject to national criminal law. In accordance with national law, Member States are not obliged to impose both administrative and criminal sanctions for the same offence, but they should be able to do so if their national law so permits. However, the maintenance of criminal sanctions instead of administrative sanctions for infringements of this Directive or of Regulation (EU) No 600/2014 should not reduce or otherwise affect the ability of competent authorities to cooperate, access and exchange information in a timely way with competent authorities in other Member States for the purposes of this Directive and of Regulation (EU) No 600/2014, including after any referral of the relevant infringements to the competent judicial authorities for criminal prosecution.
- (151) With a view to protecting clients and without prejudice to the right of customers to bring their action before the courts, it is appropriate that Member States ensure that public or private bodies are established with a view to settling disputes out-of-court, to cooperate in resolving cross-border disputes, taking into account Commission Recommendation 98/257/EC<sup>(1)</sup> and Commission Recommendation 2001/310/EC<sup>(2)</sup>. When implementing provisions on complaints and redress procedures for out-of-court settlements, Member States should be encouraged to use existing cross-border cooperation mechanisms, in particular the Financial Services Complaints Network (FIN-Net).

<sup>(1)</sup> Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115, 17.4.1998, p. 31).

<sup>(2)</sup> Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p 56).

- (152) Any exchange or transmission of information between competent authorities, other authorities, bodies or persons should be in accordance with the rules on transfer of personal data to third countries as laid down in Directive 95/46/EC. Any exchange or transmission of personal data by ESMA with third countries should be in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001.
- (153) It is necessary to reinforce provisions on exchange of information between national competent authorities and to strengthen the duties of assistance and cooperation which they owe to each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.
- (154) Where the operation of a trading venue that has established arrangements in a host Member State has become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the proportionate cooperation arrangements to be put in place should take the appropriate form amongst possible cooperation modalities between the competent authorities of the home and host Member States, proportionate to the needs for cross-border supervisory cooperation in particular resulting from the nature and scale of the impact on the securities markets and the investor protection in the host Member State, such as ad hoc or periodic information sharing, consultation and assistance.
- (155) In order to attain the objectives set out in this Directive, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of details concerning exemptions, the clarification of definitions, the criteria for the assessment of proposed acquisitions of an investment firm, the organisational requirements for investment firms, APAs and CTPs, the management of conflicts of interest, conduct of business obligations in the provision of investment services, the execution of orders on terms most favourable to the client, the handling of client orders, the transactions with eligible counterparties, the circumstances that trigger an information requirement for investment firms or market operators operating an MTF or an OTF and operators of a regulated market, the circumstances constituting significant damage to the investors' interests and the orderly functioning of the market for the purposes of the suspension and removal of financial instruments from trading on an MTF, an OTF or a regulated market, the SME growth markets, the thresholds above which the position reporting obligations apply and the criteria under which the operations of a trading venue in a host Member State could be considered as of substantial importance for the functioning of the securities markets and the protection of the investors. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (156) Technical standards in financial services should ensure consistent harmonisation and adequate protection of investors, including those investing in structured deposits, and consumers across the Union. As a body with highly specialised expertise, it would be efficient and appropriate to entrust ESMA, with the elaboration of draft regulatory and implementing technical standards which do not involve policy choices, for submission to the Commission. To ensure consistent investor and consumer protection across financial services sectors, ESMA should carry out its tasks, to the extent possible, in close cooperation with the European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EC) No 1093/2010 of the European Parliament and of the Council<sup>(1)</sup> and with EIOPA.
- (157) The Commission should adopt the draft regulatory technical standards developed by ESMA regarding exemptions that relate to activities considered to be ancillary to the main business, regarding the information to be provided and certain requirements in the context of procedures for granting and refusing requests for authorisation of investment firms, regarding acquisition of the qualifying holding, regarding algorithmic trading, regarding obligation to execute orders on terms most favourable to clients, regarding the suspension and removal of financial instruments from trading on a regulated market, on an MTF or an OTF, regarding freedom to provide investment services and activities, regarding establishment of a branch, regarding systems resilience, circuit breakers and electronic trading, regarding tick sizes, regarding synchronisation of business clocks, regarding admission of

<sup>(1)</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).

financial instruments to trading, regarding the position limits and position management controls in commodity derivatives, regarding procedures for granting and refusing requests for authorisation of data reporting services providers, regarding organisational requirements for APAs, CTPs and ARMs and regarding cooperation among competent authorities. The Commission should adopt those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

- (158) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010. ESMA should be entrusted with drafting implementing technical standards for submission to the Commission regarding procedures for granting and refusing requests for authorisation of investment firms, regarding the acquisition of a qualifying holding, regarding trading process on finalisation of transactions in MTFs and OTFs, regarding suspension and removal of financial instruments from trading, regarding freedom to provide investment services and activities, regarding establishment of a branch, regarding position reporting by categories of position holders, regarding procedures for granting and refusing requests for authorisation, regarding the procedures and forms for submitting information in relation to the publication of decisions, regarding obligation to cooperate, regarding cooperation among competent authorities, regarding exchange of information and regarding consultation prior to authorisation of an investment firm.
- (159) The Commission should submit a report to the European Parliament and the Council assessing the functioning of OTFs, the functioning of the regime for SME growth markets, the impact of requirements regarding automated and high-frequency trading, the experience with the mechanism for banning certain products or practices and the impact of the measures regarding commodity derivatives markets.
- (160) By 1 January 2018, the Commission should prepare a report assessing the potential impact on energy prices and the functioning of the energy market of the expiry of the transitional period provided for the application of the clearing obligation and the margining requirements set out in Regulation (EU) No 648/2012. If appropriate, the Commission should submit a legislative proposal to establish or amend the relevant law, including specific sectoral legislation such as Regulation (EU) No 1227/2011.
- (161) Directive 2011/61/EU of the European Parliament and of the Council (<sup>(1)</sup>) allows Member States to authorise alternative investment fund managers (AIFMs) to provide certain investment services in addition to the collective management of alternative investment funds (AIFs), including services of management of portfolios of investments, investment advice, safe-keeping and administration in relation to shares or units of collective investment undertakings, as well as reception and transmission of orders in relation to financial instruments. Since the requirements governing the provision of those services are harmonised within the Union, AIFMs authorised by their home competent authorities to provide those services should not be subject to any additional authorisation in host Member States nor to any other measure having the same effect.
- (162) Under the current legal framework, AIFMs authorised to provide those investment services and intending to provide them in Member States other than their home Member State are to comply with additional national requirements, including the establishment of a separate legal entity. In order to eliminate obstacles in the cross-border provision of harmonised investment services and to ensure a level playing field between entities providing the same investment services under the same legal requirements, an AIFM authorised to provide those services should be able to provide them on a cross-border basis, subject to appropriate notification requirements, under the authorisation granted by the competent authorities of their home Member State.
- (163) Directive 2011/61/EU should therefore be amended accordingly.
- (164) Since the objective of this Directive, namely creating an integrated financial market in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the Union and

<sup>(1)</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the Union financial system as a whole which cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of this Directive, 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 Directive does not go beyond what is necessary in order to achieve that objective.

- (165) Given the increase of tasks conferred on ESMA by this Directive and by Regulation (EU) No 600/2014, the European Parliament, the Council and the Commission should ensure that adequate human and financial resources are made available.
- (166) This Directive respects the fundamental rights and observes the principles recognised in the Charter, in particular the right to the protection of personal data, the freedom to conduct a business, the right to consumer protection, the right to an effective remedy and to a fair trial, the right not to be tried or punished twice for the same offence and has to be implemented in accordance with those rights and principles.
- (167) The European Data Protection Supervisor has been consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on 10 February 2012 (¹).
- (168) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011 (²), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (169) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared to the earlier Directives. The obligation to transpose the provisions which are unchanged arises under the earlier Directives.
- (170) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law and the dates of application of the Directives set out in Annex III, Part B,

HAVE ADOPTED THIS DIRECTIVE:

## TITLE I

### SCOPE AND DEFINITIONS

#### *Article 1*

#### **Scope**

1. This Directive shall apply to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union.

2. This Directive establishes requirements in relation to the following:

(a) authorisation and operating conditions for investment firms;

(b) provision of investment services or activities by third-country firms through the establishment of a branch;

<sup>(¹)</sup> OJ C 147, 25.5.2012, p. 1.

<sup>(²)</sup> OJ C 369, 17.12.2011, p. 14.

- (c) authorisation and operation of regulated markets;
- (d) authorisation and operation of data reporting services providers; and
- (e) supervision, cooperation and enforcement by competent authorities.

3. The following provisions shall also apply to credit institutions authorised under Directive 2013/36/EU, when providing one or more investment services and/or performing investment activities:

- (a) Article 2(2), Article 9(3) and Articles 14 and 16 to 20,
- (b) Chapter II of Title II excluding second subparagraph of Article 29(2),
- (c) Chapter III of Title II excluding Article 34(2) and (3) and Article 35(2) to (6) and (9),
- (d) Articles 67 to 75 and Articles 80, 85 and 86.

4. The following provisions shall also apply to investment firms and to credit institutions authorised under Directive 2013/36/EU when selling or advising clients in relation to structured deposits:

- (a) Article 9(3), Article 14, and Article 16(2), (3) and (6);
- (b) Articles 23 to 26, Article 28 and Article 29, excluding the second subparagraph of paragraph 2 thereof, and Article 30; and
- (c) Articles 67 to 75.

5. Article 17(1) to (6) shall also apply to members or participants of regulated markets and MTFs who are not required to be authorised under this Directive pursuant to points (a), (e), (i) and (j) of Article 2(1).

6. Articles 57 and 58 shall also apply to persons exempt under Article 2.

7. All multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets.

Any investment firms which, on an organised, frequent, systematic and substantial basis, deal on own account when executing client orders outside a regulated market, an MTF or an OTF shall operate in accordance with Title III of Regulation (EU) No 600/2014.

Without prejudice to Articles 23 and 28 of Regulation (EU) No 600/2014, all transactions in financial instruments as referred to in the first and the second subparagraphs which are not concluded on multilateral systems or systematic internalisers shall comply with the relevant provisions of Title III of Regulation (EU) No 600/2014.

*Article 2***Exemptions**

1. This Directive shall not apply to:
  - (a) insurance undertakings or undertakings carrying out the reinsurance and retrocession activities referred to in Directive 2009/138/EC when carrying out the activities referred to in that Directive;
  - (b) persons providing investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
  - (c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;
  - (d) persons dealing on own account in financial instruments other than commodity derivatives or emission allowances or derivatives thereof and not providing any other investment services or performing any other investment activities in financial instruments other than commodity derivatives or emission allowances or derivatives thereof unless such persons:
    - (i) are market makers;
    - (ii) are members of or participants in a regulated market or an MTF or have direct electronic access to a trading venue;
    - (iii) apply a high-frequency algorithmic trading technique; or
    - (iv) deal on own account when executing client orders;

Persons exempt under points (a), (i) or (j) are not required to meet the conditions laid down in this point in order to be exempt.

- (e) operators with compliance obligations under Directive 2003/87/EC who, when dealing in emission allowances, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account, provided that those persons do not apply a high-frequency algorithmic trading technique;
- (f) persons providing investment services consisting exclusively in the administration of employee-participation schemes;
- (g) persons providing investment services which only involve both the administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- (h) the members of the ESCB and other national bodies performing similar functions in the Union, other public bodies charged with or intervening in the management of the public debt in the Union and international financial institutions established by two or more Member States which have the purpose of mobilising funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems;

(i) collective investment undertakings and pension funds whether coordinated at Union level or not and the depositaries and managers of such undertakings;

(j) persons:

(i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or

(ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business;

provided that:

— for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market-maker in relation to commodity derivatives,

— those persons do not apply a high-frequency algorithmic trading technique; and

— those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business;

(k) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;

(l) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;

(m) 'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998;

(n) transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009, under Regulation (EC) No 715/2009 or under network codes or guidelines adopted pursuant to those Regulations, any persons acting as service providers on their behalf to carry out their task under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks.

That exemption shall apply to persons engaged in the activities set out in this point only where they perform investment activities or provide investment services relating to commodity derivatives in order to carry out those activities. That exemption shall not apply with regard to the operation of a secondary market, including a platform for secondary trading in financial transmission rights;

(o) CSDs that are regulated as such under Union law, to the extent that they are regulated under that Union law.

2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the ESCB performing their tasks as provided for by the TFEU and by Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.

3. The Commission shall adopt delegated acts in accordance with Article 89 to clarify for the purposes of point (c) of paragraph 1 when an activity is provided in an incidental manner.

4. ESMA shall develop draft regulatory technical standards to specify, for the purposes of point (j) of paragraph 1, the criteria for establishing when an activity is to be considered to be ancillary to the main business at a group level.

Those criteria shall take into account at least the following elements:

- (a) the need for ancillary activities to constitute a minority of activities at a group level;
- (b) the size of their trading activity compared to the overall market trading activity in that asset class.

In determining the extent to which ancillary activities constitute a minority of activities at a group level ESMA may determine that the capital employed for carrying out the ancillary activity relative to the capital employed for carrying out the main business is to be considered. However, that factor shall in no case be sufficient to demonstrate that the activity is ancillary to the main business of the group.

The activities referred to in this paragraph shall be considered at a group level.

The elements referred to in the second and third subparagraphs shall exclude:

- (a) intra-group transactions as referred to in Article 3 of Regulation (EU) No 648/2012 that serve group-wide liquidity or risk management purposes;
- (b) transactions in derivatives which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity;
- (c) transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

### Article 3

#### Optional exemptions

1. Member States may choose not to apply this Directive to any persons for which they are the home Member State, provided that the activities of those persons are authorised and regulated at national level and those persons:

- (a) are not allowed to hold client funds or client securities and which for that reason are not allowed at any time to place themselves in debit with their clients;

- (b) are not allowed to provide any investment service except the reception and transmission of orders in transferable securities and units in collective investment undertakings and/or the provision of investment advice in relation to such financial instruments; and
- (c) in the course of providing that service, are allowed to transmit orders only to:
- (i) investment firms authorised in accordance with this Directive;
  - (ii) credit institutions authorised in accordance with Directive 2013/36/EU;
  - (iii) branches of investment firms or of credit institutions authorised in a third country and which are subject to and comply with prudential rules considered by the competent authorities to be at least as stringent as those laid down in this Directive, in Regulation (EU) No 575/2013 or in Directive 2013/36/EU;
  - (iv) collective investment undertakings authorised under the law of a Member State to market units to the public and to the managers of such undertakings; or
  - (v) investment companies with fixed capital, as defined in Article 17(7) of Directive 2012/30/EU of the European Parliament and of the Council (<sup>1</sup>) the securities of which are listed or dealt in on a regulated market in a Member State; or
- (d) provide investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where those clients are exclusively local electricity undertakings as defined in Article 2(35) of Directive 2009/72/EC and/or natural gas undertakings as defined in Article 2(1) of Directive 2009/73/EC, and provided that those clients jointly hold 100 % of the capital or of the voting rights of those persons, exercise joint control and are exempt under point (j) of Article 2(1) of this Directive if they carry out those investment services themselves; or
- (e) provide investment services exclusively in emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where those clients are exclusively operators as defined in point (f) of Article 3 of Directive 2003/87/EC, and provided that those clients jointly hold 100 % of the capital or voting rights of those persons, exercise joint control and are exempt under point (j) of Article 2(1) of this Directive if they carry out those investment services themselves.

2. Member States' regimes shall submit the persons referred to in paragraph 1 to requirements which are at least analogous to the following requirements under this Directive:

- (a) conditions and procedures for authorisation and on-going supervision as established in Article 5(1) and (3), Articles 7 to 10, 21, 22 and 23 and the corresponding delegated acts adopted by the Commission in accordance with Article 89;
- (b) conduct of business obligations as established in Article 24(1), (3), (4), (5), (7) and (10), Article 25(2), (5) and (6), and, where the national regime allows those persons to appoint tied agents, Article 29, and the respective implementing measures;

(<sup>1</sup>) Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14.11.2012, p. 74).

- (c) organisational requirements as laid down in the first, sixth and seventh subparagraph of Article 16(3) and in Article 16(6) and (7) and the corresponding delegated acts adopted by the Commission in accordance with Article 89.

Member States shall require persons exempt from this Directive pursuant to paragraph 1 of this Article to be covered by an investor-compensation scheme recognised in accordance with Directive 97/9/EC. Member States may allow investment firms not to be covered by such a scheme provided they hold professional indemnity insurance where, taking into account the size, risk profile and legal nature of the persons exempt in accordance with paragraph 1 of this Article, equivalent protection to their clients is ensured.

By way of derogation from the second subparagraph of this paragraph, Member States that already have in place such laws, regulations or administrative provisions before 2 July 2014 may until 3 July 2019 require that where the persons exempt from this Directive pursuant to paragraph 1 of this Article provide the investment services of the reception and transmission of orders and/or of the provision of investment advice in units in collective investment undertakings and act as an intermediary with a management company as defined in Directive 2009/65/EC, those persons are jointly and severally liable with the management company for any damages incurred by the client in relation to those services.

3. Persons exempt from this Directive pursuant to paragraph 1 shall not benefit from the freedom to provide services or to perform activities or to establish branches as provided for in Articles 34 and 35 respectively.

4. Member States shall notify the Commission and ESMA of the exercise of the option under this Article and shall ensure that each authorisation granted in accordance with paragraph 1 mentions that it is granted in accordance with this Article.

5. Member States shall communicate to ESMA the provisions of national law analogous to the requirements of this Directive listed in paragraph 2.

#### Article 4

##### **Definitions**

1. For the purposes of this Directive, the following definitions apply:

- (1) 'investment firm' means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis.

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

(a) their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons; and

(b) they are subject to equivalent prudential supervision appropriate to their legal form.

However, where a natural person provides services involving the holding of third party funds or transferable securities, that person may be considered to be an investment firm for the purposes of this Directive and of Regulation (EU) No 600/2014 only if, without prejudice to the other requirements imposed in this Directive, in Regulation (EU) No 600/2014, and in Directive 2013/36/EU, that person complies with the following conditions:

- (a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;

- (b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;
- (c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;
- (d) where the firm has only one proprietor, that person must make provision for the protection of investors in the event of the firm's cessation of business following the proprietor's death or incapacity or any other such event;
- (2) 'investment services and activities' means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I.

The Commission shall adopt delegated acts in accordance with Article 89 measures specifying:

- (a) the derivative contracts referred to in Section C.6 of Annex I that have the characteristics of wholesale energy products that must be physically settled and C.6 energy derivative contracts;
- (b) the derivative contracts referred to in Section C.7 of Annex I that have the characteristics of other derivative financial instruments;
- (c) the derivative contracts referred to in Section C.10 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are traded on a regulated market, an MTF or an OTF;
- (3) 'ancillary services' means any of the services listed in Section B of Annex I;
- (4) 'investment advice' means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;
- (5) 'execution of orders on behalf of clients' means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients and includes the conclusion of agreements to sell financial instruments issued by an investment firm or a credit institution at the moment of their issuance;
- (6) 'dealing on own account' means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;
- (7) 'market maker' means a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person;
- (8) 'portfolio management' means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments;
- (9) 'client' means any natural or legal person to whom an investment firm provides investment or ancillary services;
- (10) 'professional client' means a client meeting the criteria laid down in Annex II;
- (11) 'retail client' means a client who is not a professional client;

- (12) 'SME growth market' means a MTF that is registered as an SME growth market in accordance with Article 33;
- (13) 'small and medium-sized enterprises' for the purposes of this Directive, means companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years;
- (14) 'limit order' means an order to buy or sell a financial instrument at its specified price limit or better and for a specified size;
- (15) 'financial instrument' means those instruments specified in Section C of Annex I;
- (16) 'C6 energy derivative contracts' means options, futures, swaps, and any other derivative contracts mentioned in Section C.6 of Annex I relating to coal or oil that are traded on an OTF and must be physically settled;
- (17) 'money-market instruments' means those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment;
- (18) 'market operator' means a person or persons who manages and/or operates the business of a regulated market and may be the regulated market itself;
- (19) 'multilateral system' means any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system;
- (20) 'systematic internaliser' means an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system;

The frequent and systematic basis shall be measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account when executing client orders. The substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument. The definition of a systematic internaliser shall apply only where the pre-set limits for a frequent and systematic basis and for a substantial basis are both crossed or where an investment firm chooses to opt-in under the systematic internaliser regime;

- (21) 'regulated market' means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive;
- (22) 'multilateral trading facility' or 'MTF' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive;
- (23) 'organised trading facility' or 'OTF' means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive;

(24) 'trading venue' means a regulated market, an MTF or an OTF;

(25) 'liquid market' means a market for a financial instrument or a class of financial instruments, where there are ready and willing buyers and sellers on a continuous basis, assessed in accordance with the following criteria, taking into consideration the specific market structures of the particular financial instrument or of the particular class of financial instruments:

(a) the average frequency and size of transactions over a range of market conditions, having regard to the nature and life cycle of products within the class of financial instrument;

(b) the number and type of market participants, including the ratio of market participants to traded instruments in a particular product;

(c) the average size of spreads, where available;

(26) 'competent authority' means the authority, designated by each Member State in accordance with Article 67, unless otherwise specified in this Directive;

(27) 'credit institution' means a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013;

(28) 'UCITS management company' means a management company as defined in point (b) of Article 2(1) of Directive 2009/65/EC of the European Parliament and of the Council (<sup>1</sup>);

(29) 'tied agent' means a natural or legal person who, under the full and unconditional responsibility of only one investment firm on whose behalf it acts, promotes investment and/or ancillary services to clients or prospective clients, receives and transmits instructions or orders from the client in respect of investment services or financial instruments, places financial instruments or provides advice to clients or prospective clients in respect of those financial instruments or services;

(30) 'branch' means a place of business other than the head office which is a part of an investment firm, which has no legal personality and which provides investment services and/or activities and which may also perform ancillary services for which the investment firm has been authorised; all the places of business set up in the same Member State by an investment firm with headquarters in another Member State shall be regarded as a single branch;

(31) 'qualifying holding' means a direct or indirect holding in an investment firm which represents 10 % or more of the capital or of the voting rights, as set out in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council (<sup>2</sup>), taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;

(32) 'parent undertaking' means a parent undertaking within the meaning of Article 2(9) and 22 of Directive 2013/34/EU of the European Parliament and of the Council (<sup>3</sup>);

(<sup>1</sup>) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

(<sup>2</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).

(<sup>3</sup>) Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

(33) 'subsidiary' means a subsidiary undertaking within the meaning of Articles 2(10) and 22 of Directive 2013/34/EU, including any subsidiary of a subsidiary undertaking of an ultimate parent undertaking;

(34) 'group' means a group as defined in Article 2(11) of Directive 2013/34/EU;

(35) 'close links' means a situation in which two or more natural or legal persons are linked by:

(a) participation in the form of ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking;

(b) 'control' which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 22(1) and (2) of Directive 2013/34/EU, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered to be a subsidiary of the parent undertaking which is at the head of those undertakings;

(c) a permanent link of both or all of them to the same person by a control relationship;

(36) 'management body' means the body or bodies of an investment firm, market operator or data reporting services provider, which are appointed in accordance with national law, which are empowered to set the entity's strategy, objectives and overall direction, and which oversee and monitor management decision-making and include persons who effectively direct the business of the entity.

Where this Directive refers to the management body and, pursuant to national law, the managerial and supervisory functions of the management body are assigned to different bodies or different members within one body, the Member State shall identify the bodies or members of the management body responsible in accordance with its national law, unless otherwise specified by this Directive;

(37) 'senior management' means natural persons who exercise executive functions within an investment firm, a market operator or a data reporting services provider and who are responsible, and accountable to the management body, for the day-to-day management of the entity, including for the implementation of the policies concerning the distribution of services and products to clients by the firm and its personnel;

(38) 'matched principal trading' means a transaction where the facilitator interposes itself between the buyer and the seller to the transaction in such a way that it is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction;

(39) 'algorithmic trading' means trading in financial instruments where a computer algorithm automatically determines individual parameters of orders such as whether to initiate the order, the timing, price or quantity of the order or how to manage the order after its submission, with limited or no human intervention, and does not include any system that is only used for the purpose of routing orders to one or more trading venues or for the processing of orders involving no determination of any trading parameters or for the confirmation of orders or the post-trade processing of executed transactions;

(40) 'high-frequency algorithmic trading technique' means an algorithmic trading technique characterised by:

(a) infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry: co-location, proximity hosting or high-speed direct electronic access;

(b) system-determination of order initiation, generation, routing or execution without human intervention for individual trades or orders; and

(c) high message intraday rates which constitute orders, quotes or cancellations;

(41) 'direct electronic access' means an arrangement where a member or participant or client of a trading venue permits a person to use its trading code so the person can electronically transmit orders relating to a financial instrument directly to the trading venue and includes arrangements which involve the use by a person of the infrastructure of the member or participant or client, or any connecting system provided by the member or participant or client, to transmit the orders (direct market access) and arrangements where such an infrastructure is not used by a person (sponsored access);

(42) 'cross-selling practice' means the offering of an investment service together with another service or product as part of a package or as a condition for the same agreement or package;

(43) 'structured deposit' means a deposit as defined in point (c) of Article 2(1) of Directive 2014/49/EU of the European Parliament and of the Council (<sup>(1)</sup>), which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as:

(a) an index or combination of indices, excluding variable rate deposits whose return is directly linked to an interest rate index such as Euribor or Libor;

(b) a financial instrument or combination of financial instruments;

(c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or

(d) a foreign exchange rate or combination of foreign exchange rates;

(44) 'transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;

(45) 'depositary receipts' means those securities which are negotiable on the capital market and which represent ownership of the securities of a non-domiciled issuer while being able to be admitted to trading on a regulated market and traded independently of the securities of the non-domiciled issuer;

<sup>(1)</sup> Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (see page 149 of this Official Journal).

(46) 'exchange-traded fund' means a fund of which at least one unit or share class is traded throughout the day on at least one trading venue and with at least one market maker which takes action to ensure that the price of its units or shares on the trading venue does not vary significantly from its net asset value and, where applicable, from its indicative net asset value;

(47) 'certificates' means certificates as defined in Article 2(1)(27) of Regulation (EU) No 600/2014;

(48) 'structured finance products' means structured finance products as defined in Article 2(1)(28) of Regulation (EU) No 600/2014;

(49) 'derivatives' means derivatives as defined in Article 2(1)(29) of Regulation (EU) No 600/2014;

(50) 'commodity derivatives' means commodity derivatives as defined in Article 2(1)(30) of Regulation (EU) No 600/2014;

(51) 'CCP' means a CCP as defined in Article 2(1) of Regulation (EU) No 648/2012;

(52) 'approved publication arrangement' or 'APA' means a person authorised under this Directive to provide the service of publishing trade reports on behalf of investment firms pursuant to Articles 20 and 21 of Regulation (EU) No 600/2014;

(53) 'consolidated tape provider' or 'CTP' means a person authorised under this Directive to provide the service of collecting trade reports for financial instruments listed in Articles 6, 7, 10, 12 and 13, 20 and 21 of Regulation (EU) No 600/2014 from regulated markets, MTFs, OTFs and APAs and consolidating them into a continuous electronic live data stream providing price and volume data per financial instrument;

(54) 'approved reporting mechanism' or 'ARM' means a person authorised under this Directive to provide the service of reporting details of transactions to competent authorities or to ESMA on behalf of investment firms;

(55) 'home Member State' means:

(a) in the case of investment firms:

(i) if the investment firm is a natural person, the Member State in which its head office is situated;

(ii) if the investment firm is a legal person, the Member State in which its registered office is situated;

(iii) if the investment firm has, under its national law, no registered office, the Member State in which its head office is situated;

(b) in the case of a regulated market, the Member State in which the regulated market is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the regulated market is situated;

(c) in the case of an APA, a CTP or an ARM:

(i) if the APA, CTP or ARM is a natural person, the Member State in which its head office is situated;

(ii) if the APA, CTP or ARM is a legal person, the Member State in which its registered office is situated;

(iii) if the APA, CTP or ARM has, under its national law, no registered office, the Member State in which its head office is situated;

(56) 'host Member State' means the Member State, other than the home Member State, in which an investment firm has a branch or provides investment services and/or activities, or the Member State in which a regulated market provides appropriate arrangements so as to facilitate access to trading on its system by remote members or participants established in that same Member State;

(57) 'third-country firm' means a firm that would be a credit institution providing investment services or performing investment activities or an investment firm if its head office or registered office were located within the Union;

(58) 'wholesale energy product' means wholesale energy products as defined in point (4) of Article 2 of Regulation (EU) No 1227/2011;

(59) 'agricultural commodity derivatives' means derivative contracts relating to products listed in Article 1 of, and Annex I, Parts I to XX and XXIV/1, to, Regulation (EU) No 1308/2013 of the European Parliament and of the Council (<sup>(1)</sup>);

(60) 'sovereign issuer' means any of the following that issues debt instruments:

(i) the Union;

(ii) a Member State, including a government department, an agency, or a special purpose vehicle of the Member State;

(iii) in the case of a federal Member State, a member of the federation;

(iv) a special purpose vehicle for several Member States;

(v) an international financial institution established by two or more Member States which has the purpose of mobilising funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems; or

(vi) the European Investment Bank;

(61) 'sovereign debt' means a debt instrument issued by a sovereign issuer;

(62) 'durable medium' means any instrument which:

(a) enables a client to store information addressed personally to that client in a way accessible for future reference and for a period of time adequate for the purposes of the information; and

(b) allows the unchanged reproduction of the information stored;

<sup>(1)</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).

(63) 'data reporting services provider' means an APA, a CTP or an ARM.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to specify some technical elements of the definitions laid down in paragraph 1, to adjust them to market developments, technological developments and experience of behaviour that is prohibited under Regulation (EU) No 596/2014 and to ensure the uniform application of this Directive.

## TITLE II

### AUTHORISATION AND OPERATING CONDITIONS FOR INVESTMENT FIRMS

#### CHAPTER I

##### ***Conditions and procedures for authorisation***

###### *Article 5*

###### **Requirement for authorisation**

1. Each Member State shall require that the provision of investment services and/or the performance of investment activities as a regular occupation or business on a professional basis be subject to prior authorisation in accordance with this Chapter. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 67.

2. By way of derogation from paragraph 1, Member States shall authorise any market operator to operate an MTF or an OTF, subject to the prior verification of their compliance with this Chapter.

3. Member States shall register all investment firms. The register shall be publicly accessible and shall contain information on the services or activities for which the investment firm is authorised. It shall be updated on a regular basis. Every authorisation shall be notified to ESMA.

ESMA shall establish a list of all investment firms in the Union. That list shall contain information on the services or activities for which each investment firm is authorised and it shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website.

Where a competent authority has withdrawn an authorisation in accordance with points (b), (c) and (d) of Article 8, that withdrawal shall be published on the list for a period of five years.

4. Each Member State shall require that:

- (a) any investment firm which is a legal person have its head office in the same Member State as its registered office;
- (b) any investment firm which is not a legal person or any investment firm which is a legal person but under its national law has no registered office, have its head office in the Member State in which it actually carries out its business.

###### *Article 6*

###### **Scope of authorisation**

1. The home Member State shall ensure that the authorisation specifies the investment services or activities which the investment firm is authorised to provide. The authorisation may cover one or more of the ancillary services set out in Section B of Annex I. Authorisation shall in no case be granted solely for the provision of ancillary services.

2. An investment firm seeking authorisation to extend its business to additional investment services or activities or ancillary services not foreseen at the time of initial authorisation shall submit a request for extension of its authorisation.

3. The authorisation shall be valid for the entire Union and shall allow an investment firm to provide the services or perform the activities, for which it has been authorised, throughout the Union, either through the right of establishment, including through a branch, or through the freedom to provide services.

## Article 7

### Procedures for granting and refusing requests for authorisation

1. The competent authority shall not grant authorisation unless and until such time as it is fully satisfied that the applicant complies with all requirements under the provisions adopted pursuant to this Directive.

2. The investment firm shall provide all information, including a programme of operations setting out, *inter alia*, the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the investment firm has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under this Chapter.

3. An applicant shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted.

4. ESMA shall develop draft regulatory technical standards to specify:

(a) the information to be provided to the competent authorities under paragraph 2 of this Article including the programme of operations;

(b) the requirements applicable to the management of investment firms under Article 9(6) and the information for the notifications under Article 9(5);

(c) the requirements applicable to shareholders and members with qualifying holdings, as well as obstacles which may prevent effective exercise of the supervisory functions of the competent authority, under Article 10(1) and (2).

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

5. ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the notification or provision of information provided for in paragraph 2 of this Article and in Article 9(5).

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## Article 8

### Withdrawal of authorisations

The competent authority may withdraw the authorisation issued to an investment firm where such an investment firm:

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;

- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted, such as compliance with the conditions set out in Regulation (EU) No 575/2013;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive or Regulation (EU) No 600/2014 governing the operating conditions for investment firms;
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

Every withdrawal of authorisation shall be notified to ESMA.

#### Article 9

##### **Management body**

1. Competent authorities granting the authorisation in accordance with Article 5 shall ensure that investment firms and their management bodies comply with Article 88 and Article 91 of Directive 2013/36/EU.

ESMA and EBA shall adopt, jointly, guidelines on the elements listed in Article 91(12) of Directive 2013/36/EU.

2. When granting the authorisation in accordance with Article 5, competent authorities may authorise members of the management body to hold one additional non-executive directorship than allowed in accordance with Article 91(3) of Directive 2013/36/EU. Competent authorities shall regularly inform ESMA of such authorisations.

EBA and ESMA shall coordinate the collection of information provided for under the first subparagraph of this paragraph and under Article 91(6) of Directive 2013/36/EU in relation to investment firms.

3. Member States shall ensure that the management body of an investment firm defines, oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of the investment firm including the segregation of duties in the investment firm and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market and the interest of clients.

Without prejudice to the requirements established in Article 88(1) of Directive 2013/36/EU, those arrangements shall also ensure that the management body define, approve and oversee:

- (a) the organisation of the firm for the provision of investment services and activities and ancillary services, including the skills, knowledge and expertise required by personnel, the resources, the procedures and the arrangements for the provision of services and activities, taking into account the nature, scale and complexity of its business and all the requirements the firm has to comply with;
- (b) a policy as to services, activities, products and operations offered or provided, in accordance with the risk tolerance of the firm and the characteristics and needs of the clients of the firm to whom they will be offered or provided, including carrying out appropriate stress testing, where appropriate;
- (c) a remuneration policy of persons involved in the provision of services to clients aiming to encourage responsible business conduct, fair treatment of clients as well as avoiding conflict of interest in the relationships with clients.

The management body shall monitor and periodically assess the adequacy and the implementation of the firm's strategic objectives in the provision of investment services and activities and ancillary services, the effectiveness of the investment firm's governance arrangements and the adequacy of the policies relating to the provision of services to clients and take appropriate steps to address any deficiencies.

Members of the management body shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.

4. The competent authority shall refuse authorisation if it is not satisfied that the members of the management body of the investment firm are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions in the investment firm, or if there are objective and demonstrable grounds for believing that the management body of the firm may pose a threat to its effective, sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market.

5. Member States shall require the investment firm to notify the competent authority of all members of its management body and of any changes to its membership, along with all information needed to assess whether the firm complies with paragraphs 1, 2 and 3.

6. Member States shall require that at least two persons meeting the requirements laid down in paragraph 1 effectively direct the business of the applicant investment firm.

By way of derogation from the first subparagraph, Member States may grant authorisation to investment firms that are natural persons or to investment firms that are legal persons managed by a single natural person in accordance with their constitutive rules and national laws. Member States shall nevertheless require that:

- (a) alternative arrangements be in place which ensure the sound and prudent management of such investment firms and the adequate consideration of the interest of clients and the integrity of the market;
- (b) the natural persons concerned are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties.

#### Article 10

##### **Shareholders and members with qualifying holdings**

1. The competent authorities shall not authorise the provision of investment services or performance of investment activities by an investment firm until they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and the amounts of those holdings.

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an investment firm, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings.

Where close links exist between the investment firm and other natural or legal persons, the competent authority shall grant authorisation only if those links do not prevent the effective exercise of the supervisory functions of the competent authority.

2. The competent authority shall refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

3. Member States shall require that, where the influence exercised by the persons referred to in the first subparagraph of paragraph 1 is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation.

Such measures may include applications for judicial orders or the imposition of sanctions against directors and those responsible for management, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

## Article 11

### Notification of proposed acquisitions

1. Member States shall require any natural or legal person or such persons acting in concert (the 'proposed acquirer'), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the investment firm would become its subsidiary (the 'proposed acquisition'), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 13(4).

Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an investment firm first to notify in writing the competent authorities, indicating the size of the intended holding. Such a person shall likewise notify the competent authorities if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the investment firm would cease to be his subsidiary.

Member States need not apply the 30 % threshold where, in accordance with point (a) of Article 9(3) of Directive 2004/109/EC, they apply a threshold of one-third.

In determining whether the criteria for a qualifying holding referred to in Article 10 and in this Article are fulfilled, Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

2. The relevant competent authorities shall work in full consultation with each other when carrying out the assessment provided for in Article 13(1) (the 'assessment') if the proposed acquirer is one of the following:

- (a) a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed;
- (b) the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed; or
- (c) a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.

The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In that regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the investment firm in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

3. Member States shall require that, if an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in the first subparagraph of paragraph 1, that investment firm is to inform the competent authority without delay.

At least once a year, investment firms shall also inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders and members or as a result of compliance with the regulations applicable to companies whose transferable securities are admitted to trading on a regulated market.

4. Member States shall require that competent authorities take measures similar to those referred to in Article 10(3) in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.

## Article 12

### Assessment period

1. The competent authorities shall, promptly and in any event within two working days following receipt of the notification required under the first subparagraph of Article 11(1), as well as following the possible subsequent receipt of the information referred to in paragraph 2 of this Article, acknowledge receipt thereof in writing to the proposed acquirer.

The competent authorities shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 13(4) (the 'assessment period'), to carry out the assessment.

The competent authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

2. The competent authorities may, during the assessment period, if necessary, and no later than on the 50th working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but may not result in an interruption of the assessment period.

3. The competent authorities may extend the interruption referred to in the second subparagraph of paragraph 2 up to 30 working days if the proposed acquirer is one of the following:

- (a) a natural or legal person situated or regulated outside the Union;

(b) a natural or legal person not subject to supervision under this Directive or Directives 2009/65/EC, 2009/138/EC or 2013/36/EU.

4. If the competent authorities, upon completion of the assessment, decide to oppose the proposed acquisition, they shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to make such disclosure in the absence of a request by the proposed acquirer.

5. If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

6. The competent authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

7. Member States may not impose requirements for the notification to and approval by the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

8. ESMA shall develop draft regulatory technical standards to establish an exhaustive list of information, referred to in Article 13(4) to be included by proposed acquirers in their notification, without prejudice to paragraph 2 of this Article.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 January 2014.

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

9. ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the modalities of the consultation process between the relevant competent authorities as referred to in Article 11(2).

ESMA shall submit those draft implementing technical standards to the Commission by 1 January 2014.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## Article 13

### Assessment

1. In assessing the notification provided for in Article 11(1) and the information referred to in Article 12(2), the competent authorities shall, in order to ensure the sound and prudent management of the investment firm in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment firm, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

- (a) the reputation of the proposed acquirer;
- (b) the reputation and experience of any person who will direct the business of the investment firm as a result of the proposed acquisition;
- (c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the investment firm in which the acquisition is proposed;

- (d) whether the investment firm will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, in particular Directives 2002/87/EC and 2013/36/EU, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;
- (e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

The Commission shall be empowered to adopt delegated acts in accordance with Article 89 which adjust the criteria set out in the first subparagraph of this paragraph.

2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

3. Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their competent authorities to examine the proposed acquisition in terms of the economic needs of the market.

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 11(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5. Notwithstanding Article 12(1), (2) and (3), where two or more proposals to acquire or increase qualifying holdings in the same investment firm have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

#### Article 14

##### **Membership of an authorised investor compensation scheme**

The competent authority shall verify that any entity seeking authorisation as an investment firm meets its obligations under Directive 97/9/EC at the time of authorisation.

The obligation laid down in the first paragraph shall be met in relation to structured deposits where the structured deposit is issued by a credit institution which is a member of a deposit guarantee scheme recognised under Directive 2014/49/EU.

#### Article 15

##### **Initial capital endowment**

Member States shall ensure that the competent authorities do not grant authorisation unless the investment firm has sufficient initial capital in accordance with the requirements of Regulation (EU) No 575/2013 having regard to the nature of the investment service or activity in question.

#### Article 16

##### **Organisational requirements**

1. The home Member State shall require that investment firms comply with the organisational requirements laid down in paragraphs 2 to 10 of this Article and in Article 17.

2. An investment firm shall establish adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under this Directive as well as appropriate rules governing personal transactions by such persons.

3. An investment firm shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 23 from adversely affecting the interests of its clients.

An investment firm which manufactures financial instruments for sale to clients shall maintain, operate and review a process for the approval of each financial instrument and significant adaptations of existing financial instruments before it is marketed or distributed to clients.

The product approval process shall specify an identified target market of end clients within the relevant category of clients for each financial instrument and shall ensure that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market.

An investment firm shall also regularly review financial instruments it offers or markets, taking into account any event that could materially affect the potential risk to the identified target market, to assess at least whether the financial instrument remains consistent with the needs of the identified target market and whether the intended distribution strategy remains appropriate.

An investment firm which manufactures financial instruments shall make available to any distributor all appropriate information on the financial instrument and the product approval process, including the identified target market of the financial instrument.

Where an investment firm offers or recommends financial instruments which it does not manufacture, it shall have in place adequate arrangements to obtain the information referred to in the fifth subparagraph and to understand the characteristics and identified target market of each financial instrument.

The policies, processes and arrangements referred to in this paragraph shall be without prejudice to all other requirements under this Directive and Regulation (EU) No 600/2014, including those relating to disclosure, suitability or appropriateness, identification and management of conflicts of interests, and inducements.

4. An investment firm shall take reasonable steps to ensure continuity and regularity in the performance of investment services and activities. To that end the investment firm shall employ appropriate and proportionate systems, resources and procedures.

5. An investment firm shall ensure, when relying on a third party for the performance of operational functions which are critical for the provision of continuous and satisfactory service to clients and the performance of investment activities on a continuous and satisfactory basis, that it takes reasonable steps to avoid undue additional operational risk. Outsourcing of important operational functions may not be undertaken in such a way as to impair materially the quality of its internal control and the ability of the supervisor to monitor the firm's compliance with all obligations.

An investment firm shall have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.

Without prejudice to the ability of competent authorities to require access to communications in accordance with this Directive and Regulation (EU) No 600/2014, an investment firm shall have sound security mechanisms in place to guarantee the security and authentication of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage maintaining the confidentiality of the data at all times.

6. An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive, Regulation (EU) No 600/2014, Directive 2014/57/EU and Regulation (EU) No 596/2014, and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market.

7. Records shall include the recording of telephone conversations or electronic communications relating to, at least, transactions concluded when dealing on own account and the provision of client order services that relate to the reception, transmission and execution of client orders.

Such telephone conversations and electronic communications shall also include those that are intended to result in transactions concluded when dealing on own account or in the provision of client order services that relate to the reception, transmission and execution of client orders, even if those conversations or communications do not result in the conclusion of such transactions or in the provision of client order services.

For those purposes, an investment firm shall take all reasonable steps to record relevant telephone conversations and electronic communications, made with, sent from or received by equipment provided by the investment firm to an employee or contractor or the use of which by an employee or contractor has been accepted or permitted by the investment firm.

An investment firm shall notify new and existing clients that telephone communications or conversations between the investment firm and its clients that result or may result in transactions will be recorded.

Such a notification may be made once, before the provision of investment services to new and existing clients.

An investment firm shall not provide, by telephone, investment services and activities to clients who have not been notified in advance about the recording of their telephone communications or conversations, where such investment services and activities relate to the reception, transmission and execution of client orders.

Orders may be placed by clients through other channels, however such communications must be made in a durable medium such as mails, faxes, emails or documentation of client orders made at meetings. In particular, the content of relevant face-to-face conversations with a client may be recorded by using written minutes or notes. Such orders shall be considered equivalent to orders received by telephone.

An investment firm shall take all reasonable steps to prevent an employee or contractor from making, sending or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the investment firm is unable to record or copy.

The records kept in accordance with this paragraph shall be provided to the client involved upon request and shall be kept for a period of five years and, where requested by the competent authority, for a period of up to seven years.

8. An investment firm shall, when holding financial instruments belonging to clients, make adequate arrangements so as to safeguard the ownership rights of clients, especially in the event of the investment firm's insolvency, and to prevent the use of a client's financial instruments on own account except with the client's express consent.

9. An investment firm shall, when holding funds belonging to clients, make adequate arrangements to safeguard the rights of clients and, except in the case of credit institutions, prevent the use of client funds for its own account.

10. An investment firm shall not conclude title transfer financial collateral arrangements with retail clients for the purpose of securing or covering present or future, actual or contingent or prospective obligations of clients.

11. In the case of branches of investment firms, the competent authority of the Member State in which the branch is located shall, without prejudice to the possibility of the competent authority of the home Member State of the investment firm to have direct access to those records, enforce the obligation laid down in paragraphs 6 and 7 with regard to transactions undertaken by the branch.

Member States may, in exceptional circumstances, impose requirements on investment firms concerning the safeguarding of client assets additional to the provisions set out in paragraphs 8, 9 and 10 and the respective delegated acts as referred to in paragraph 12. Such requirements must be objectively justified and proportionate so as to address, where investment firms safeguard client assets and client funds, specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State.

Member States shall notify, without undue delay, the Commission of any requirement which they intend to impose in accordance with this paragraph and at least two months before the date appointed for that requirement to come into force. The notification shall include a justification for that requirement. Any such additional requirements shall not restrict or otherwise affect the rights of investment firms under Articles 34 and 35.

The Commission shall within two months of the notification referred to in the third subparagraph provide its opinion on the proportionality of and justification for the additional requirements.

Member States may retain additional requirements provided that they were notified to the Commission in accordance with Article 4 of Directive 2006/73/EC before 2 July 2014 and that the conditions laid down in that Article are met.

The Commission shall communicate to Member States and make public on its website the additional requirements imposed in accordance with this paragraph.

12. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to specify the concrete organisational requirements laid down in paragraphs 2 to 10 of this Article to be imposed on investment firms and on branches of third-country firms authorised in accordance with Article 41 performing different investment services and/or activities and ancillary services or combinations thereof.

## Article 17

### **Algorithmic trading**

1. An investment firm that engages in algorithmic trading shall have in place effective systems and risk controls suitable to the business it operates to ensure that its trading systems are resilient and have sufficient capacity, are subject to appropriate trading thresholds and limits and prevent the sending of erroneous orders or the systems otherwise functioning in a way that may create or contribute to a disorderly market. Such a firm shall also have in place effective systems and risk controls to ensure the trading systems cannot be used for any purpose that is contrary to Regulation (EU) No 596/2014 or to the rules of a trading venue to which it is connected. The investment firm shall have in place effective business continuity arrangements to deal with any failure of its trading systems and shall ensure its systems are fully tested and properly monitored to ensure that they meet the requirements laid down in this paragraph.

2. An investment firm that engages in algorithmic trading in a Member State shall notify this to the competent authorities of its home Member State and of the trading venue at which the investment firm engages in algorithmic trading as a member or participant of the trading venue.

The competent authority of the home Member State of the investment firm may require the investment firm to provide, on a regular or ad-hoc basis, a description of the nature of its algorithmic trading strategies, details of the trading parameters or limits to which the system is subject, the key compliance and risk controls that it has in place to ensure the conditions laid down in paragraph 1 are satisfied and details of the testing of its systems. The competent authority of the home Member State of the investment firm may, at any time, request further information from an investment firm about its algorithmic trading and the systems used for that trading.

The competent authority of the home Member State of the investment firm shall, on the request of a competent authority of a trading venue at which the investment firm as a member or participant of the trading venue is engaged in algorithmic trading and without undue delay, communicate the information referred to in the second subparagraph that it receives from the investment firm that engages in algorithmic trading.

The investment firm shall arrange for records to be kept in relation to the matters referred to in this paragraph and shall ensure that those records be sufficient to enable its competent authority to monitor compliance with the requirements of this Directive.

An investment firm that engages in a high-frequency algorithmic trading technique shall store in an approved form accurate and time sequenced records of all its placed orders, including cancellations of orders, executed orders and quotations on trading venues and shall make them available to the competent authority upon request.

3. An investment firm that engages in algorithmic trading to pursue a market making strategy shall, taking into account the liquidity, scale and nature of the specific market and the characteristics of the instrument traded:

- (a) carry out this market making continuously during a specified proportion of the trading venue's trading hours, except under exceptional circumstances, with the result of providing liquidity on a regular and predictable basis to the trading venue;
- (b) enter into a binding written agreement with the trading venue which shall at least specify the obligations of the investment firm in accordance with point (a); and
- (c) have in place effective systems and controls to ensure that it fulfils its obligations under the agreement referred to in point (b) at all times.

4. For the purposes of this Article and of Article 48 of this Directive, an investment firm that engages in algorithmic trading shall be considered to be pursuing a market making strategy when, as a member or participant of one or more trading venues, its strategy, when dealing on own account, involves posting firm, simultaneous two-way quotes of comparable size and at competitive prices relating to one or more financial instruments on a single trading venue or across different trading venues, with the result of providing liquidity on a regular and frequent basis to the overall market.

5. An investment firm that provides direct electronic access to a trading venue shall have in place effective systems and controls which ensure a proper assessment and review of the suitability of clients using the service, that clients using the service are prevented from exceeding appropriate pre-set trading and credit thresholds, that trading by clients using the service is properly monitored and that appropriate risk controls prevent trading that may create risks to the investment firm itself or that could create or contribute to a disorderly market or could be contrary to Regulation (EU) No 596/2014 or the rules of the trading venue. Direct electronic access without such controls is prohibited.

An investment firm that provides direct electronic access shall be responsible for ensuring that clients using that service comply with the requirements of this Directive and the rules of the trading venue. The investment firm shall monitor the transactions in order to identify infringements of those rules, disorderly trading conditions or conduct that may involve market abuse and that is to be reported to the competent authority. The investment firm shall ensure that there is a binding written agreement between the investment firm and the client regarding the essential rights and obligations arising from the provision of the service and that under the agreement the investment firm retains responsibility under this Directive.

An investment firm that provides direct electronic access to a trading venue shall notify the competent authorities of its home Member State and of the trading venue at which the investment firm provides direct electronic access accordingly.

The competent authority of the home Member State of the investment firm may require the investment firm to provide, on a regular or ad-hoc basis, a description of the systems and controls referred to in first subparagraph and evidence that those have been applied.

The competent authority of the home Member State of the investment firm shall, on the request of a competent authority of a trading venue in relation to which the investment firm provides direct electronic access, communicate without undue delay the information referred to in the fourth subparagraph that it receives from the investment firm.

The investment firm shall arrange for records to be kept in relation to the matters referred to in this paragraph and shall ensure that those records be sufficient to enable its competent authority to monitor compliance with the requirements of this Directive.

6. An investment firm that acts as a general clearing member for other persons shall have in place effective systems and controls to ensure clearing services are only applied to persons who are suitable and meet clear criteria and that appropriate requirements are imposed on those persons to reduce risks to the investment firm and to the market. The investment firm shall ensure that there is a binding written agreement between the investment firm and the person regarding the essential rights and obligations arising from the provision of that service.

7. ESMA shall develop draft regulatory technical standards to specify the following:

- (a) the details of organisational requirements laid down in paragraphs 1 to 6 to be imposed on investment firms providing different investment services and/or activities and ancillary services or combinations thereof, whereby the specifications in relation to the organisational requirements laid down in paragraph 5 shall set out specific requirements for direct market access and for sponsored access in such a way as to ensure that the controls applied to sponsored access are at least equivalent to those applied to direct market access;
- (b) the circumstances in which an investment firm would be obliged to enter into the market making agreement referred to in point (b) of paragraph 3 and the content of such agreements, including the proportion of the trading venue's trading hours laid down in paragraph 3;
- (c) the situations constituting exceptional circumstances referred to in paragraph 3, including circumstances of extreme volatility, political and macroeconomic issues, system and operational matters, and circumstances which contradict the investment firm's ability to maintain prudent risk management practices as laid down in paragraph 1;
- (d) the content and format of the approved form referred to in the fifth subparagraph of paragraph 2 and the length of time for which such records must be kept by the investment firm.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 18

### **Trading process and finalisation of transactions in an MTF and an OTF**

1. Member States shall require that investment firms and market operators operating an MTF or an OTF, in addition to meeting the organisational requirements laid down in Article 16, establish transparent rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders. They shall have arrangements for the sound management of the technical operations of the facility, including the establishment of effective contingency arrangements to cope with risks of systems disruption.

2. Member States shall require that investment firms and market operators operating an MTF or an OTF establish transparent rules regarding the criteria for determining the financial instruments that can be traded under its systems.

Member States shall require that, where applicable, investment firms and market operators operating an MTF or an OTF provide, or are satisfied that there is access to, sufficient publicly available information to enable its users to form an investment judgement, taking into account both the nature of the users and the types of instruments traded.

3. Member States shall require that investment firms and market operators operating an MTF or an OTF establish, publish and maintain and implement transparent and non-discriminatory rules, based on objective criteria, governing access to its facility.

4. Member States shall require that investment firms and market operators operating an MTF or an OTF have arrangements to identify clearly and manage the potential adverse consequences for the operation of the MTF or OTF, or for the members or participants and users, of any conflict of interest between the interest of the MTF, the OTF, their owners or the investment firm or market operator operating the MTF or OTF and the sound functioning of the MTF or OTF.

5. Member States shall require that investment firms and market operators operating an MTF or OTF comply with Articles 48 and 49 and have in place all the necessary effective systems, procedures and arrangements to do so.

6. Member States shall require that investment firms and market operators operating an MTF or an OTF clearly inform its members or participants of their respective responsibilities for the settlement of the transactions executed in that facility. Member States shall require that investment firms and market operators operating an MTF or an OTF have put in place the necessary arrangements to facilitate the efficient settlement of the transactions concluded under the systems of that MTF or OTF.

7. Member States shall require that MTFs and OTFs have at least three materially active members or users, each having the opportunity to interact with all the others in respect to price formation.

8. Where a transferable security that has been admitted to trading on a regulated market is also traded on an MTF or an OTF without the consent of the issuer, the issuer shall not be subject to any obligation relating to initial, ongoing or ad hoc financial disclosure with regard to that MTF or an OTF.

9. Member States shall require that any investment firm and market operator operating an MTF or an OTF comply immediately with any instruction from its competent authority pursuant to Article 69(2) to suspend or remove a financial instrument from trading.

10. Member States shall require that investment firms and market operators operating an MTF or an OTF provide the competent authority with a detailed description of the functioning of the MTF or OTF, including, without prejudice to Article 20(1), (4) and (5), any links to or participation by a regulated market, an MTF, an OTF or a systematic internaliser owned by the same investment firm or market operator, and a list of their members, participants and/or users. Competent authorities shall make that information available to ESMA on request. Every authorisation to an investment firm or market operator as an MTF and an OTF shall be notified to ESMA. ESMA shall establish a list of all MTFs and OTFs in the Union. The list shall contain information on the services an MTF or an OTF provides and entail the unique code identifying the MTF and the OTF for use in reports in accordance with Articles 6, 10 and 26 of Regulation (EU) No 600/2014. It shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website.

11. ESMA shall develop draft implementing technical standards to determine the content and format of the description and notification referred to in paragraph 10.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### Article 19

##### **Specific requirements for MTFs**

1. Member States shall require that investment firms and market operators operating an MTF, in addition to meeting the requirements laid down in Articles 16 and 18, shall establish and implement non-discretionary rules for the execution of orders in the system.

2. Member States shall require that the rules referred to in Article 18(3) governing access to an MTF comply with the conditions established in Article 53(3).

3. Member States shall require that investment firms and market operators operating an MTF to have arrangements:

(a) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;

(b) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems; and

(c) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

4. Member States shall ensure that Articles 24, 25, Article 27(1), (2) and (4) to (10) and Article 28 are not applicable to the transactions concluded under the rules governing an MTF between its members or participants or between the MTF and its members or participants in relation to the use of the MTF. However, the members of or participants in the MTF shall comply with the obligations provided for in Articles 24, 25, 27 and 28 with respect to their clients when, acting on behalf of their clients, they execute their orders through the systems of an MTF.

5. Member States shall not allow investment firms or market operators operating an MTF to execute client orders against proprietary capital, or to engage in matched principal trading.

#### Article 20

##### **Specific requirements for OTFs**

1. Member States shall require that an investment firm and a market operator operating an OTF establishes arrangements preventing the execution of client orders in an OTF against the proprietary capital of the investment firm or market operator operating the OTF or from any entity that is part of the same group or legal person as the investment firm or market operator.

2. Member States shall permit an investment firm or market operator operating an OTF to engage in matched principal trading in bonds, structured finance products, emission allowances and certain derivatives only where the client has consented to the process.

An investment firm or market operator operating an OTF shall not use matched principal trading to execute client orders in an OTF in derivatives pertaining to a class of derivatives that has been declared subject to the clearing obligation in accordance with Article 5 of Regulation (EU) No 648/2012.

An investment firm or market operator operating an OTF shall establish arrangements ensuring compliance with the definition of matched principal trading in point (38) of Article 4(1).

3. Member States shall permit an investment firm or market operator operating an OTF to engage in dealing on own account other than matched principal trading only with regard to sovereign debt instruments for which there is not a liquid market.

4. Member States shall not allow the operation of an OTF and of a systematic internaliser to take place within the same legal entity. An OTF shall not connect with a systematic internaliser in a way which enables orders in an OTF and orders or quotes in a systematic internaliser to interact. An OTF shall not connect with another OTF in a way which enables orders in different OTFs to interact.

5. Member States shall not prevent an investment firm or a market operator operating an OTF from engaging another investment firm to carry out market making on that OTF on an independent basis.

For the purposes of this Article, an investment firm shall not be deemed to be carrying out market making on an OTF on an independent basis if it has close links with the investment firm or market operator operating the OTF.

6. Member States shall require that the execution of orders on an OTF is carried out on a discretionary basis.

An investment firm or market operator operating an OTF shall exercise discretion only in either or both of the following circumstances:

- (a) when deciding to place or retract an order on the OTF they operate;
- (b) when deciding not to match a specific client order with other orders available in the systems at a given time, provided it is in compliance with specific instructions received from a client and with its obligations in accordance with Article 27.

For the system that crosses client orders the investment firm or market operator operating the OTF may decide if, when and how much of two or more orders it wants to match within the system. In accordance with paragraphs 1, 2, 4 and 5 and without prejudice to paragraph 3, with regard to a system that arranges transactions in non-equities, the investment firm or market operator operating the OTF may facilitate negotiation between clients so as to bring together two or more potentially compatible trading interest in a transaction.

That obligation shall be without prejudice to Articles 18 and 27.

7. The competent authority may require, either when an investment firm or market operator requests to be authorised for the operation of an OTF or on ad-hoc basis, a detailed explanation why the system does not correspond to and cannot operate as a regulated market, MTF, or systematic internaliser, a detailed description as to how discretion will be exercised, in particular when an order to the OTF may be retracted and when and how two or more client orders will be matched within the OTF. In addition, the investment firm or market operator of an OTF shall provide the competent authority with information explaining its use of matched principal trading. The competent authority shall monitor an investment firm's or market operator's engagement in matched principal trading to ensure that it continues to fall within the definition of such trading and that its engagement in matched principal trading does not give rise to conflicts of interest between the investment firm or market operator and its clients.

8. Member States shall ensure that Articles 24, 25, 27 and 28 are applied to the transactions concluded on an OTF.

## CHAPTER II

### ***Operating conditions for investment firms***

#### Section 1

##### **General provisions**

###### *Article 21*

###### **Regular review of conditions for initial authorisation**

1. Member States shall require that an investment firm authorised in their territory comply at all times with the conditions for initial authorisation established in Chapter I.

2. Member States shall require competent authorities to establish the appropriate methods to monitor that investment firms comply with their obligation under paragraph 1. They shall require investment firms to notify the competent authorities of any material changes to the conditions for initial authorisation.

ESMA may develop guidelines regarding the monitoring methods referred to in this paragraph.

###### *Article 22*

###### **General obligation in respect of on-going supervision**

Member States shall ensure that the competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this Directive. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of investment firms with those obligations.

###### *Article 23*

###### **Conflicts of interest**

1. Member States shall require investment firms to take all appropriate steps to identify and to prevent or manage conflicts of interest between themselves, including their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any investment and ancillary services, or combinations thereof, including those caused by the receipt of inducements from third parties or by the investment firm's own remuneration and other incentive structures.

2. Where organisational or administrative arrangements made by the investment firm in accordance with Article 16(3) to prevent conflicts of interest from adversely affecting the interest of its client are not sufficient to ensure, with reasonable confidence, that risks of damage to client interests will be prevented, the investment firm shall clearly disclose to the client the general nature and/or sources of conflicts of interest and the steps taken to mitigate those risks before undertaking business on its behalf.

3. The disclosure referred to in paragraph 2 shall:

(a) be made in a durable medium; and

(b) include sufficient detail, taking into account the nature of the client, to enable that client to take an informed decision with respect to the service in the context of which the conflict of interest arises.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to:

- (a) define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and disclose conflicts of interest when providing various investment and ancillary services and combinations thereof;
- (b) establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the clients or potential clients of the investment firm.

## Section 2

### Provisions to ensure investor protection

#### Article 24

##### General principles and information to clients

1. Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25.

2. Investment firms which manufacture financial instruments for sale to clients shall ensure that those financial instruments are designed to meet the needs of an identified target market of end clients within the relevant category of clients, the strategy for distribution of the financial instruments is compatible with the identified target market, and the investment firm takes reasonable steps to ensure that the financial instrument is distributed to the identified target market.

An investment firm shall understand the financial instruments they offer or recommend, assess the compatibility of the financial instruments with the needs of the clients to whom it provides investment services, also taking account of the identified target market of end clients as referred to in Article 16(3), and ensure that financial instruments are offered or recommended only when this is in the interest of the client.

3. All information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

4. Appropriate information shall be provided in good time to clients or potential clients with regard to the investment firm and its services, the financial instruments and proposed investment strategies, execution venues and all costs and related charges. That information shall include the following:

- (a) when investment advice is provided, the investment firm must, in good time before it provides investment advice, inform the client:
  - (i) whether or not the advice is provided on an independent basis;
  - (ii) whether the advice is based on a broad or on a more restricted analysis of different types of financial instruments and, in particular, whether the range is limited to financial instruments issued or provided by entities having close links with the investment firm or any other legal or economic relationships, such as contractual relationships, so close as to pose a risk of impairing the independent basis of the advice provided;
  - (iii) whether the investment firm will provide the client with a periodic assessment of the suitability of the financial instruments recommended to that client;

- (b) the information on financial instruments and proposed investment strategies must include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies and whether the financial instrument is intended for retail or professional clients, taking account of the identified target market in accordance with paragraph 2;
- (c) the information on all costs and associated charges must include information relating to both investment and ancillary services, including the cost of advice, where relevant, the cost of the financial instrument recommended or marketed to the client and how the client may pay for it, also encompassing any third-party payments.

The information about all costs and charges, including costs and charges in connection with the investment service and the financial instrument, which are not caused by the occurrence of underlying market risk, shall be aggregated to allow the client to understand the overall cost as well as the cumulative effect on return of the investment, and where the client so requests, an itemised breakdown shall be provided. Where applicable, such information shall be provided to the client on a regular basis, at least annually, during the life of the investment.

5. The information referred to in paragraphs 4 and 9 shall be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. Member States may allow that information to be provided in a standardised format.

6. Where an investment service is offered as part of a financial product which is already subject to other provisions of Union law relating to credit institutions and consumer credits with respect to information requirements, that service shall not be additionally subject to the obligations set out in paragraphs 3, 4 and 5.

7. Where an investment firm informs the client that investment advice is provided on an independent basis, that investment firm shall:

- (a) assess a sufficient range of financial instruments available on the market which must be sufficiently diverse with regard to their type and issuers or product providers to ensure that the client's investment objectives can be suitably met and must not be limited to financial instruments issued or provided by:
  - (i) the investment firm itself or by entities having close links with the investment firm; or
  - (ii) other entities with which the investment firm has such close legal or economic relationships, such as contractual relationships, as to pose a risk of impairing the independent basis of the advice provided;
- (b) not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients. Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client must be clearly disclosed and are excluded from this point.

8. When providing portfolio management the investment firm shall not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients. Minor non-monetary benefits that are capable of enhancing the quality of service provided to a client and are of a scale and nature such that they could not be judged to impair compliance with the investment firm's duty to act in the best interest of the client shall be clearly disclosed and are excluded from this paragraph.

9. Member States shall ensure that investment firms are regarded as not fulfilling their obligations under Article 23 or under paragraph 1 of this Article where they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit in connection with the provision of an investment service or an ancillary service, to or by any party except the client or a person on behalf of the client, other than where the payment or benefit:

- (a) is designed to enhance the quality of the relevant service to the client; and
- (b) does not impair compliance with the investment firm's duty to act honestly, fairly and professionally in accordance with the best interest of its clients.

The existence, nature and amount of the payment or benefit referred to in the first subparagraph, or, where the amount cannot be ascertained, the method of calculating that amount, must be clearly disclosed to the client, in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant investment or ancillary service. Where applicable, the investment firm shall also inform the client on mechanisms for transferring to the client the fee, commission, monetary or non-monetary benefit received in relation to the provision of the investment or ancillary service.

The payment or benefit which enables or is necessary for the provision of investment services, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which by its nature cannot give rise to conflicts with the investment firm's duties to act honestly, fairly and professionally in accordance with the best interests of its clients, is not subject to the requirements set out in the first subparagraph.

10. An investment firm which provides investment services to clients shall ensure that it does not remunerate or assess the performance of its staff in a way that conflicts with its duty to act in the best interests of its clients. In particular, it shall not make any arrangement by way of remuneration, sales targets or otherwise that could provide an incentive to its staff to recommend a particular financial instrument to a retail client when the investment firm could offer a different financial instrument which would better meet that client's needs.

11. When an investment service is offered together with another service or product as part of a package or as a condition for the same agreement or package, the investment firm shall inform the client whether it is possible to buy the different components separately and shall provide for a separate evidence of the costs and charges of each component.

Where the risks resulting from such an agreement or package offered to a retail client are likely to be different from the risks associated with the components taken separately, the investment firm shall provide an adequate description of the different components of the agreement or package and the way in which its interaction modifies the risks.

ESMA, in cooperation with EBA and EIOPA, shall develop by 3 January 2016, and update periodically, guidelines for the assessment and the supervision of cross-selling practices indicating, in particular, situations in which cross-selling practices are not compliant with obligations laid down in paragraph 1.

12. Member States may, in exceptional cases, impose additional requirements on investment firms in respect of the matters covered by this Article. Such requirements must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State.

Member States shall notify the Commission of any requirement which they intend to impose in accordance with this paragraph without undue delay and at least two months before the date appointed for that requirement to come into force. The notification shall include a justification for that requirement. Any such additional requirements shall not restrict or otherwise affect the rights of investment firms under Articles 34 and 35 of this Directive.

The Commission shall within two months from the notification referred to in the second subparagraph provide its opinion on the proportionality of and justification for the additional requirements.

The Commission shall communicate to Member States and make public on its website the additional requirements imposed in accordance with this paragraph.

Member States may retain additional requirements that were notified to the Commission in accordance with Article 4 of Directive 2006/73/EC before 2 July 2014 provided that the conditions laid down in that Article are met.

13. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to ensure that investment firms comply with the principles set out in this Article when providing investment or ancillary services to their clients, including:

- (a) the conditions with which the information must comply in order to be fair, clear and not misleading;
- (b) the details about content and format of information to clients in relation to client categorisation, investment firms and their services, financial instruments, costs and charges;
- (c) the criteria for the assessment of a range of financial instruments available on the market;
- (d) the criteria to assess compliance of firms receiving inducements with the obligation to act honestly, fairly and professionally in accordance with the best interest of the client.

In formulating the requirements for information on financial instruments in relation to point b of paragraph 4 information on the structure of the product shall be included, where applicable, taking into account any relevant standardized information required under Union law.

14. The delegated acts referred to in paragraph 13 shall take into account:

- (a) the nature of the service(s) offered or provided to the client or potential client, taking into account the type, object, size and frequency of the transactions;
- (b) the nature and range of products being offered or considered including different types of financial instruments;
- (c) the retail or professional nature of the client or potential clients or, in the case of paragraphs 4 and 5, their classification as eligible counterparties.

#### *Article 25*

#### **Assessment of suitability and appropriateness and reporting to clients**

1. Member States shall require investment firms to ensure and demonstrate to competent authorities on request that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligations under Article 24 and this Article. Member States shall publish the criteria to be used for assessing such knowledge and competence.

2. When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, that person's financial situation including his ability to bear losses, and his investment objectives including his risk tolerance so as to enable the investment firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him and, in particular, are in accordance with his risk tolerance and ability to bear losses.

Member States shall ensure that where an investment firm provides investment advice recommending a package of services or products bundled pursuant to Article 24(11), the overall bundled package is suitable.

3. Member States shall ensure that investment firms, when providing investment services other than those referred to in paragraph 2, ask the client or potential client to provide information regarding that person's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client. Where a bundle of services or products is envisaged pursuant to Article 24(11), the assessment shall consider whether the overall bundled package is appropriate.

Where the investment firm considers, on the basis of the information received under the first subparagraph, that the product or service is not appropriate to the client or potential client, the investment firm shall warn the client or potential client. That warning may be provided in a standardised format.

Where clients or potential clients do not provide the information referred to under the first subparagraph, or where they provide insufficient information regarding their knowledge and experience, the investment firm shall warn them that the investment firm is not in a position to determine whether the service or product envisaged is appropriate for them. That warning may be provided in a standardised format.

4. Member States shall allow investment firms when providing investment services that only consist of execution or reception and transmission of client orders with or without ancillary services, excluding the granting of credits or loans as specified in Section B.1 of Annex I that do not comprise of existing credit limits of loans, current accounts and overdraft facilities of clients, to provide those investment services to their clients without the need to obtain the information or make the determination provided for in paragraph 3 where all the following conditions are met:

(a) the services relate to any of the following financial instruments:

- (i) shares admitted to trading on a regulated market or on an equivalent third-country market or on a MTF, where those are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative;
- (ii) bonds or other forms of securitised debt admitted to trading on a regulated market or on an equivalent third country market or on a MTF, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved;
- (iii) money-market instruments, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved;
- (iv) shares or units in UCITS, excluding structured UCITS as referred to in the second subparagraph of Article 36(1) of Regulation (EU) No 583/2010;

(v) structured deposits, excluding those that incorporate a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term;

(vi) other non-complex financial instruments for the purpose of this paragraph.

For the purpose of this point, if the requirements and the procedure laid down under the third and the fourth subparagraphs of Article 4(1) of Directive 2003/71/EC are fulfilled, a third-country market shall be considered to be equivalent to a regulated market.

(b) the service is provided at the initiative of the client or potential client;

(c) the client or potential client has been clearly informed that in the provision of that service the investment firm is not required to assess the appropriateness of the financial instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules. Such a warning may be provided in a standardised format;

(d) the investment firm complies with its obligations under Article 23.

5. The investment firm shall establish a record that includes the document or documents agreed between the investment firm and the client that set out the rights and obligations of the parties, and the other terms on which the investment firm will provide services to the client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

6. The investment firm shall provide the client with adequate reports on the service provided in a durable medium. Those reports shall include periodic communications to clients, taking into account the type and the complexity of financial instruments involved and the nature of the service provided to the client and shall include, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.

When providing investment advice, the investment firm shall, before the transaction is made, provide the client with a statement on suitability in a durable medium specifying the advice given and how that advice meets the preferences, objectives and other characteristics of the retail client.

Where the agreement to buy or sell a financial instrument is concluded using a means of distance communication which prevents the prior delivery of the suitability statement, the investment firm may provide the written statement on suitability in a durable medium immediately after the client is bound by any agreement, provided both the following conditions are met:

(a) the client has consented to receiving the suitability statement without undue delay after the conclusion of the transaction; and

(b) the investment firm has given the client the option of delaying the transaction in order to receive the statement on suitability in advance.

Where an investment firm provides portfolio management or has informed the client that it will carry out a periodic assessment of suitability, the periodic report shall contain an updated statement of how the investment meets the client's preferences, objectives and other characteristics of the retail client.

7. If a credit agreement relating to residential immovable property, which is subject to the provisions concerning creditworthiness assessment of consumers laid down in Directive 2014/17/EU of the European Parliament and the Council (<sup>1</sup>), has as a prerequisite the provision to that same consumer of an investment service in relation to mortgage bonds specifically issued to secure the financing of and having identical terms as the credit agreement relating to residential immovable property, in order for the loan to be payable, refinanced or redeemed, that service shall not be subject to the obligations set out in this Article.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to ensure that investment firms comply with the principles set out in paragraphs 2 to 6 of this Article when providing investment or ancillary services to their clients, including information to obtain when assessing the suitability or appropriateness of the services and financial instruments for their clients, criteria to assess non-complex financial instruments for the purposes of point (a)(vi) of paragraph 4 of this Article, the content and the format of records and agreements for the provision of services to clients and of periodic reports to clients on the services provided. Those delegated acts shall take into account:

- (a) the nature of the service(s) offered or provided to the client or potential client, having regard to the type, object, size and frequency of the transactions;
- (b) the nature of the products being offered or considered, including different types of financial instruments;
- (c) the retail or professional nature of the client or potential clients or, in the case of paragraph 6, their classification as eligible counterparties.

9. ESMA shall adopt by 3 January 2016 guidelines specifying criteria for the assessment of knowledge and competence required under paragraph 1.

10. ESMA shall develop by 3 January 2016, and update periodically, guidelines for the assessment of:

- (a) financial instruments incorporating a structure which makes it difficult for the client to understand the risk involved in accordance with points (a)(ii) and (a)(iii) of paragraph 4;
- (b) structured deposits incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term, in accordance with point (a)(v) of paragraph 4.

11. ESMA may develop guidelines, and update them periodically, for the assessment of financial instruments being classified as non-complex for the purpose of point (a)(vi) of paragraph 4, taking into account the delegated acts adopted under paragraph 8.

## Article 26

### Provision of services through the medium of another investment firm

Member States shall allow an investment firm receiving an instruction to provide investment or ancillary services on behalf of a client through the medium of another investment firm to rely on client information transmitted by the latter investment firm. The investment firm which mediates the instructions will remain responsible for the completeness and accuracy of the information transmitted.

<sup>(1)</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

The investment firm which receives an instruction to undertake services on behalf of a client in that way shall also be able to rely on any recommendations in respect of the service or transaction that have been provided to the client by another investment firm. The investment firm which mediates the instructions will remain responsible for the suitability for the client of the recommendations or advice provided.

The investment firm which receives client instructions or orders through the medium of another investment firm shall remain responsible for concluding the service or transaction, based on any such information or recommendations, in accordance with the relevant provisions of this Title.

#### Article 27

##### **Obligation to execute orders on terms most favourable to the client**

1. Member States shall require that investment firms take all sufficient steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, where there is a specific instruction from the client the investment firm shall execute the order following the specific instruction.

Where an investment firm executes an order on behalf of a retail client, the best possible result shall be determined in terms of the total consideration, representing the price of the financial instrument and the costs relating to execution, which shall include all expenses incurred by the client which are directly relating to the execution of the order, including execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order.

For the purposes of delivering best possible result in accordance with the first subparagraph where there is more than one competing venue to execute an order for a financial instrument, in order to assess and compare the results for the client that would be achieved by executing the order on each of the execution venues listed in the investment firm's order execution policy that is capable of executing that order, the investment firm's own commissions and the costs for executing the order on each of the eligible execution venues shall be taken into account in that assessment.

2. An investment firm shall not receive any remuneration, discount or non-monetary benefit for routing client orders to a particular trading venue or execution venue which would infringe the requirements on conflicts of interest or inducements set out in paragraph 1 of this Article and Article 16(3) and Articles 23 and 24.

3. Member States shall require that for financial instruments subject to the trading obligation in Articles 23 and 28 Regulation (EU) No 600/2014 each trading venue and systematic internaliser and for other financial instruments each execution venue makes available to the public, without any charges, data relating to the quality of execution of transactions on that venue on at least an annual basis and that following execution of a transaction on behalf of a client the investment firm shall inform the client where the order was executed. Periodic reports shall include details about price, costs, speed and likelihood of execution for individual financial instruments.

4. Member States shall require investment firms to establish and implement effective arrangements for complying with paragraph 1. In particular, Member States shall require investment firms to establish and implement an order execution policy to allow them to obtain, for their client orders, the best possible result in accordance with paragraph 1.

5. The order execution policy shall include, in respect of each class of financial instruments, information on the different venues where the investment firm executes its client orders and the factors affecting the choice of execution venue. It shall at least include those venues that enable the investment firm to obtain on a consistent basis the best possible result for the execution of client orders.

Member States shall require that investment firms provide appropriate information to their clients on their order execution policy. That information shall explain clearly, in sufficient detail and in a way that can be easily understood by clients, how orders will be executed by the investment firm for the client. Member States shall require that investment firms obtain the prior consent of their clients to the order execution policy.

Member States shall require that, where the order execution policy provides for the possibility that client orders may be executed outside a trading venue, the investment firm shall, in particular, inform its clients about that possibility. Member States shall require that investment firms obtain the prior express consent of their clients before proceeding to execute their orders outside a trading venue. Investment firms may obtain such consent either in the form of a general agreement or in respect of individual transactions.

6. Member States shall require investment firms who execute client orders to summarise and make public on an annual basis, for each class of financial instruments, the top five execution venues in terms of trading volumes where they executed client orders in the preceding year and information on the quality of execution obtained.

7. Member States shall require investment firms who execute client orders to monitor the effectiveness of their order execution arrangements and execution policy in order to identify and, where appropriate, correct any deficiencies. In particular, they shall assess, on a regular basis, whether the execution venues included in the order execution policy provide for the best possible result for the client or whether they need to make changes to their execution arrangements, taking account of, inter alia, the information published under paragraphs 3 and 6. Member States shall require investment firms to notify clients with whom they have an ongoing client relationship of any material changes to their order execution arrangements or execution policy.

8. Member States shall require investment firms to be able to demonstrate to their clients, at their request, that they have executed their orders in accordance with the investment firm's execution policy and to demonstrate to the competent authority, at its request, their compliance with this Article.

9. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning:

- (a) the criteria for determining the relative importance of the different factors that, pursuant to paragraph 1, may be taken into account for determining the best possible result taking into account the size and type of order and the retail or professional nature of the client;
- (b) factors that may be taken into account by an investment firm when reviewing its execution arrangements and the circumstances under which changes to such arrangements may be appropriate. In particular, the factors for determining which venues enable investment firms to obtain on a consistent basis the best possible result for executing the client orders;
- (c) the nature and extent of the information to be provided to clients on their execution policies, pursuant to paragraph 5.

10. ESMA shall develop draft regulatory technical standards to determine:

- (a) the specific content, the format and the periodicity of data relating to the quality of execution to be published in accordance with paragraph 3, taking into account the type of execution venue and the type of financial instrument concerned;
- (b) the content and the format of information to be published by investment firms in accordance with paragraph 6.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

*Article 28***Client order handling rules**

1. Member States shall require that investment firms authorised to execute orders on behalf of clients implement procedures and arrangements which provide for the prompt, fair and expeditious execution of client orders, relative to other client orders or the trading interests of the investment firm.

Those procedures or arrangements shall allow for the execution of otherwise comparable client orders in accordance with the time of their reception by the investment firm.

2. Member States shall require that, in the case of a client limit order in respect of shares admitted to trading on a regulated market or traded on a trading venue which are not immediately executed under prevailing market conditions, investment firms are, unless the client expressly instructs otherwise, to take measures to facilitate the earliest possible execution of that order by making public immediately that client limit order in a manner which is easily accessible to other market participants. Member States may decide that investment firms comply with that obligation by transmitting the client limit order to a trading venue. Member States shall provide that the competent authorities may waive the obligation to make public a limit order that is large in scale compared with normal market size as determined under Article 4 of Regulation (EU) No 600/2014.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to define:

- (a) the conditions and nature of the procedures and arrangements which result in the prompt, fair and expeditious execution of client orders and the situations in which or types of transaction for which investment firms may reasonably deviate from prompt execution so as to obtain more favourable terms for clients;
- (b) the different methods through which an investment firm can be deemed to have met its obligation to disclose not immediately executable client limit orders to the market.

*Article 29***Obligations of investment firms when appointing tied agents**

1. Member States shall allow an investment firm to appoint tied agents for the purposes of promoting the services of the investment firm, soliciting business or receiving orders from clients or potential clients and transmitting them, placing financial instruments and providing advice in respect of such financial instruments and services offered by that investment firm.

2. Member States shall require that where an investment firm decides to appoint a tied agent it remains fully and unconditionally responsible for any action or omission on the part of the tied agent when acting on behalf of the investment firm. Member States shall require the investment firm to ensure that a tied agent discloses the capacity in which he is acting and the investment firm which he is representing when contacting or before dealing with any client or potential client.

Member States may allow, in accordance with Article 16(6), (8) and (9), tied agents registered in their territory to hold money and/or financial instruments of clients on behalf and under the full responsibility of the investment firm for which they are acting within their territory or, in the case of a cross border operation, in the territory of a Member State which allows a tied agent to hold client money.

Member States shall require the investment firms to monitor the activities of their tied agents so as to ensure that they continue to comply with this Directive when acting through tied agents.

3. Tied agents shall be registered in the public register in the Member State where they are established. ESMA shall publish on its website references or hyperlinks to the public registers established under this Article by the Member States that decide to allow investment firms to appoint tied agents.

Member States shall ensure that tied agents are only admitted to the public register if it has been established that they are of sufficiently good repute and that they possess the appropriate general, commercial and professional knowledge and competence so as to be able to deliver the investment service or ancillary service and to communicate accurately all relevant information regarding the proposed service to the client or potential client.

Member States may decide that, subject to appropriate control, investment firms can verify whether the tied agents which they have appointed are of sufficiently good repute and possess the knowledge and competence referred to in the second subparagraph.

The register shall be updated on a regular basis. It shall be publicly available for consultation.

4. Member States shall require that investment firms appointing tied agents take adequate measures in order to avoid any negative impact that the activities of the tied agent not covered by the scope of this Directive could have on the activities carried out by the tied agent on behalf of the investment firm.

Member States may allow competent authorities to collaborate with investment firms and credit institutions, their associations and other entities in registering tied agents and in monitoring compliance of tied agents with the requirements of paragraph 3. In particular, tied agents may be registered by an investment firm, credit institution or their associations and other entities under the supervision of the competent authority.

5. Member States shall require that investment firms appoint only tied agents entered in the public registers referred to in paragraph 3.

6. Member States may adopt or retain provisions that are more stringent than those set out in this Article or add further requirements for tied agents registered within their jurisdiction.

#### *Article 30*

##### **Transactions executed with eligible counterparties**

1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with the obligations under Article 24, with the exception of paragraphs 4 and 5, Article 25, with the exception of paragraph 6, Article 27 and Article 28(1) in respect of those transactions or in respect of any ancillary service directly relating to those transactions.

Member States shall ensure that, in their relationship with eligible counterparties, investment firms act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business.

2. Member States shall recognise as eligible counterparties for the purposes of this Article investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions authorised or regulated under Union law or under the national law of a Member State, national governments and their corresponding offices including public bodies that deal with public debt at national level, central banks and supranational organisations.

Classification as an eligible counterparty under the first subparagraph shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as clients whose business with the investment firm is subject to Articles 24, 25, 27 and 28.

3. Member States may also recognise as eligible counterparties other undertakings meeting pre-determined proportionate requirements, including quantitative thresholds. In the event of a transaction where the prospective counterparties are located in different jurisdictions, the investment firm shall defer to the status of the other undertaking as determined by the law or measures of the Member State in which that undertaking is established.

Member States shall ensure that the investment firm, when it enters into transactions in accordance with paragraph 1 with such undertakings, obtains the express confirmation from the prospective counterparty that it agrees to be treated as an eligible counterparty. Member States shall allow the investment firm to obtain that confirmation either in the form of a general agreement or in respect of each individual transaction.

4. Member States may recognise as eligible counterparties third country entities equivalent to those categories of entities referred to in paragraph 2.

Member States may also recognise as eligible counterparties third country undertakings such as those referred to in paragraph 3 on the same conditions and subject to the same requirements as those laid down in paragraph 3.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to specify:

- (a) the procedures for requesting treatment as clients under paragraph 2;
- (b) the procedures for obtaining the express confirmation from prospective counterparties under paragraph 3;
- (c) the pre-determined proportionate requirements, including quantitative thresholds that would allow an undertaking to be considered to be an eligible counterparty under paragraph 3.

### Section 3 Market transparency and integrity Article 31

#### Monitoring of compliance with the rules of the MTF or the OTF and with other legal obligations

1. Member States shall require that investment firms and market operators operating an MTF or OTF establish and maintain effective arrangements and procedures, relevant to the MTF or OTF, for the regular monitoring of the compliance by its members or participants or users with its rules. Investment firms and market operators operating an MTF or an OTF shall monitor the orders sent, including cancellations and the transactions undertaken by their members or participants or users under their systems, in order to identify infringements of those rules, disorderly trading conditions, conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014 or system disruptions in relation to a financial instrument and shall deploy the resource necessary to ensure that such monitoring is effective.

2. Member States shall require investment firms and market operators operating an MTF or an OTF to inform its competent authority immediately of significant infringements of its rules or disorderly trading conditions or conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014 or system disruptions in relation to a financial instrument.

The competent authorities of the investment firms and market operators operating an MTF or an OTF shall communicate to ESMA and to the competent authorities of the other Member States the information referred to in the first subparagraph.

In relation to conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014, a competent authority must be convinced that such behaviour is being or has been carried out before it notifies the competent authorities of the other Member States and ESMA.

3. Member States shall also require investment firms and market operators operating an MTF or an OTF to also supply without undue delay the information referred to in paragraph 2 to the authority competent for the investigation and prosecution of market abuse and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through its systems.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to determine circumstances that trigger an information requirement as referred to in paragraph 2 of this Article.

## Article 32

### **Suspension and removal of financial instruments from trading on an MTF or an OTF**

1. Without prejudice to the right of the competent authority under Article 69(2) to demand suspension or removal of a financial instrument from trading, an investment firm or a market operator operating an MTF or an OTF may suspend or remove from trading a financial instrument which no longer complies with the rules of the MTF or an OTF unless such suspension or removal would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

2. Member States shall require that an investment firm or a market operator operating an MTF or an OTF that suspends or removes from trading a financial instrument also suspends or removes derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument where necessary to support the objectives of the suspension or removal of the underlying financial instrument. The investment firm or market operator operating an MTF or an OTF shall make public its decision on the suspension or removal of the financial instrument and of any related derivative and communicate the relevant decisions to its competent authority.

The competent authority, in whose jurisdiction the suspension or removal originated, shall require that regulated markets, other MTFs, other OTFs and systematic internalisers, which fall under its jurisdiction and trade the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I to this Directive that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument infringing Articles 7 and 17 of Regulation (EU) No 596/2014 except where such suspension or removal could cause significant damage to the investors' interests or the orderly functioning of the market.

The competent authority shall immediately make public and communicate to ESMA and the competent authorities of the other Member States such a decision.

The notified competent authorities of the other Member States shall require that regulated markets, other MTFs, other OTFs and systematic internalisers, which fall under their jurisdiction and trade the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument infringing Articles 7 and 17 of Regulation (EU) No 596/2014 except where such suspension or removal could cause significant damage to the investors' interests or the orderly functioning of the market.

Each notified competent authority shall communicate its decision to ESMA and other competent authorities, including an explanation if the decision was not to suspend or remove from trading the financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument.

This paragraph also applies when the suspension from trading of a financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument is lifted.

The notification procedure referred to in this paragraph shall also apply in the case where the decision to suspend or remove from trading a financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument is taken by the competent authority pursuant to points (m) and (n) of Article 69(2).

In order to ensure that the obligation to suspend or remove from trading such derivatives is applied proportionately, ESMA shall develop draft regulatory technical standards to further specify the cases in which the connection between a derivative as referred to in points (4) to (10) of Section C of Annex I relating or referenced to a financial instrument suspended or removed from trading and the original financial instrument implies that the derivative is also to be suspended or removed from trading, in order to achieve the objective of the suspension or removal of the underlying financial instrument.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

3. ESMA shall develop draft implementing technical standards to determine the format and timing of the communications and the publication referred to in paragraph 2.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to list situations constituting significant damage to the investors' interests and the orderly functioning of the market referred to in paragraphs 1 and 2 of this Article.

#### Section 4

##### **SME growth markets**

###### *Article 33*

##### **SME growth markets**

1. Member States shall provide that the operator of a MTF may apply to its home competent authority to have the MTF registered as an SME growth market.

2. Member States shall provide that the home competent authority may register the MTF as an SME growth market if the competent authority receives an application referred to in paragraph 1 and is satisfied that the requirements in paragraph 3 are complied with in relation to the MTF.

3. Member States shall ensure that MTFs are subject to effective rules, systems and procedures which ensure that the following is complied with:

- (a) at least 50 % of the issuers whose financial instruments are admitted to trading on the MTF are SMEs at the time when the MTF is registered as an SME growth market and in any calendar year thereafter;

- (b) appropriate criteria are set for initial and ongoing admission to trading of financial instruments of issuers on the market;
- (c) on initial admission to trading of financial instruments on the market there is sufficient information published to enable investors to make an informed judgment about whether or not to invest in the financial instruments, either an appropriate admission document or a prospectus if the requirements laid down in Directive 2003/71/EC are applicable in respect of a public offer being made in conjunction with the initial admission to trading of the financial instrument on the MTF;
- (d) there is appropriate ongoing periodic financial reporting by or on behalf of an issuer on the market, for example audited annual reports;
- (e) issuers on the market as defined in point (21) of Article 3(1) of Regulation (EU) No 596/2014, persons discharging managerial responsibilities as defined in point (25) of Article 3(1) of Regulation (EU) No 596/2014 and persons closely associated with them as defined in point (26) of Article 3(1) of Regulation (EU) No 596/2014 comply with relevant requirements applicable to them under Regulation (EU) No 596/2014;
- (f) regulatory information concerning the issuers on the market is stored and disseminated to the public;
- (g) there are effective systems and controls aiming to prevent and detect market abuse on that market as required under the Regulation (EU) No 596/2014.

4. The criteria in paragraph 3 are without prejudice to compliance by the investment firm or market operator operating the MTF with other obligations under this Directive relevant to the operation of MTFs. They also do not prevent the investment firm or market operator operating the MTF from imposing additional requirements to those specified in that paragraph.

5. Member States shall provide that the home competent authority may deregister a MTF as an SME growth market in any of the following cases:

- (a) the investment firm or market operator operating the market applies for its deregistration;
- (b) the requirements in paragraph 3 are no longer complied with in relation to the MTF.

6. Members States shall require that if a home competent authority registers or deregisters an MTF as an SME growth market under this Article it shall as soon as possible notify ESMA of that registration or deregistration. ESMA shall publish on its website a list of SME growth markets and shall keep that list up to date.

7. Member States shall require that where a financial instrument of an issuer is admitted to trading on one SME growth market, the financial instrument may also be traded on another SME growth market only where the issuer has been informed and has not objected. In such a case however, the issuer shall not be subject to any obligation relating to corporate governance or initial, ongoing or ad hoc disclosure with regard to the latter SME growth market.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 further specifying the requirements laid down in paragraph 3 of this Article. The measures shall take into account the need for the requirements to maintain high levels of investor protection to promote investor confidence in those markets while minimising the administrative burdens for issuers on the market and that de-registrations do not occur nor shall registrations be refused as a result of a merely temporary failure to meet the conditions set out in point (a) of paragraph 3 of this Article.

## CHAPTER III

**Rights of investment firms**

## Article 34

**Freedom to provide investment services and activities**

1. Member States shall ensure that any investment firm authorised and supervised by the competent authorities of another Member State in accordance with this Directive, and in respect of credit institutions in accordance with Directive 2013/36/EU, may freely provide investment services and/or perform investment activities as well as ancillary services within their territories, provided that such services and activities are covered by its authorisation. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements on such an investment firm or credit institution in respect of the matters covered by this Directive.

2. Any investment firm wishing to provide services or activities within the territory of another Member State for the first time, or which wishes to change the range of services or activities so provided, shall communicate the following information to the competent authorities of its home Member State:

(a) the Member State in which it intends to operate;

(b) a programme of operations stating in particular the investment services and/or activities as well as ancillary services which it intends to provide in the territory of that Member State and whether it intends to do so through the use of tied agents, established in its home Member State. Where an investment firm intends to use tied agents, the investment firm shall communicate to the competent authority of its home Member State the identity of those tied agents.

Where an investment firm intends to use tied agents established in its home Member State, in the territory of the Member States in which it intends to provide services the competent authority of the home Member State of the investment firm shall, within one month from receipt of all the information, communicate to the competent authority of the host Member State designated as contact point in accordance with Article 79(1) the identity of the tied agents that the investment firm intends to use to provide investment services and activities in that Member State. The host Member State shall publish such information. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.

3. The competent authority of the home Member State shall, within one month of receiving the information, forward it to the competent authority of the host Member State designated as contact point in accordance with Article 79(1). The investment firm may then start to provide the investment services and activities concerned in the host Member State.

4. In the event of a change in any of the particulars communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the home Member State shall inform the competent authority of the host Member State of that change.

5. Any credit institution wishing to provide investment services or activities as well as ancillary services in accordance with paragraph 1 through tied agents shall communicate to the competent authority of its home Member State the identity of those tied agents.

Where the credit institution intends to use tied agents established in its home Member State in the territory of the Member States in which it intends to provide services, the competent authority of the home Member State of the credit institution shall, within one month from the receipt of all the information, communicate to the competent authority of the host Member State designated as contact point in accordance with Article 79(1) the identity of the tied agents that the credit institution intends to use to provide services in that Member State. The host Member State shall publish such information.

6. Member States shall, without further legal or administrative requirement, allow investment firms and market operators operating MTFs and OTFs from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and trading on those markets by remote users, members or participants established in their territory.

7. The investment firm or the market operator operating an MTF or an OTF shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State shall communicate, within one month, that information to the competent authority of the Member State in which the MTF or the OTF intends to provide such arrangements.

The competent authority of the home Member State of the MTF shall, on the request of the competent authority of the host Member State of the MTF and without undue delay, communicate the identity of the remote members or participants of the MTF established in that Member State.

8. ESMA shall develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2, 4, 5 and 7.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

9. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 3, 4, 5 and 7.

ESMA shall submit those draft implementing technical standards to the Commission by 31 December 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

### Article 35

#### Establishment of a branch

1. Member States shall ensure that investment services and/or activities as well as ancillary services may be provided within their territories in accordance with this Directive and with Directive 2013/36/EU through the right of establishment, whether by the establishment of a branch or by the use of a tied agent established in a Member State outside its home Member State, provided that those services and activities are covered by the authorisation granted to the investment firm or the credit institution in the home Member State. Ancillary services may only be provided together with an investment service and/or activity.

Member States shall not impose any additional requirements save those allowed under paragraph 8, on the organisation and operation of the branch in respect of the matters covered by this Directive.

2. Member States shall require any investment firm wishing to establish a branch within the territory of another Member State or to use tied agents established in another Member State in which it has not established a branch, first to notify the competent authority of its home Member State and to provide it with the following information:

- (a) the Member States within the territory of which it plans to establish a branch or the Member States in which it has not established a branch but plans to use tied agents established there;

- (b) a programme of operations setting out, inter alia, the investment services and/or activities as well as the ancillary services to be offered;
- (c) where established, the organisational structure of the branch and indicating whether the branch intends to use tied agents and the identity of those tied agents;
- (d) where tied agents are to be used in a Member State in which an investment firm has not established a branch, a description of the intended use of the tied agent(s) and an organisational structure, including reporting lines, indicating how the agent(s) fit into the corporate structure of the investment firm;
- (e) the address in the host Member State from which documents may be obtained;
- (f) the names of those responsible for the management of the branch or of the tied agent.

Where an investment firm uses a tied agent established in a Member State outside its home Member State, such tied agent shall be assimilated to the branch, where one is established, and shall in any event be subject to the provisions of this Directive relating to branches.

3. Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of an investment firm, taking into account the activities envisaged, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article 79(1) and inform the investment firm concerned accordingly.

4. In addition to the information referred to in paragraph 2, the competent authority of the home Member State shall communicate details of the accredited compensation scheme of which the investment firm is a member in accordance with Directive 97/9/EC to the competent authority of the host Member State. In the event of a change in the particulars, the competent authority of the home Member State shall inform the competent authority of the host Member State accordingly.

5. Where the competent authority of the home Member State refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the investment firm concerned within three months of receiving all the information.

6. On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the branch may be established and commence business.

7. Any credit institution wishing to use a tied agent established in a Member State outside its home Member State to provide investment services and/or activities as well as ancillary services in accordance with this Directive shall notify the competent authority of its home Member State and provide it with the information referred to in paragraph 2.

Unless the competent authority of the home Member State has reason to doubt the adequacy of the administrative structure or the financial situation of a credit institution, it shall, within three months of receiving all the information, communicate that information to the competent authority of the host Member State designated as contact point in accordance with Article 79(1) and inform the credit institution concerned accordingly.

Where the competent authority of the home Member State refuses to communicate the information to the competent authority of the host Member State, it shall give reasons for its refusal to the credit institution concerned within three months of receiving all the information.

On receipt of a communication from the competent authority of the host Member State, or failing such communication from the latter at the latest after two months from the date of transmission of the communication by the competent authority of the home Member State, the tied agent can commence business. Such tied agent shall be subject to the provisions of this Directive relating to branches.

8. The competent authority of the Member State in which the branch is located shall assume responsibility for ensuring that the services provided by the branch within its territory comply with the obligations laid down in Articles 24, 25, 27, 28, of this Directive and Articles 14 to 26 of Regulation (EU) No 600/2014 and the measures adopted pursuant thereto by the host Member State where allowed in accordance with Article 24(12).

The competent authority of the Member State in which the branch is located shall have the right to examine branch arrangements and to request such changes as are strictly needed to enable the competent authority to enforce the obligations under Articles 24, 25, 27, 28 of this Directive and Articles 14 to 26 of Regulation (EU) No 600/2014 and measures adopted pursuant thereto with respect to the services and/or activities provided by the branch within its territory.

9. Each Member State shall provide that, where an investment firm authorised in another Member State has established a branch within its territory, the competent authority of the home Member State of the investment firm, in the exercise of its responsibilities and after informing the competent authority of the host Member State, may carry out on-site inspections in that branch.

10. In the event of a change in any of the information communicated in accordance with paragraph 2, an investment firm shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The competent authority of the host Member State shall also be informed of that change by the competent authority of the home Member State.

11. ESMA shall develop draft regulatory technical standards to specify the information to be notified in accordance with paragraphs 2, 4, 7 and 10.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

12. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the transmission of information in accordance with paragraphs 3, 4, 7 and 10.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## Article 36

### **Access to regulated markets**

1. Member States shall require that investment firms from other Member States which are authorised to execute client orders or to deal on own account have the right of membership or have access to regulated markets established in their territory by means of any of the following arrangements:

(a) directly, by setting up branches in the host Member States;

- (b) by becoming remote members of or having remote access to the regulated market without having to be established in the home Member State of the regulated market, where the trading procedures and systems of the market in question do not require a physical presence for conclusion of transactions on the market.

2. Member States shall not impose any additional regulatory or administrative requirements, in respect of matters covered by this Directive, on investment firms exercising the right conferred by paragraph 1.

#### Article 37

##### **Access to CCP, clearing and settlement facilities and right to designate settlement system**

1. Without prejudice to Titles III, IV or V of Regulation (EU) No 648/2012, Member States shall require that investment firms from other Member States have the right of direct and indirect access to CCP, clearing and settlement systems in their territory for the purposes of finalising or arranging the finalisation of transactions in financial instruments.

Member States shall require that direct and indirect access of those investment firms to such facilities be subject to the same non-discriminatory, transparent and objective criteria as apply to local members or participants. Member States shall not restrict the use of those facilities to the clearing and settlement of transactions in financial instruments undertaken on a trading venue in their territory.

2. Member States shall require that regulated markets in their territory offer all their members or participants the right to designate the system for the settlement of transactions in financial instruments undertaken on that regulated market, subject to the following conditions:

- (a) such links and arrangements between the designated settlement system and any other system or facility as are necessary to ensure the efficient and economic settlement of the transaction in question;
- (b) agreement by the competent authority responsible for the supervision of the regulated market that technical conditions for settlement of transactions concluded on the regulated market through a settlement system other than that designated by the regulated market are such as to allow the smooth and orderly functioning of financial markets.

That assessment of the competent authority of the regulated market shall be without prejudice to the competencies of the national central banks as overseers of settlement systems or other supervisory authorities with competence in relation to such systems. The competent authority shall take into account the oversight/supervision already exercised by those institutions in order to avoid undue duplication of control.

#### Article 38

##### **Provisions regarding CCPs, clearing and settlement arrangements in respect of MTFs**

1. Member States shall not prevent investment firms and market operators operating an MTF from entering into appropriate arrangements with a CCP or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by the members or participants under their systems.

2. The competent authority of investment firms and market operators operating an MTF may not oppose the use of CCP, clearing houses and/or settlement systems in another Member State except where demonstrably necessary in order to maintain the orderly functioning of that MTF and taking into account the conditions for settlement systems established in Article 37(2).

In order to avoid undue duplication of control, the competent authority shall take into account the oversight and supervision of the clearing and settlement system already exercised by the central banks as overseers of clearing and settlement systems or by other supervisory authorities with competence in relation to such systems.

**CHAPTER IV*****Provision of investment services and activities by third country firms*****Section 1****Provision of services or performance of activities through the establishment of a branch****Article 39****Establishment of a branch**

1. A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State.

2. Where a Member State requires that a third-country firm intending to provide investment services or to perform investment activities with or without any ancillary services in its territory establish a branch, the branch shall acquire a prior authorisation by the competent authorities of that Member State in accordance with the following conditions:

- (a) the provision of services for which the third-country firm requests authorisation is subject to authorisation and supervision in the third country where the firm is established and the requesting firm is properly authorised, whereby the competent authority pays due regard to any FATF recommendations in the context of anti-money laundering and countering the financing of terrorism;
- (b) cooperation arrangements, that include provisions regulating the exchange of information for the purpose of preserving the integrity of the market and protecting investors, are in place between the competent authorities in the Member State where the branch is to be established and competent supervisory authorities of the third country where the firm is established;
- (c) sufficient initial capital is at free disposal of the branch;
- (d) one or more persons are appointed to be responsible for the management of the branch and they all comply with the requirement laid down in Article 9(1);
- (e) the third country where the third-country firm is established has signed an agreement with the Member State where the branch is to be established, which fully comply with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements;
- (f) the firm belongs to an investor-compensation scheme authorised or recognised in accordance with Directive 97/9/EC.

3. The third-country firm referred to in paragraph 1 shall submit its application to the competent authority of the Member State where it intends to establish a branch.

**Article 40****Obligation to provide information**

A third-country firm intending to obtain authorisation for the provision of any investment services or the performance of investment activities with or without any ancillary services in the territory of a Member State through a branch shall provide the competent authority of that Member State with the following:

- (a) the name of the authority responsible for its supervision in the third country concerned. When more than one authority is responsible for supervision, the details of the respective areas of competence shall be provided;

- (b) all relevant details of the firm (name, legal form, registered office and address, members of the management body, relevant shareholders) and a programme of operations setting out the investment services and/or activities as well as the ancillary services to be provided and the organisational structure of the branch, including a description of any outsourcing to third parties of essential operating functions;
- (c) the name of the persons responsible for the management of the branch and the relevant documents to demonstrate compliance with requirements laid down in Article 9(1);
- (d) information about the initial capital at free disposal of the branch.

#### *Article 41*

##### **Granting of the authorisation**

1. The competent authority of the Member State where the third-country firm has established or intends to establish its branch shall only grant authorisation when the competent authority is satisfied that:

(a) the conditions under Article 39 are fulfilled; and

(b) the branch of the third-country firm will be able to comply with the provisions referred to in paragraph 2.

The competent authority shall inform the third-country firm, within six months of submission of a complete application, whether or not the authorisation has been granted.

2. The branch of the third-country firm authorised in accordance with paragraph 1, shall comply with the obligations laid down in Articles 16 to 20, 23, 24, 25 and 27, Article 28(1), and Articles 30, 31 and 32 of this Directive and in Articles 3 to 26 of Regulation (EU) No 600/2014 and the measures adopted pursuant thereto and shall be subject to the supervision of the competent authority in the Member State where the authorisation was granted.

Member States shall not impose any additional requirements on the organisation and operation of the branch in respect of the matters covered by this Directive and shall not treat any branch of third-country firms more favourably than Union firms.

#### *Article 42*

##### **Provision of services at the exclusive initiative of the client**

Member States shall ensure that where a retail client or professional client within the meaning of Section II of Annex II established or situated in the Union initiates at its own exclusive initiative the provision of an investment service or activity by a third-country firm, the requirement for authorisation under Article 39 shall not apply to the provision of that service or activity by the third country firm to that person including a relationship specifically relating to the provision of that service or activity. An initiative by such clients shall not entitle the third-country firm to market otherwise than through the branch, where one is required in accordance with national law, new categories of investment products or investment services to that client.

#### **Section 2**

##### **Withdrawal of authorisations**

#### *Article 43*

##### **Withdrawal of authorisations**

The competent authority which granted an authorisation under Articles 41 may withdraw the authorisation issued to a third country firm where such a firm:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no investment services or performed no investment activity for the preceding six months, unless the Member State concerned has provided for the authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive governing the operating conditions for investment firms and applicable to third-country firms;
- (e) falls within any of the cases where national law, in respect of matters outside the scope of this Directive, provides for withdrawal.

### TITLE III

#### **REGULATED MARKETS**

##### *Article 44*

###### **Authorisation and applicable law**

1. Member States shall reserve authorisation as a regulated market to those systems which comply with this Title.

Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in this Title.

In the case of a regulated market that is a legal person and that is managed or operated by a market operator other than the regulated market itself, Member States shall establish how the different obligations imposed on the market operator under this Directive are to be allocated between the regulated market and the market operator.

The market operator shall provide all information, including a programme of operations setting out, *inter alia*, the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the regulated market has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under this Title.

2. Member States shall require the market operator to perform tasks relating to the organisation and operation of the regulated market under the supervision of the competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of regulated markets with this Title. They shall also ensure that competent authorities monitor that regulated markets comply at all times with the conditions for initial authorisation established under this Title.

3. Member States shall ensure that the market operator is responsible for ensuring that the regulated market that it manages complies with the requirements laid down in this Title.

Member States shall also ensure that the market operator is entitled to exercise the rights that correspond to the regulated market that it manages by virtue of this Directive.

4. Without prejudice to any relevant provisions of Regulation (EU) No 596/2014 or of Directive 2014/57/EU, the public law governing the trading conducted under the systems of the regulated market shall be that of the home Member State of the regulated market.

5. The competent authority may withdraw the authorisation issued to a regulated market, where it:
  - (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has not operated for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
  - (b) has obtained the authorisation by making false statements or by any other irregular means;
  - (c) no longer meets the conditions under which authorisation was granted;
  - (d) has seriously and systematically infringed the provisions adopted pursuant to this Directive or Regulation (EU) No 600/2014;
  - (e) falls within any of the cases where national law provides for withdrawal.

6. ESMA shall be notified of any withdrawal of authorisation.

#### *Article 45*

#### **Requirements for the management body of a market operator**

1. Member States shall require that all members of the management body of any market operator shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience to perform their duties. The overall composition of the management body shall reflect an adequately broad range of experience.

2. Members of the management body shall, in particular, fulfil the following requirements:

- (a) All members of the management body shall commit sufficient time to perform their functions in the market operator. The number of directorships a member of the management body can hold, in any legal entity, at the same time shall take into account individual circumstances and the nature, scale and complexity of the market operator's activities.

Unless representing the Member State, members of the management body of market operators that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities shall not at the same time hold positions exceeding more than one of the following combinations:

- (i) one executive directorship with two non-executive directorships;
  - (ii) four non-executive directorships.

Executive or non-executive directorships held within the same group or undertakings where the market operator owns a qualifying holding shall be considered to be one single directorship.

Competent authorities may authorise members of the management body to hold one additional non-executive directorship. Competent authorities shall regularly inform ESMA of such authorisations.

Directorships in organisations which do not pursue predominantly commercial objectives shall be exempt from the limitation on the number of directorships a member of a management body can hold.

(b) The management body shall possess adequate collective knowledge, skills and experience to be able to understand the market operator's activities, including the main risks.

(c) Each member of the management body shall act with honesty, integrity and independence of mind to effectively assess and challenge the decisions of the senior management where necessary and to effectively oversee and monitor decision-making.

3. Market operators shall devote adequate human and financial resources to the induction and training of members of the management body.

4. Member States shall ensure that market operators which are significant in terms of their size, internal organisation and the nature, scope and complexity of their activities establish a nomination committee composed of members of the management body who do not perform any executive function in the market operator concerned.

The nomination committee shall carry out the following:

(a) identify and recommend, for the approval of the management body or for approval of the general meeting, candidates to fill management body vacancies. In doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body. Further, the committee shall prepare a description of the roles and capabilities for a particular appointment, and assess the time commitment expected. Furthermore, the nomination committee shall decide on a target for the representation of the underrepresented gender in the management body and prepare a policy on how to increase the number of the underrepresented gender in the management body in order to meet that target;

(b) periodically, and at least annually, assess the structure, size, composition and performance of the management body, and make recommendations to the management body with regard to any changes;

(c) periodically, and at least annually, assess the knowledge, skills and experience of individual members of the management body and of the management body collectively, and report to the management body accordingly;

(d) periodically review the policy of the management body for selection and appointment of senior management and make recommendations to the management body.

In performing its duties, the nomination committee shall, to the extent possible and on an ongoing basis, take account of the need to ensure that the management body's decision making is not dominated by any one individual or small group of individuals in a manner that is detrimental to the interests of the market operator as a whole.

In performing its duties, the nomination committee shall be able to use any forms of resources it deems appropriate, including external advice.

Where, under national law, the management body does not have any competence in the process of selection and appointment of any of its members, this paragraph shall not apply.

5. Member States or competent authorities shall require market operators and their respective nomination committees to engage a broad set of qualities and competences when recruiting members to the management body and for that purpose to put in place a policy promoting diversity on the management body.

6. Member States shall ensure that the management body of a market operator defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an organisation, including the segregation of duties in the organisation and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market.

Member States shall ensure that the management body monitors and periodically assesses the effectiveness of the market operator's governance arrangements and takes appropriate steps to address any deficiencies.

Members of the management body shall have adequate access to information and documents which are needed to oversee and monitor management decision-making.

7. The competent authority shall refuse authorisation if it is not satisfied that the members of the management body of the market operator are of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their functions, or if there are objective and demonstrable grounds for believing that the management body of the market operator may pose a threat to its effective, sound and prudent management and to the adequate consideration of the integrity of the market.

Member States shall ensure that, in the process of authorisation of a regulated market, the person or persons who effectively direct the business and the operations of an already authorised regulated market in accordance with this Directive are deemed to comply with the requirements laid down in paragraph 1.

8. Member States shall require the market operator to notify the competent authority of the identity of all members of its management body and of any changes to its membership, along with all information needed to assess whether the market operator complies with paragraphs 1 to 5.

9. ESMA shall issue guidelines on the following:

- (a) the notion of sufficient time commitment of a member of the management body to perform that member's functions, in relation to the individual circumstances and the nature, scale and complexity of activities of the market operator;
- (b) the notion of adequate collective knowledge, skills and experience of the management body as referred to in point (b) of paragraph 2;
- (c) the notions of honesty, integrity and independence of mind of a member of the management body as referred to in point (c) of paragraph 2;
- (d) the notion of adequate human and financial resources devoted to the induction and training of members of the management body as referred to in paragraph 3;
- (e) the notion of diversity to be taken into account for the selection of members of the management body as referred to in paragraph 5.

ESMA shall issue those guidelines by 3 January 2016.

#### Article 46

##### **Requirements relating to persons exercising significant influence over the management of the regulated market**

1. Member States shall require the persons who are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable.

2. Member States shall require the market operator of the regulated market:

- (a) to provide the competent authority with, and to make public, information regarding the ownership of the regulated market and/or the market operator, and in particular, the identity and scale of interests of any parties in a position to exercise significant influence over the management;
- (b) to inform the competent authority of and to make public any transfer of ownership which gives rise to a change in the identity of the persons exercising significant influence over the operation of the regulated market.

3. The competent authority shall refuse to approve proposed changes to the controlling interests of the regulated market and/or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

#### *Article 47*

#### **Organisational requirements**

1. Member States shall require the regulated market:

- (a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its members or participants, of any conflict of interest between the interest of the regulated market, its owners or its market operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;
- (b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;
- (c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;
- (d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;
- (e) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems;
- (f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

2. Member States shall not allow market operators to execute client orders against proprietary capital, or to engage in matched principal trading on any of the regulated markets they operate.

#### *Article 48*

#### **Systems resilience, circuit breakers and electronic trading**

1. Member States shall require a regulated market to have in place effective systems, procedures and arrangements to ensure its trading systems are resilient, have sufficient capacity to deal with peak order and message volumes, are able to ensure orderly trading under conditions of severe market stress, are fully tested to ensure such conditions are met and are subject to effective business continuity arrangements to ensure continuity of its services if there is any failure of its trading systems.

2. Member States shall require a regulated market to have in place:

- (a) written agreements with all investment firms pursuing a market making strategy on the regulated market;
- (b) schemes to ensure that a sufficient number of investment firms participate in such agreements which require them to post firm quotes at competitive prices with the result of providing liquidity to the market on a regular and predictable basis, where such a requirement is appropriate to the nature and scale of the trading on that regulated market.

3. The written agreement referred to in paragraph 2 shall at least specify:

- (a) the obligations of the investment firm in relation to the provision of liquidity and where applicable any other obligation arising from participation in the scheme referred to in paragraph 2(b);
- (b) any incentives in terms of rebates or otherwise offered by the regulated market to an investment firm so as to provide liquidity to the market on a regular and predictable basis and, where applicable, any other rights accruing to the investment firm as a result of participation in the scheme referred to in paragraph 2(b).

The regulated market shall monitor and enforce compliance by investment firms with the requirements of such binding written agreements. The regulated market shall inform the competent authority about the content of the binding written agreement and shall, upon request, provide all further information to the competent authority necessary to enable the competent authority to satisfy itself of compliance by the regulated market with this paragraph.

4. Member States shall require a regulated market to have in place effective systems, procedures and arrangements to reject orders that exceed pre-determined volume and price thresholds or are clearly erroneous.

5. Member States shall require a regulated market to be able to temporarily halt or constrain trading if there is a significant price movement in a financial instrument on that market or a related market during a short period and, in exceptional cases, to be able to cancel, vary or correct any transaction. Member States shall require a regulated market to ensure that the parameters for halting trading are appropriately calibrated in a way which takes into account the liquidity of different asset classes and sub-classes, the nature of the market model and types of users and is sufficient to avoid significant disruptions to the orderliness of trading.

Member States shall ensure that a regulated market reports the parameters for halting trading and any material changes to those parameters to the competent authority in a consistent and comparable manner, and that the competent authority shall in turn report them to ESMA. Member States shall require that where a regulated market which is material in terms of liquidity in that financial instrument halts trading, in any Member State, that trading venue has the necessary systems and procedures in place to ensure that it will notify competent authorities in order for them to coordinate a market-wide response and determine whether it is appropriate to halt trading on other venues on which the financial instrument is traded until trading resumes on the original market.

6. Member States shall require a regulated market to have in place effective systems, procedures and arrangements, including requiring members or participants to carry out appropriate testing of algorithms and providing environments to facilitate such testing, to ensure that algorithmic trading systems cannot create or contribute to disorderly trading conditions on the market and to manage any disorderly trading conditions which do arise from such algorithmic trading systems, including systems to limit the ratio of unexecuted orders to transactions that may be entered into the system by a member or participant, to be able to slow down the flow of orders if there is a risk of its system capacity being reached and to limit and enforce the minimum tick size that may be executed on the market.

7. Member States shall require a regulated market that permits direct electronic access to have in place effective systems procedures and arrangements to ensure that members or participants are only permitted to provide such services if they are investment firms authorised under this Directive or credit institutions authorised under Directive 2013/36/EU,

that appropriate criteria are set and applied regarding the suitability of persons to whom such access may be provided and that the member or participant retains responsibility for orders and trades executed using that service in relation to the requirements of this Directive.

Member States shall also require that the regulated market set appropriate standards regarding risk controls and thresholds on trading through such access and is able to distinguish and if necessary to stop orders or trading by a person using direct electronic access separately from other orders or trading by the member or participant.

The regulated market shall have arrangements in place to suspend or terminate the provision of direct electronic access by a member or participant to a client in the case of non-compliance with this paragraph.

8. Member States shall require a regulated market to ensure that its rules on co-location services are transparent, fair and non-discriminatory.

9. Member States shall require that a regulated market ensure that its fee structures including execution fees, ancillary fees and any rebates are transparent, fair and non-discriminatory and that they do not create incentives to place, modify or cancel orders or to execute transactions in a way which contributes to disorderly trading conditions or market abuse. In particular, Member States shall require a regulated market to impose market making obligations in individual shares or a suitable basket of shares in exchange for any rebates that are granted.

Member States shall allow a regulated market to adjust its fees for cancelled orders according to the length of time for which the order was maintained and to calibrate the fees to each financial instrument to which they apply.

Member States may allow a regulated market to impose a higher fee for placing an order that is subsequently cancelled than an order which is executed and to impose a higher fee on participants placing a high ratio of cancelled orders to executed orders and on those operating a high-frequency algorithmic trading technique in order to reflect the additional burden on system capacity.

10. Member States shall require a regulated market to be able to identify, by means of flagging from members or participants, orders generated by algorithmic trading, the different algorithms used for the creation of orders and the relevant persons initiating those orders. That information shall be available to competent authorities upon request.

11. Member States shall require that upon request by the competent authority of the home Member State of a regulated market, regulated markets make available to the competent authority data relating to the order book or give the competent authority access to the order book so that it is able to monitor trading.

12. ESMA shall develop draft regulatory technical standards further specifying:

- (a) the requirements to ensure trading systems of regulated markets are resilient and have adequate capacity;
- (b) the ratio referred to in paragraph 6, taking into account factors such as the value of unexecuted orders in relation to the value of executed transactions;
- (c) the controls concerning direct electronic access in such a way as to ensure that the controls applied to sponsored access are at least equivalent to those applied to direct market access;
- (d) the requirements to ensure that co-location services and fee structures are fair and non-discriminatory and that fee structures do not create incentives for disorderly trading conditions or market abuse;

- (e) the determination of where a regulated market is material in terms of liquidity in that financial instrument;
- (f) the requirements to ensure that market making schemes are fair and non-discriminatory and to establish minimum market making obligations that regulated markets must provide for when designing a market making scheme and the conditions under which the requirement to have in place a market making scheme is not appropriate, taking into account the nature and scale of the trading on that regulated market, including whether the regulated market allows for or enables algorithmic trading to take place through its systems;
- (g) the requirements to ensure appropriate testing of algorithms so as to ensure that algorithmic trading systems including high-frequency algorithmic trading systems cannot create or contribute to disorderly trading conditions on the market.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

13. ESMA shall, by 3 January 2016, develop guidelines on the appropriate calibration of trading halts under paragraph 5, taking into account the factors referred to in that paragraph.

#### *Article 49*

##### **Tick sizes**

1. Member States shall require regulated markets to adopt tick size regimes in shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and in any other financial instrument for which regulatory technical standards are developed in accordance with paragraph 4.

2. The tick size regimes referred to in paragraph 1 shall:

(a) be calibrated to reflect the liquidity profile of the financial instrument in different markets and the average bid-ask spread, taking into account the desirability of enabling reasonably stable prices without unduly constraining further narrowing of spreads;

(b) adapt the tick size for each financial instrument appropriately.

3. ESMA shall develop draft regulatory technical standards to specify minimum tick sizes or tick size regimes for specific shares, depositary receipts, exchange-traded funds, certificates, and other similar financial instruments where necessary to ensure the orderly functioning of markets, in accordance with the factors in paragraph 2 and the price, spreads and depth of liquidity of the financial instruments.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

4. ESMA may develop draft regulatory technical standards to specify minimum tick sizes or tick size regimes for specific financial instruments other than those listed in paragraph 3 where necessary to ensure the orderly functioning of markets, in accordance with the factors in paragraph 2 and the price, spreads and depth of liquidity of the financial instruments.

ESMA shall submit any such draft regulatory technical standards to the Commission by 3 January 2016.

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

#### *Article 50*

##### **Synchronisation of business clocks**

1. Member States shall require that all trading venues and their members or participants synchronise the business clocks they use to record the date and time of any reportable event.

2. ESMA shall develop draft regulatory technical standards to specify the level of accuracy to which clocks are to be synchronised in accordance with international standards.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

#### *Article 51*

##### **Admission of financial instruments to trading**

1. Member States shall require that regulated markets have clear and transparent rules regarding the admission of financial instruments to trading.

Those rules shall ensure that any financial instruments admitted to trading on a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.

2. In the case of derivatives, the rules referred to in paragraph 1 shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

3. In addition to the obligations set out in paragraphs 1 and 2, Member States shall require the regulated market to establish and maintain effective arrangements to verify that issuers of transferable securities that are admitted to trading on the regulated market comply with their obligations under Union law in respect of initial, ongoing or ad hoc disclosure obligations.

Member States shall ensure that the regulated market establishes arrangements which facilitate its members or participants in obtaining access to information which has been made public under Union law.

4. Member States shall ensure that regulated markets have established the necessary arrangements to review regularly the compliance with the admission requirements of the financial instruments which they admit to trading.

5. A transferable security that has been admitted to trading on a regulated market can subsequently be admitted to trading on other regulated markets, even without the consent of the issuer and in compliance with the relevant provisions of Directive 2003/71/EC. The issuer shall be informed by the regulated market of the fact that its securities are traded on that regulated market. The issuer shall not be subject to any obligation to provide information required under paragraph 3 directly to any regulated market which has admitted the issuer's securities to trading without its consent.

6. ESMA shall develop draft regulatory technical standards which:

- (a) specify the characteristics of different classes of financial instruments to be taken into account by the regulated market when assessing whether a financial instrument is issued in a manner consistent with the conditions laid down in the second subparagraph of paragraph 1 for admission to trading on the different market segments which it operates;
- (b) clarify the arrangements that the regulated market is required to implement so as to be considered to have fulfilled its obligation to verify that the issuer of a transferable security complies with its obligations under Union law in respect of initial, ongoing or ad hoc disclosure obligations;
- (c) clarify the arrangements that the regulated market has to establish pursuant to paragraph 3 in order to facilitate its members or participants in obtaining access to information which has been made public under the conditions established by Union law.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Article 52

### **Suspension and removal of financial instruments from trading on a regulated market**

1. Without prejudice to the right of the competent authority under Article 69(2) to demand suspension or removal of a financial instrument from trading, a market operator may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such suspension or removal would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.

2. Member States shall require that a market operator that suspends or removes from trading a financial instrument also suspends or removes the derivatives as referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument where necessary to support the objectives of the suspension or removal of the underlying financial instrument. The market operator shall make public its decision on the suspension or removal of the financial instrument and of any related derivative and communicate the relevant decisions to its competent authority.

The competent authority, in whose jurisdiction the suspension or removal originated, shall require that other regulated markets, MTFs, OTFs and systematic internalisers, which fall under its jurisdiction and trade the same financial instrument or derivatives as referred to in points (4) to (10) of Section C of Annex I to this Directive that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument infringing Articles 7 and 17 of Regulation (EU) No. 596/2014 except where such suspension or removal could cause significant damage to the investors' interests or the orderly functioning of the market.

Each notified competent authority shall communicate its decision to ESMA and other competent authorities, including an explanation if the decision was not to suspend or remove from trading the financial instrument or derivatives as referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument.

The competent authority shall immediately make public and communicate to ESMA and the competent authorities of the other Member States such a decision.

The notified competent authorities of the other Member States shall require that regulated markets, other MTFs, other OTFs and systematic internalisers, which fall under their jurisdiction and trade the same financial instrument or derivatives referred to in points (4) to (10) of Section C of Annex I to this Directive that relate or are referenced to that financial instrument, also suspend or remove that financial instrument or derivatives from trading, where the suspension or removal is due to suspected market abuse, a take-over bid or the non-disclosure of inside information about the issuer or financial instrument infringing Articles 7 and 17 of Regulation (EU) No 596/2014 except where such suspension or removal could cause significant damage to the investors' interests or the orderly functioning of the market.

This paragraph applies also when the suspension from trading of a financial instrument or derivatives as referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument is lifted.

The notification procedure referred to in this paragraph shall also apply in the case where the decision to suspend or remove from trading a financial instrument or derivatives as referred to in points (4) to (10) of Section C of Annex I that relate or are referenced to that financial instrument is taken by the competent authority pursuant to points (m) and (n) of Article 69(2).

In order to ensure that the obligation to suspend or remove from trading such derivatives is applied proportionately, ESMA shall develop draft regulatory technical standards to further specify the cases in which the connection between a derivative relating or referenced to a financial instrument suspended or removed from trading and the original financial instrument implies that the derivative are also to be suspended or removed from trading, in order to achieve the objective of the suspension or removal of the underlying financial instrument.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

3. ESMA shall develop draft implementing technical standards to determine the format and timing of the communications and publications referred to in paragraph 2.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to specify the list of circumstances constituting significant damage to the investors' interests and the orderly functioning of the market referred to in paragraphs 1 and 2.

#### Article 53

##### **Access to a regulated market**

1. Member States shall require a regulated market to establish, implement and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the regulated market.

2. The rules referred to in paragraph 1 shall specify any obligations for the members or participants arising from:

- (a) the constitution and administration of the regulated market;
- (b) rules relating to transactions on the market;
- (c) professional standards imposed on the staff of the investment firms or credit institutions that are operating on the market;
- (d) the conditions established, for members or participants other than investment firms and credit institutions, under paragraph 3;
- (e) the rules and procedures for the clearing and settlement of transactions concluded on the regulated market.

3. Regulated markets may admit as members or participants investment firms, credit institutions authorised under Directive 2013/36/EU and other persons who:

- (a) are of sufficient good repute;
- (b) have a sufficient level of trading ability, competence and experience;
- (c) have, where applicable, adequate organisational arrangements;
- (d) have sufficient resources for the role they are to perform, taking into account the different financial arrangements that the regulated market may have established in order to guarantee the adequate settlement of transactions.

4. Member States shall ensure that, for the transactions concluded on a regulated market, members and participants are not obliged to apply to each other the obligations laid down in Articles 24, 25, 27 and 28. However, the members or participants of the regulated market shall apply the obligations provided for in Articles 24, 25, 27 and 28 with respect to their clients when they, acting on behalf of their clients, execute their orders on a regulated market.

5. Member States shall ensure that the rules on access to or membership of or participation in the regulated market provide for the direct or remote participation of investment firms and credit institutions.

6. Member States shall, without further legal or administrative requirements, allow regulated markets from other Member States to provide appropriate arrangements on their territory so as to facilitate access to and trading on those markets by remote members or participants established in their territory.

The regulated market shall communicate to the competent authority of its home Member State the Member State in which it intends to provide such arrangements. The competent authority of the home Member State shall communicate that information to the Member State in which the regulated market intends to provide such arrangements within 1 month. ESMA may request access to that information in accordance with the procedure and under the conditions set out in Article 35 of Regulation (EU) No 1095/2010.

The competent authority of the home Member State of the regulated market shall, on the request of the competent authority of the host Member State and, without undue delay, communicate the identity of the members or participants of the regulated market established in that Member State.

7. Member States shall require the market operator to communicate, on a regular basis, the list of the members or participants of the regulated market to the competent authority of the regulated market.

#### Article 54

##### **Monitoring of compliance with the rules of the regulated market and with other legal obligations**

1. Member States shall require that regulated markets establish and maintain effective arrangements and procedures including the necessary resource for the regular monitoring of the compliance by their members or participants with their rules. Regulated markets shall monitor orders sent including cancellations and the transactions undertaken by their members or participants under their systems in order to identify infringements of those rules, disorderly trading conditions or conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014 or system disruptions in relation to a financial instrument.

2. Member States shall require the market operators of the regulated markets to immediately inform their competent authorities of significant infringements of their rules or disorderly trading conditions or conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014 or system disruptions in relation to a financial instrument.

The competent authorities of the regulated markets shall communicate to ESMA and to the competent authorities of the other Member States the information referred to in the first subparagraph.

In relation to conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014, a competent authority shall be convinced that such behaviour is being or has been carried out before it notifies the competent authorities of the other Member States and ESMA.

3. Member States shall require the market operator to supply the relevant information without undue delay to the authority competent for the investigation and prosecution of market abuse on the regulated market and to provide full assistance to the latter in investigating and prosecuting market abuse occurring on or through the systems of the regulated market.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to determine circumstances that trigger an information requirement as referred to in paragraph 2 of this Article.

#### Article 55

##### **Provisions regarding CCP and clearing and settlement arrangements**

1. Without prejudice to Titles III, IV or V of Regulation (EU) No 648/2012, Member States shall not prevent regulated markets from entering into appropriate arrangements with a CCP or clearing house and a settlement system of another Member State with a view to providing for the clearing and/or settlement of some or all trades concluded by market participants under their systems.

2. Without prejudice to Titles III, IV or V of Regulation (EU) No 648/2012, the competent authority of a regulated market may not oppose the use of CCP, clearing houses and/or settlement systems in another Member State except where demonstrably necessary in order to maintain the orderly functioning of that regulated market and taking into account the conditions for settlement systems established in Article 37(2) of this Directive.

In order to avoid undue duplication of control, the competent authority shall take into account the oversight/supervision of the clearing and settlement system already exercised by the central banks as overseers of clearing and settlement systems or by other supervisory authorities with competence in relation to such systems.

*Article 56***List of regulated markets**

Each Member State shall draw up a list of the regulated markets for which it is the home Member State and shall forward that list to the other Member States and ESMA. A similar communication shall be effected in respect of each change to that list. ESMA shall publish and keep up-to-date a list of all regulated markets on its website. That list shall contain the unique code established by ESMA in accordance with Article 65(6) identifying the regulated markets for use in reports in accordance with point (g) of Article 65(1) and point (g) of Article 65(2) of this Directive and with Articles 6, 10 and 26 of Regulation (EU) No 600/2014.

## TITLE IV

**POSITION LIMITS AND POSITION MANAGEMENT CONTROLS IN COMMODITY DERIVATIVES AND REPORTING***Article 57***Position limits and position management controls in commodity derivatives**

1. Member States shall ensure that competent authorities, in line with the methodology for calculation determined by ESMA, establish and apply position limits on the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and economically equivalent OTC contracts. The limits shall be set on the basis of all positions held by a person and those held on its behalf at an aggregate group level in order to:

- (a) prevent market abuse;
- (b) support orderly pricing and settlement conditions, including preventing market distorting positions, and ensuring, in particular, convergence between prices of derivatives in the delivery month and spot prices for the underlying commodity, without prejudice to price discovery on the market for the underlying commodity.

Position limits shall not apply to positions held by or on behalf of a non-financial entity and which are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity.

2. Position limits shall specify clear quantitative thresholds for the maximum size of a position in a commodity derivative that persons can hold.

3. ESMA shall develop draft regulatory technical standards to determine the methodology for calculation that competent authorities are to apply in establishing the spot month position limits and other months' position limits for physically settled and cash settled commodity derivatives based on the characteristics of the relevant derivative. The methodology for calculation shall take into account at least the following factors:

- (a) the maturity of the commodity derivative contracts;
- (b) the deliverable supply in the underlying commodity;
- (c) the overall open interest in that contract and the overall open interest in other financial instruments with the same underlying commodity;
- (d) the volatility of the relevant markets, including substitute derivatives and the underlying commodity markets;
- (e) the number and size of the market participants;

(f) the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market;

(g) the development of new contracts.

ESMA shall take into account experience regarding the position limits of investment firms or market operators operating a trading venue and of other jurisdictions.

ESMA shall submit those draft regulatory technical standards referred to in the first subparagraph to the Commission by 3 July 2015.

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

4. A competent authority shall set limits for each contract in commodity derivatives traded on trading venues based on the methodology for calculation determined by ESMA in accordance with paragraph 3. That position limit shall include economically equivalent OTC contracts.

A competent authority shall review position limits where there is a significant change in deliverable supply or open interest or any other significant change on the market, based on its determination of deliverable supply and open interest and reset the position limit in accordance with the methodology for calculation developed by ESMA.

5. Competent authorities shall notify ESMA of the exact position limits they intend to set in accordance with the methodology for calculation established by ESMA under paragraph 3. Within two months following receipt of the notification, ESMA shall issue an opinion to the competent authority concerned assessing the compatibility of position limits with the objectives of paragraph 1 and with the methodology for calculation established by ESMA under paragraph 3. ESMA shall publish the opinion on its website. The competent authority concerned shall modify the position limits in accordance with ESMA's opinion, or provide ESMA with justification why the change is considered to be unnecessary. Where a competent authority imposes limits contrary to an ESMA opinion, it shall immediately publish on its website a notice fully explaining its reasons for doing so.

Where ESMA determines that a position limit is not in line with the methodology for calculation in paragraph 3, it shall take action in accordance with its powers under Article 17 of Regulation (EU) No 1095/2010.

6. Where the same commodity derivative is traded in significant volumes on trading venues in more than one jurisdiction, the competent authority of the trading venue where the largest volume of trading takes place (the central competent authority) shall set the single position limit to be applied on all trading in that contract. The central competent authority shall consult the competent authorities of other trading venues on which that derivative is traded in significant volumes on the single position limit to be applied and any revisions to that single position limit. Where competent authorities do not agree, they shall state in writing the full and detailed reasons why they consider that the requirements laid down in paragraph 1 are not met. ESMA shall settle any dispute arising from a disagreement between competent authorities in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

The competent authorities of the trading venues where the same commodity derivative is traded and the competent authorities of position holders in that commodity derivative shall put in place cooperation arrangements including exchange of relevant data with each other in order to enable the monitoring and enforcement of the single position limit.

7. ESMA shall monitor at least once a year the way competent authorities have implemented the position limits set in accordance with the methodology for calculation established by ESMA under paragraph 3. In doing so, ESMA shall ensure that a single position limit effectively applies to the same contract irrespective of where it is traded in line with paragraph 6.

8. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives apply position management controls. Those controls shall include at least, the powers for the trading venue to:

- (a) monitor the open interest positions of persons;
- (b) access information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market;
- (c) require a person to terminate or reduce a position, on a temporary or permanent basis as the specific case may require and to unilaterally take appropriate action to ensure the termination or reduction if the person does not comply; and
- (d) where appropriate, require a person to provide liquidity back into the market at an agreed price and volume on a temporary basis with the express intent of mitigating the effects of a large or dominant position.

9. The position limits and position management controls shall be transparent and non-discriminatory, specifying how they apply to persons and taking account of the nature and composition of market participants and of the use they make of the contracts submitted to trading.

10. The investment firm or market operator operating the trading venue shall inform the competent authority of the details of position management controls.

The competent authority shall communicate the same information as well as the details of the position limits it has established to ESMA, which shall publish and maintain on its website a database with summaries of the position limits and position management controls.

11. The position limits of paragraph 1 shall be imposed by competent authorities pursuant to point (p) of Article 69(2).

12. ESMA shall develop draft regulatory technical standards to determine:

- (a) the criteria and methods for determining whether a position qualifies as reducing risks directly relating to commercial activities;
- (b) the methods to determine when positions of a person are to be aggregated within a group;
- (c) the criteria for determining whether a contract is an economically equivalent OTC contract to that traded on a trading venue, referred to in paragraph 1, in a way that facilitates the reporting of positions taken in equivalent OTC contracts to the relevant competent authority as determined in Article 58(2);

- (d) the definition of what constitutes the same commodity derivative and significant volumes under paragraph 6 of this Article;
- (e) the methodology for aggregating and netting OTC and on-venue commodity derivatives positions to establish the net position for purposes of assessing compliance with the limits. Such methodologies shall establish criteria to determine which positions may be netted against one another and shall not facilitate the build-up of positions in a manner inconsistent with the objectives set out in paragraph 1 of this Article;
- (f) the procedure setting out how persons may apply for the exemption under the second subparagraph of paragraph 1 of this Article and how the relevant competent authority will approve such applications;
- (g) the method for calculation to determine the venue where the largest volume of trading in a commodity derivative takes place and significant volumes under paragraph 6 of this Article.

ESMA shall submit those draft regulatory technical standards referred to in the first subparagraph to the Commission by 3 July 2015.

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

13. Competent authorities shall not impose limits which are more restrictive than those adopted pursuant to paragraph 1 except in exceptional cases where they are objectively justified and proportionate taking into account the liquidity of the specific market and the orderly functioning of that market. Competent authorities shall publish on their website the details of the more restrictive position limits they decide to impose, which shall be valid for an initial period not exceeding six months from the date of their publication on the website. The more restrictive position limits may be renewed for further periods not exceeding six months at a time if the grounds for the restriction continue to be applicable. If not renewed after that six-month period, they shall automatically expire.

Where competent authorities decide to impose more restrictive position limits, they shall notify ESMA. The notification shall include a justification for the more restrictive position limits. ESMA shall, within 24 hours, issue an opinion on whether it considers that the more restrictive position limits are necessary to address the exceptional case. The opinion shall be published on ESMA's website.

Where a competent authority imposes limits contrary to an ESMA opinion, it shall immediately publish on its website a notice fully explaining its reasons for doing so.

14. Member States shall provide that competent authorities can apply their powers to impose sanctions under this Directive for the infringements of position limits set in accordance with this Article to:

- (a) positions held by persons situated or operating in its territory or abroad which exceed the limits on commodity derivative contracts the competent authority has set in relation to contracts on trading venues situated or operating in its territory or economically equivalent OTC contracts;
- (b) positions held by persons situated or operating in its territory which exceed the limits on commodity derivative contracts set by competent authorities in other Member States.

**Article 58****Position reporting by categories of position holders**

1. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission allowances or derivatives thereof:

- (a) make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives thereof traded on their trading venue, specifying the number of long and short positions by such categories, changes thereto since the previous report, the percentage of the total open interest represented by each category and the number of persons holding a position in each category in accordance with paragraph 4 and communicate that report to the competent authority and to ESMA; ESMA shall proceed to a centralised publication of the information included in those reports;
- (b) provide the competent authority with a complete breakdown of the positions held by all persons, including the members or participants and the clients thereof, on that trading venue, at least on a daily basis.

The obligation laid down in point (a) shall only apply when both the number of persons and their open positions exceed minimum thresholds.

2. Member States shall ensure that investment firms trading in commodity derivatives or emission allowances or derivatives thereof outside a trading venue provide the competent authority of the trading venue where the commodity derivatives or emission allowances or derivatives thereof are traded or the central competent authority where the commodity derivatives or emission allowances or derivatives thereof are traded in significant volumes on trading venues in more than one jurisdiction at least on a daily basis with a complete breakdown of their positions taken in commodity derivatives or emission allowances or derivatives thereof traded on a trading venue and economically equivalent OTC contracts, as well as of those of their clients and the clients of those clients until the end client is reached, in accordance with Article 26 of Regulation (EU) No 600/2014 and, where applicable, of Article 8 of Regulation (EU) No 1227/2011.

3. In order to enable monitoring of compliance with Article 57(1), Member States shall require members or participants of regulated markets, MTFs and clients of OTFs to report to the investment firm or market operator operating that trading venue the details of their own positions held through contracts traded on that trading venue at least on a daily basis, as well as those of their clients and the clients of those clients until the end client is reached.

4. Persons holding positions in a commodity derivative or emission allowance or derivative thereof shall be classified by the investment firm or market operator operating that trading venue according to the nature of their main business, taking account of any applicable authorisation, as either:

- (a) investment firms or credit institutions;
- (b) investment funds, either an undertaking for collective investments in transferable securities (UCITS) as defined in Directive 2009/65/EC, or an alternative investment fund manager as defined in Directive 2011/61/EC;
- (c) other financial institutions, including insurance undertakings and reinsurance undertakings as defined in Directive 2009/138/EC, and institutions for occupational retirement provision as defined in Directive 2003/41/EC;
- (d) commercial undertakings;

- (e) in the case of emission allowances or derivatives thereof, operators with compliance obligations under Directive 2003/87/EC.

The reports referred to in point (a) of paragraph 1 shall specify the number of long and short positions by category of persons, any changes thereto since the previous report, percent of total open interest represented by each category, and the number of persons in each category.

The reports referred to in point (a) of paragraph 1 and the breakdowns referred to in paragraph 2 shall differentiate between:

- (a) positions identified as positions which in an objectively measurable way reduce risks directly relating to commercial activities; and
- (b) other positions.

5. ESMA shall develop draft implementing technical standards to determine the format of the reports referred to in point (a) of paragraph 1 and of the breakdowns referred to in paragraph 2.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

In the case of emission allowances or derivatives thereof, the reporting shall not prejudice the compliance obligations under Directive 2003/87/EC.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to specify the thresholds referred to in the second subparagraph of paragraph 1 of this Article, having regard to the total number of open positions and their size and the total number of persons holding a position.

7. ESMA shall develop draft implementing technical standards to specify the measures to require all reports referred to in point (a) of paragraph 1 to be sent to ESMA at a specified weekly time, for their centralised publication by the latter.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## TITLE V

### DATA REPORTING SERVICES

#### Section 1

#### AUTHORISATION PROCEDURES FOR DATA REPORTING SERVICES PROVIDERS

##### Article 59

###### Requirement for authorisation

1. Member States shall require that the provision of data reporting services described in Annex I, Section D as a regular occupation or business be subject to prior authorisation in accordance with this Section. Such authorisation shall be granted by the home Member State competent authority designated in accordance with Article 67.

2. By way of derogation from paragraph 1, Member States shall allow an investment firm or a market operator operating a trading venue to operate the data reporting services of an APA, a CTP and an ARM, subject to the prior verification of their compliance with this Title. Such a service shall be included in their authorisation.

3. Member States shall register all data reporting services providers. The register shall be publicly accessible and shall contain information on the services for which the data reporting services provider is authorised. It shall be updated on a regular basis. Every authorisation shall be notified to ESMA.

ESMA shall establish a list of all data reporting services providers in the Union. The list shall contain information on the services for which the data reporting services provider is authorised and it shall be updated on a regular basis. ESMA shall publish and keep up-to-date that list on its website.

Where a competent authority has withdrawn an authorisation in accordance with Article 62, that withdrawal shall be published on the list for a period of 5 years.

4. Member States shall require data reporting services providers to provide their services under the supervision of the competent authority. Member States shall ensure that competent authorities keep under regular review the compliance of data reporting services providers with this Title. They shall also ensure that competent authorities monitor that data reporting services providers comply at all times with the conditions for initial authorisation established under this Title.

#### *Article 60*

##### **Scope of authorisation**

1. The home Member State shall ensure that the authorisation specifies the data reporting service which the data reporting services provider is authorised to provide. A data reporting services provider seeking to extend its business to additional data reporting services shall submit a request for extension of its authorisation.

2. The authorisation shall be valid for the entire Union and shall allow a data reporting services provider to provide the services, for which it has been authorised, throughout the Union.

#### *Article 61*

##### **Procedures for granting and refusing requests for authorisation**

1. The competent authority shall not grant authorisation unless and until such time as it is fully satisfied that the applicant complies with all requirements under the provisions adopted pursuant to this Directive.

2. The data reporting services provider shall provide all information, including a programme of operations setting out, inter alia, the types of services envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the data reporting services provider has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Title.

3. An applicant shall be informed, within six months of the submission of a complete application, whether or not authorisation has been granted.

4. ESMA shall develop draft regulatory technical standards to determine:

(a) the information to be provided to the competent authorities under paragraph 2, including the programme of operations;

(b) the information included in the notifications under Article 63(3).

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 3 July 2015.

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

5. ESMA shall develop draft implementing technical standards to determine standard forms, templates and procedures for the notification or provision of information provided for in paragraph 2 of this Article and in Article 63(4).

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 62*

##### **Withdrawal of authorisations**

The competent authority may withdraw the authorisation issued to a data reporting services provider where the provider:

- (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has provided no data reporting services for the preceding six months, unless the Member State concerned has provided for authorisation to lapse in such cases;
- (b) has obtained the authorisation by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which authorisation was granted;
- (d) has seriously and systematically infringed the provisions of this Directive or of Regulation (EU) No 600/2014.

#### *Article 63*

##### **Requirements for the management body of a data reporting services provider**

1. Member States shall require that all members of the management body of a data reporting services provider shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience and commit sufficient time to perform their duties.

The management body shall possess adequate collective knowledge, skills and experience to be able to understand the activities of the data reporting services provider. Each member of the management body shall act with honesty, integrity and independence of mind to effectively challenge the decisions of the senior management where necessary and to effectively oversee and monitor management decision-making where necessary.

Where a market operator seeks authorisation to operate an APA, a CTP or an ARM and the members of the management body of the APA, the CTP or the ARM are the same as the members of the management body of the regulated market, those persons are deemed to comply with the requirement laid down in the first subparagraph.

2. ESMA shall, by 3 January 2016, develop guidelines for the assessment of the suitability of the members of the management body described in paragraph 1, taking into account different roles and functions carried out by them and the need to avoid conflicts of interest between members of the management body and users of the APA, CTP or ARM.

3. Member States shall require the data reporting services provider to notify the competent authority of all members of its management body and of any changes to its membership, along with all information needed to assess whether the entity complies with paragraph 1.

4. Member States shall ensure that the management body of a data reporting services provider defines and oversees the implementation of the governance arrangements that ensure effective and prudent management of an organisation including the segregation of duties in the organisation and the prevention of conflicts of interest, and in a manner that promotes the integrity of the market and the interest of its clients.

5. The competent authority shall refuse authorisation if it is not satisfied that the person or the persons who shall effectively direct the business of the data reporting services provider are of sufficiently good repute, or if there are objective and demonstrable grounds for believing that proposed changes to the management of the provider pose a threat to its sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market.

## Section 2

### Conditions for APAs

#### Article 64

#### Organisational requirements

1. The home Member State shall require an APA to have adequate policies and arrangements in place to make public the information required under Articles 20 and 21 of Regulation (EU) No 600/2014 as close to real time as is technically possible, on a reasonable commercial basis. The information shall be made available free of charge 15 minutes after the APA has published it. The home Member State shall require the APA to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in a format that facilitates the consolidation of the information with similar data from other sources.

2. The information made public by an APA in accordance with paragraph 1 shall include, at least, the following details:

- (a) the identifier of the financial instrument;
- (b) the price at which the transaction was concluded;
- (c) the volume of the transaction;
- (d) the time of the transaction;
- (e) the time the transaction was reported;
- (f) the price notation of the transaction;

(g) the code for the trading venue the transaction was executed on, or where the transaction was executed via a systematic internaliser the code 'SI' or otherwise the code 'OTC';

(h) if applicable, an indicator that the transaction was subject to specific conditions.

3. The home Member State shall require the APA to operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients. In particular, an APA who is also a market operator or investment firm shall treat all information collected in a non-discriminatory fashion and shall operate and maintain appropriate arrangements to separate different business functions.

4. The home Member State shall require the APA to have sound security mechanisms in place designed to guarantee the security of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage before publication. The APA shall maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

5. The home Member State shall require the APA to have systems in place that can effectively check trade reports for completeness, identify omissions and obvious errors and request re-transmission of any such erroneous reports.

6. ESMA shall develop draft regulatory technical standards to determine common formats, data standards and technical arrangements facilitating the consolidation of information as referred to in paragraph 1.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 3 July 2015.

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

7. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 clarifying what constitutes a reasonable commercial basis to make information public as referred to in paragraph 1 of this Article.

8. ESMA shall develop draft regulatory technical standards specifying:

(a) the means by which an APA may comply with the information obligation referred to in paragraph 1;

(b) the content of the information published under paragraph 1, including at least the information referred to in paragraph 2 in such a way as to enable the publication of information required under Article 64;

(c) the concrete organisational requirements laid down in paragraphs 3, 4 and 5.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

**Section 3****Conditions for CTPs****Article 65****Organisational requirements**

1. The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 6 and 20 of Regulation (EU) No 600/2014, consolidate it into a continuous electronic data stream and make the information available to the public as close to real time as is technically possible, on a reasonable commercial basis.

That information shall include, at least, the following details:

- (a) the identifier of the financial instrument;
- (b) the price at which the transaction was concluded;
- (c) the volume of the transaction;
- (d) the time of the transaction;
- (e) the time the transaction was reported;
- (f) the price notation of the transaction;
- (g) the code for the trading venue the transaction was executed on, or where the transaction was executed via a systematic internaliser the code 'SI' or otherwise the code 'OTC';
- (h) where applicable, the fact that a computer algorithm within the investment firm was responsible for the investment decision and the execution of the transaction;
- (i) if applicable, an indicator that the transaction was subject to specific conditions;
- (j) if the obligation to make public the information referred to in Article 3(1) of Regulation (EU) No 600/2014 was waived in accordance with point (a) or (b) of Article 4(1) of that Regulation, a flag to indicate which of those waivers the transaction was subject to.

The information shall be made available free of charge 15 minutes after the CTP has published it. The home Member State shall require the CTP to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in formats that are easily accessible and utilisable for market participants.

2. The home Member State shall require a CTP to have adequate policies and arrangements in place to collect the information made public in accordance with Articles 10 and 21 of Regulation (EU) No 600/2014, consolidate it into a continuous electronic data stream and make following information available to the public as close to real time as is technically possible, on a reasonable commercial basis including, at least, the following details:

- (a) the identifier or identifying features of the financial instrument;

- (b) the price at which the transaction was concluded;
- (c) the volume of the transaction;
- (d) the time of the transaction;
- (e) the time the transaction was reported;
- (f) the price notation of the transaction;
- (g) the code for the trading venue the transaction was executed on, or where the transaction was executed via a systematic internaliser the code 'SI' or otherwise the code 'OTC';
- (h) if applicable, an indicator that the transaction was subject to specific conditions.

The information shall be made available free of charge 15 minutes after the CTP has published it. The home Member State shall require the CTP to be able to efficiently and consistently disseminate such information in a way that ensures fast access to the information, on a non-discriminatory basis and in generally accepted formats that are interoperable and easily accessible and utilisable for market participants.

3. The home Member State shall require the CTP to ensure that the data provided is consolidated from all the regulated markets, MTFs, OTFs and APAs and for the financial instruments specified by regulatory technical standards under point (c) of paragraph 8.

4. The home Member State shall require the CTP to operate and maintain effective administrative arrangements designed to prevent conflicts of interest. In particular, a market operator or an APA, who also operate a consolidated tape, shall treat all information collected in a non-discriminatory fashion and shall operate and maintain appropriate arrangements to separate different business functions.

5. The home Member State shall require the CTP to have sound security mechanisms in place designed to guarantee the security of the means of transfer of information and to minimise the risk of data corruption and unauthorised access. The home Member State shall require the CTP to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

6. ESMA shall develop draft regulatory technical standards to determine data standards and formats for the information to be published in accordance with Articles 6, 10, 20 and 21 of Regulation (EU) No 600/2014, including financial instrument identifier, price, quantity, time, price notation, venue identifier and indicators for specific conditions the transactions was subject to as well as technical arrangements promoting an efficient and consistent dissemination of information in a way ensuring for it to be easily accessible and utilisable for market participants as referred to in paragraphs 1 and 2, including identifying additional services the CTP could perform which increase the efficiency of the market.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 3 July 2015 in respect of information published in accordance with Articles 6 and 20 of Regulation (EU) No 600/2014 and by 3 July 2015 in respect of information published in accordance with Articles 10 and 21 of Regulation (EU) No 600/2014.

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

7. The Commission shall adopt delegated acts in accordance with Article 89 clarifying what constitutes a reasonable commercial basis to provide access to data streams as referred to in paragraphs 1 and 2 of this Article.

8. ESMA shall develop draft regulatory technical standards specifying:

- (a) the means by which the CTP may comply with the information obligation referred to in paragraphs 1 and 2;
- (b) the content of the information published under paragraphs 1 and 2;
- (c) the financial instruments data of which must be provided in the data stream and for non-equity instruments the trading venues and APAs which need to be included;
- (d) other means to ensure that the data published by different CTPs is consistent and allows for comprehensive mapping and cross-referencing against similar data from other sources, and is capable of being aggregated at Union level;
- (e) the concrete organisational requirements laid down in paragraphs 4 and 5.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## Section 4

### Conditions for ARMs

#### Article 66

##### Organisational requirements

1. The home Member State shall require an ARM to have adequate policies and arrangements in place to report the information required under Article 26 of Regulation (EU) No 600/2014 as quickly as possible, and no later than the close of the working day following the day upon which the transaction took place. Such information shall be reported in accordance with the requirements laid down in Article 26 of Regulation (EU) No 600/2014.

2. The home Member State shall require the ARM to operate and maintain effective administrative arrangements designed to prevent conflicts of interest with its clients. In particular, an ARM that is also a market operator or investment firm shall treat all information collected in a non-discriminatory fashion and shall operate and maintain appropriate arrangements to separate different business functions.

3. The home Member State shall require the ARM to have sound security mechanisms in place designed to guarantee the security and authentication of the means of transfer of information, minimise the risk of data corruption and unauthorised access and to prevent information leakage, maintaining the confidentiality of the data at all times. The home Member State shall require the ARM to maintain adequate resources and have back-up facilities in place in order to offer and maintain its services at all times.

4. The home Member State shall require the ARM to have systems in place that can effectively check transaction reports for completeness, identify omissions and obvious errors caused by the investment firm and where such error or omission occurs, to communicate details of the error or omission to the investment firm and request re-transmission of any such erroneous reports.

The home Member State shall also require the ARM to have systems in place to enable the ARM to detect errors or omissions caused by the ARM itself and to enable the ARM to correct and transmit, or re-transmit as the case may be, correct and complete transaction reports to the competent authority.

5. ESMA shall develop draft regulatory technical standards specifying:

- (a) the means by which the ARM may comply with the information obligation referred to in paragraph 1; and
- (b) the concrete organisational requirements laid down in paragraphs 2, 3 and 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

## TITLE VI

### COMPETENT AUTHORITIES

#### CHAPTER I

##### *Designation, powers and redress procedures*

###### Article 67

###### **Designation of competent authorities**

1. Each Member State shall designate the competent authorities which are to carry out each of the duties provided for under the different provisions of Regulation (EU) No 600/2014 and of this Directive. Member States shall inform the Commission, ESMA and the competent authorities of other Member States of the identity of the competent authorities responsible for enforcement of each of those duties, and of any division of those duties.

2. The competent authorities referred to in paragraph 1 shall be public authorities, without prejudice to the possibility of delegating tasks to other entities where that is expressly provided for in Article 29(4).

Any delegation of tasks to entities other than the authorities referred to in paragraph 1 may not involve either the exercise of public authority or the use of discretionary powers of judgement. Member States shall require that, prior to delegation, competent authorities take all reasonable steps to ensure that the entity to which tasks are to be delegated has the capacity and resources to effectively execute all tasks and that the delegation takes place only if a clearly defined and documented framework for the exercise of any delegated tasks has been established stating the tasks to be undertaken and the conditions under which they are to be carried out. Those conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. The final responsibility for supervising compliance with this Directive and with its implementing measures shall lie with the competent authority or authorities designated in accordance with paragraph 1.

Member States shall inform the Commission, ESMA and the competent authorities of other Member States of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

3. ESMA shall publish and keep up-to-date a list of the competent authorities referred to in paragraphs 1 and 2 on its website.

*Article 68***Cooperation between authorities in the same Member State**

If a Member State designates more than one competent authority to enforce a provision of this Directive or of Regulation (EU) No 600/2014, their respective roles shall be clearly defined and they shall cooperate closely.

Each Member State shall require that such cooperation also take place between the competent authorities for the purposes of this Directive or of Regulation (EU) No 600/2014 and the competent authorities responsible in that Member State for the supervision of credit and other financial institutions, pension funds, UCITS, insurance and reinsurance intermediaries and insurance undertakings.

Member States shall require that competent authorities exchange any information which is essential or relevant to the exercise of their functions and duties.

*Article 69***Supervisory powers**

1. Competent authorities shall be given all supervisory powers, including investigatory powers and powers to impose remedies, necessary to fulfil their duties under this Directive and under Regulation (EU) No 600/2014.
2. The powers referred to in paragraph 1 shall include, at least, the following powers to:
  - (a) have access to any document or other data in any form which the competent authority considers could be relevant for the performance of its duties and receive or take a copy of it;
  - (b) require or demand the provision of information from any person and if necessary to summon and question a person with a view to obtaining information;
  - (c) carry out on-site inspections or investigations;
  - (d) require existing recordings of telephone conversations or electronic communications or other data traffic records held by an investment firm, a credit institution, or any other entity regulated by this Directive or by Regulation (EU) No 600/2014;
  - (e) require the freezing or the sequestration of assets, or both;
  - (f) require the temporary prohibition of professional activity;
  - (g) require the auditors of authorised investment firms, regulated markets and data reporting services providers to provide information;
  - (h) refer matters for criminal prosecution;
  - (i) allow auditors or experts to carry out verifications or investigations;
  - (j) require or demand the provision of information including all relevant documentation from any person regarding the size and purpose of a position or exposure entered into via a commodity derivative, and any assets or liabilities in the underlying market;

- (k) require the temporary or permanent cessation of any practice or conduct that the competent authority considers to be contrary to the provisions of Regulation (EU) No 600/2014 and the provisions adopted in the implementation of this Directive and prevent repetition of that practice or conduct;
- (l) adopt any type of measure to ensure that investment firms, regulated markets and other persons to whom this Directive or Regulation (EU) No 600/2014 applies, continue to comply with legal requirements;
- (m) require the suspension of trading in a financial instrument;
- (n) require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements;
- (o) request any person to take steps to reduce the size of the position or exposure;
- (p) limit the ability of any person from entering into a commodity derivative, including by introducing limits on the size of a position any person can hold at all times in accordance with Article 57 of this Directive;
- (q) issue public notices;
- (r) require, in so far as permitted by national law, existing data traffic records held by a telecommunication operator, where there is a reasonable suspicion of an infringement and where such records may be relevant to an investigation into infringements of this Directive or of Regulation (EU) No 600/2014;
- (s) suspend the marketing or sale of financial instruments or structured deposits where the conditions of Articles 40, 41 or 42 of Regulation (EU) No 600/2014 are met;
- (t) suspend the marketing or sale of financial instruments or structured deposits where the investment firm has not developed or applied an effective product approval process or otherwise failed to comply with Article 16(3) of this Directive;
- (u) require the removal of a natural person from the management board of an investment firm or market operator.

By 3 July 2016, the Member States shall notify the laws, regulations and administrative provisions transposing paragraphs 1 and 2 to the Commission and ESMA. They shall notify the Commission and ESMA without undue delay of any subsequent amendment thereto.

Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014.

## Article 70

### **Sanctions for infringements**

1. Without prejudice to the supervisory powers including investigatory powers and powers to impose remedies of competent authorities in accordance with Article 69 and the right for Member States to provide for and impose criminal sanctions, Member States shall lay down rules on and ensure that their competent authorities may impose administrative sanctions and measures applicable to all infringements of this Directive or of Regulation (EU) No 600/2014 and the national provisions adopted in the implementation of this Directive and of Regulation (EU) No 600/2014, and shall take all measures necessary to ensure that they are implemented. Such sanctions and measures shall be effective, proportionate and dissuasive and shall apply to infringements even where they are not specifically referred to in paragraphs 3, 4 and 5.

Member States may decide not to lay down rules for administrative sanctions for infringements which are subject to criminal sanctions under their national law. In that case, Member States shall communicate to the Commission the relevant criminal law provisions.

By 3 July 2016 Member States shall notify the laws, regulations and administrative provisions transposing this Article, including any relevant criminal law provisions, to the Commission and ESMA. Member States shall notify the Commission and ESMA without undue delay of any subsequent amendments thereto.

2. Member States shall ensure that where obligations apply to investment firms, market operators, data reporting services providers, credit institutions in relation to investment services or investment activities and ancillary services, and branches of third-country firms in the case of an infringement, sanctions and measures can be applied, subject to the conditions laid down in national law in areas not harmonised by this Directive, to the members of the investment firms' and market operators' management body, and any other natural or legal persons who, under national law, are responsible for an infringement.

3. Member States shall ensure that at least an infringement of the following provisions of this Directive or of Regulation (EU) No. 600/2014 shall be regarded as an infringement of this Directive or of Regulation (EU) No. 600/2014:

(a) with regard to this Directive:

(i) point (b) of Article 8;

(ii) Article 9(1) to (6);

(iii) Article 11(1) and (3);

(iv) Article 16(1) to (11);

(v) Article 17(1) to (6);

(vi) Article 18(1) to (9) and the first sentence of Article 18(10);

(vii) Articles 19 and 20;

(viii) Article 21(1);

(ix) Article 23(1), (2) and (3);

(x) Article 24(1) to (5) and (7) to (10) and the first and second subparagraphs of Article 24(11);

(xi) Article 25(1) to (6);

(xii) the second sentence of Article 26(1) and Article 26(2) and (3);

(xiii) Article 27(1) to (8);

- (xiv) Article 28(1) and (2);
- (xv) the first subparagraph of Article 29(2), the third subparagraph of Article 29(2), the first sentence of Article 29(3), the first subparagraph of Article 29(4), and Article 29(5);
- (xvi) the second subparagraph of Article 30(1), the first sentence of the second subparagraph of Article 30(3);
- (xvii) Article 31(1), the first subparagraph of Article 31(2) and Article 31(3);
- (xviii) Article 32(1), the first, second and fourth subparagraphs of Article 32(2);
- (xix) Article 33(3);
- (xx) Article 34(2), the first sentence of Article 34(4), the first sentence of Article 34(5), the first sentence of Article 34(7);
- (xxi) Article 35(2), the first subparagraph of Article 35(7), the first sentence of Article 35(10);
- (xxii) Article 36(1);
- (xxiii) the first subparagraph and the first sentence of the second subparagraph of Article 37(1), and the first subparagraph of Article 37(2);
- (xxiv) the fourth subparagraph of Article 44(1), the first sentence of Article 44(2), the first subparagraph of Article 44(3) and point (b) of Article 44(5);
- (xxv) Article 45(1) to (6) and (8);
- (xxvi) Article 46(1), points (a) and (b) of Article 46(2);
- (xxvii) Article 47;
- (xxviii) Article 48(1) to (11);
- (xxix) Article 49(1);
- (xxx) Article 50(1);
- (xxxi) Article 51(1) to (4) and the second sentence of Article 51(5);
- (xxxii) Article 52(1), the first, second and fifth subparagraphs of Article 52(2);
- (xxxiii) Article 53(1), (2) and (3) and the first sentence of the second subparagraph of Article 53(6), Article 53(7);

- (xxxiv) Article 54(1), the first subparagraph of Article 54(2) and Article 54(3);
- (xxxv) Article 57(1) and (2), Article 57(8) and the first subparagraph of Article 57(10);
- (xxxvi) Article 58(1) to (4);
- (xxxvii) Article 63(1), (3) and (4);
- (xxxviii) Article 64(1) to (5);
- (xxxix) Article 65(1) to (5);
- (xxxx) Article 66(1) to (4); and

(b) with regard to Regulation (EU) No 600/2014:

- (i) Articles 3(1) and (3);
- (ii) the first subparagraph of Article 4(3);
- (iii) Article 6;
- (iv) the first sentence of third subparagraph of Article 7(1);
- (v) Article 8(1), (3) and, (4);
- (vi) Article 10;
- (vii) the first sentence of third subparagraph of Article 11(1) and the third subparagraph of Article 11(3);
- (viii) Article 12(1);
- (ix) Article 13(1);
- (x) Article 14(1), the first sentence of Article 14(2) and the second, third and fourth sentence of Article 14(3);
- (xi) the first subparagraph and the first and third sentences of second subparagraph of Article 15(1), Article 15(2) and the second sentence of Article 15(4);
- (xii) the second sentence of Article 17(1);
- (xiii) Article 18(1) and (2), first sentence of Article 18(4), first sentence of Article 18(5), the first subparagraph of Article 18(6), Article 18(8) and (9);

- (xiv) Article 20(1) and the first sentence of Article 20(2);
- (xv) Article 21(1), (2) and (3);
- (xvi) Article 22(2);
- (xvii) Article 23(1) and (2);
- (xviii) Article 25(1) and (2);
- (xix) the first subparagraph of Article 26(1), Article 26(2) to (5), the first subparagraph of Article 26(6), the first to fifth and eighth subparagraph of Article 26(7);
- (xx) Article 27(1);
- (xxi) Article 28(1) and the first subparagraph of Article 28(2);
- (xxii) Article 29(1) and (2);
- (xxiii) Article 30(1);
- (xxiv) Article 31(2) and (3);
- (xxv) Article 35(1), (2) and (3);
- (xxvi) Article 36(1), (2) and (3);
- (xxvii) Article 37(1) and (3);
- (xxviii) Articles 40, 41 and 42.

4. Providing investment services or performing investment activities without the required authorisation or approval in accordance with the following provisions of this Directive or of Regulation (EU) No 600/2014 shall also be considered to be an infringement of this Directive or of Regulation (EU) No 600/2014:

- (a) Article 5 or Article 6(2) or Articles 34, 35, 39, 44 or 59 of this Directive; or
- (b) the third sentence of Article 7(1) or Article 11(1) of Regulation (EU) No 600/2014.

5. Failure to cooperate or comply in an investigation or with an inspection or request covered by Article 69 shall also be regarded as an infringement of this Directive.

6. In the cases of infringements referred to in paragraphs 3, 4 and 5, Member States shall, in conformity with national law, provide that competent authorities have the power to take and impose at least the following administrative sanctions and measures:

- (a) a public statement, which indicates the natural or legal person and the nature of the infringement in accordance with Article 71;
- (b) an order requiring the natural or legal person to cease the conduct and to desist from a repetition of that conduct;
- (c) in the case of an investment firm, a market operator authorised to operate an MTF or OTF, a regulated market, an APA, a CTP and an ARM, withdrawal or suspension of the authorisation of the institution in accordance with Articles 8, 43 and 65;
- (d) a temporary or, for repeated serious infringements a permanent ban against any member of the investment firm's management body or any other natural person, who is held responsible, to exercise management functions in investment firms;
- (e) a temporary ban on any investment firm being a member of or participant in regulated markets or MTFs or any client of OTFs;
- (f) in the case of a legal person, maximum administrative fines of at least EUR 5 000 000, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014, or of up to 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body; where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts in accordance with Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant accounting legislative acts according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking;
- (g) in the case of a natural person, maximum administrative fines of at least EUR 5 000 000, or in the Member States whose currency is not the euro, the corresponding value in the national currency on 2 July 2014;
- (h) maximum administrative fines of at least twice the amount of the benefit derived from the infringement where that benefit can be determined, even if that exceeds the maximum amounts in points (f) and (g).

7. Member States may empower competent authorities to impose types of sanction in addition to those referred to in paragraph 6 or to impose fines exceeding the amounts referred to in points (f), (g) and (h) of paragraph 6.

#### Article 71

##### Publication of decisions

1. Member States shall provide that competent authorities publish any decision imposing an administrative sanction or measure for infringements of Regulation (EU) No 600/2014 or of the national provisions adopted in the implementation of this Directive on their official websites without undue delay after the person on whom the sanction was imposed has been informed of that decision. The publication shall include at least information on the type and nature of the infringement and the identity of the persons responsible. That obligation does not apply to decisions imposing measures that are of an investigatory nature.

However, where the publication of the identity of the legal persons or of the personal data of the natural persons is considered by the competent authority to be disproportionate following a case-by-case assessment conducted on the proportionality of the publication of such data, or where publication jeopardises the stability of financial markets or an on-going investigation, Member States shall ensure that competent authorities shall either:

- (a) defer the publication of the decision to impose the sanction or measure until the moment where the reasons for non-publication cease to exist;
- (b) publish the decision to impose the sanction or measure on an anonymous basis in a manner which complies with national law, if such anonymous publication ensures an effective protection of the personal data concerned;
- (c) not publish the decision to impose a sanction or measure at all in the event that the options set out in points (a) and (b) are considered to be insufficient to ensure:
  - (i) that the stability of financial markets would not be put in jeopardy;
  - (ii) the proportionality of the publication of such decisions with regard to measures which are deemed to be of a minor nature.

In the case of a decision to publish a sanction or measure on an anonymous basis, the publication of the relevant data may be postponed for a reasonable period of time if it is envisaged that within that period the reasons for anonymous publication shall cease to exist.

2. Where the decision to impose a sanction or measure is subject to appeal before the relevant judicial or other authorities, competent authorities shall also publish, immediately, on their official website such information and any subsequent information on the outcome of such appeal. Moreover, any decision annulling a previous decision to impose a sanction or a measure shall also be published.

3. 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 after its publication. Personal data contained in the publication shall only be kept on the official website of the competent authority for the period which is necessary in accordance with the applicable data protection rules.

Competent authorities shall inform ESMA of all administrative sanctions imposed but not published in accordance with point (c) of paragraph 1 including any appeal in relation thereto and the outcome thereof. Member States shall ensure that competent authorities receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA. ESMA shall maintain a central database of sanctions communicated to it solely for the purposes of exchanging information between competent authorities. That database shall be accessible to competent authorities only and it shall be updated on the basis of the information provided by the competent authorities.

4. Member States shall provide ESMA annually with aggregated information regarding all sanctions and measures imposed in accordance with paragraphs 1 and 2. That obligation does not apply to measures of an investigatory nature. ESMA shall publish that information in an annual report.

Where Member States have chosen, in accordance with Article 70, to lay down criminal sanctions for infringements of the provisions referred to in that Article, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish data on criminal sanctions imposed in an annual report.

5. Where the competent authority has disclosed an administrative measure, sanction or criminal sanction to the public, it shall, at the same time, report that fact to ESMA.

6. Where a published criminal or administrative sanction relates to an investment firm, market operator, data reporting services provider, credit institution in relation to investment services and activities or ancillary services, or a branch of third-country firms authorised in accordance with this Directive, ESMA shall add a reference to the published sanction in the relevant register.

7. ESMA shall develop draft implementing technical standards concerning the procedures and forms for submitting information as referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

## *Article 72*

### **Exercise of supervisory powers and powers to impose sanctions**

1. Competent authorities shall exercise the supervisory powers including, investigatory powers and powers to impose remedies, referred to in Article 69 and the powers to impose sanctions referred to in Article 70 in accordance with their national legal frameworks:

- (a) directly;
- (b) in collaboration with other authorities;
- (c) under their responsibility by delegation to entities to which tasks have been delegated pursuant to Article 67(2); or
- (d) by application to the competent judicial authorities.

2. Member States shall ensure that competent authorities, when determining the type and level of an administrative sanction or measure imposed under the exercise of powers to impose sanctions in Article 70, 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 for the infringement;
- (c) the financial strength of the responsible natural or legal person, as indicated in particular by the total turnover of the responsible legal person or the annual income and net assets of the responsible natural person;
- (d) the importance of profits gained or losses avoided by the responsible natural or legal person, 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 responsible natural or legal person with the competent authority, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

(g) previous infringements by the responsible natural or legal person.

Competent authorities may take into account additional factors to those referred to in the first subparagraph when determining the type and level of administrative sanctions and measures.

#### *Article 73*

##### **Reporting of infringements**

1. Member States shall ensure that competent authorities establish effective mechanisms to enable reporting of potential or actual infringements of the provisions of Regulation (EU) No 600/2014 and of the national provisions adopted in the implementation of this Directive to competent authorities.

The mechanisms referred to in the first subparagraph shall include at least:

- (a) specific procedures for the receipt of reports on potential or actual infringements and their follow-up, including the establishment of secure communication channels for such reports;
- (b) appropriate protection for employees of financial institutions who report infringements committed within the financial institution at least against retaliation, discrimination or other types of unfair treatment;
- (c) protection of the identity of both the person who reports the infringements and the natural person who is allegedly responsible for an infringement, at all stages of the procedures unless such disclosure is required by national law in the context of further investigation or subsequent administrative or judicial proceedings.

2. Member States shall require investment firms, market operators, data reporting services providers, credit institutions in relation to investment services or activities and ancillary services, and branches of third-country firms to have in place appropriate procedures for their employees to report potential or actual infringements internally through a specific, independent and autonomous channel.

#### *Article 74*

##### **Right of appeal**

1. Member States shall ensure that any decision taken under the provisions of Regulation (EU) No 600/2014 or under laws, regulations or administrative provisions adopted in accordance with this Directive is properly reasoned and is subject to the right of appeal before a tribunal. The right of appeal before a tribunal shall also apply where, in respect of an application for authorisation which provides all the information required, no decision is taken within six months of its submission.

2. Member States shall provide that one or more of the following bodies, as determined by national law, also may, in the interests of consumers and in accordance with national law, take action before the courts or competent administrative bodies to ensure that Regulation (EU) No 600/2014 and the national provisions adopted in the implementation of this Directive are applied:

- (a) public bodies or their representatives;
- (b) consumer organisations having a legitimate interest in protecting consumers;
- (c) professional organisations having a legitimate interest in acting to protect their members.

*Article 75***Extra-judicial mechanism for consumers complaints**

1. Member States shall ensure the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate. Member States shall further ensure that all investment firms adhere to one or more such bodies implementing such complaint and redress procedures.
2. Member States shall ensure that those bodies actively cooperate with their counterparts in other Member States in the resolution of cross-border disputes.
3. The competent authorities shall notify ESMA of the complaint and redress procedures referred to in paragraph 1 which are available under its jurisdictions.

ESMA shall publish and keep up-to-date a list of all extra-judicial mechanisms on its website.

*Article 76***Professional secrecy**

1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 67(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. They shall not divulge any confidential information which they may receive in the course of their duties, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to requirements of national criminal or taxation law or the other provisions of this Directive or of Regulation (EU) No 600/2014.
2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.
3. Without prejudice to requirements of national criminal or taxation law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive or to Regulation (EU) No 600/2014 may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or of Regulation (EU) No 600/2014 or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically relating to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.
4. Any confidential information received, exchanged or transmitted pursuant to this Directive or to Regulation (EU) No 600/2014 shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive or with Regulation (EU) No 600/2014 and with other Directives or Regulations applicable to investment firms, credit institutions, pension funds, UCITS, AIFs, insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators, CCPs, CSDs, or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.
5. This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.

**Article 77****Relations with auditors**

1. Member States shall provide, at least, that any person authorised within the meaning of Directive 2006/43/EC of the European Parliament and of the Council (<sup>(1)</sup>), performing in an investment firm, a regulated market or a data reporting services provider the task described in Article 34 of Directive 2013/34/EU or Article 73 of Directive 2009/65/EC or any other task prescribed by law, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which that person has become aware while carrying out that task and which is liable to:

- (a) constitute a material infringement of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of investment firms;
- (b) affect the continuous functioning of the investment firm;
- (c) lead to refusal to certify the accounts or to the expression of reservations.

That person shall also have a duty to report any facts and decisions of which the person becomes aware in the course of carrying out one of the tasks referred to in the first subparagraph in an undertaking having close links with the investment firm within which he is carrying out that task.

2. The disclosure in good faith to the competent authorities, by persons authorised within the meaning of Directive 2006/43/EC, of any fact or decision referred to in paragraph 1 shall not constitute a breach of any contractual or legal restriction on disclosure of information and shall not involve such persons in liability of any kind.

**Article 78****Data protection**

The processing of personal data collected in or for the exercise of the supervisory powers including investigatory powers in accordance with this Directive shall be carried out in accordance with national law implementing Directive 95/46/EC and with Regulation (EC) No 45/2001 where applicable.

**CHAPTER II*****Cooperation between the competent authorities of the Member States and with ESMA*****Article 79****Obligation to cooperate**

1. Competent authorities of different Member States shall cooperate with each other where necessary for the purpose of carrying out their duties under this Directive or under Regulation (EU) No 600/2014, making use of their powers whether set out in this Directive or in Regulation (EU) No 600/2014 or in national law.

Where Member States have chosen, in accordance with Article 70, to lay down criminal sanctions for infringements of the provisions referred to in that Article, they shall ensure that appropriate measures are in place so that competent authorities have all the necessary powers to liaise with judicial authorities within their jurisdiction to receive specific information relating to criminal investigations or proceedings commenced for possible infringements of this Directive and of Regulation (EU) No 600/2014 and provide the same to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and ESMA for the purposes of this Directive and of Regulation (EU) No 600/2014.

<sup>(1)</sup> Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).

Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

Competent authorities may also cooperate with competent authorities of other Member States with respect to facilitating the recovery of fines.

In order to facilitate and accelerate cooperation, and more particularly exchange of information, Member States shall designate a single competent authority as a contact point for the purposes of this Directive and of Regulation (EU) No 600/2014. Member States shall communicate to the Commission, ESMA and to the other Member States the names of the authorities which are designated to receive requests for exchange of information or cooperation pursuant to this paragraph. ESMA shall publish and keep up-to-date a list of those authorities on its website.

2. When, taking into account the situation of the securities markets in the host Member State, the operations of a trading venue that has established arrangements in a host Member State have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the home and host competent authorities of the trading venue shall establish proportionate cooperation arrangements.

3. Member States shall take the necessary administrative and organisational measures to facilitate the assistance provided for in paragraph 1

Competent authorities may use their powers for the purpose of cooperation, even where the conduct under investigation does not constitute an infringement of any regulation in force in that Member State.

4. Where a competent authority has good reasons to suspect that acts contrary to the provisions of this Directive or of Regulation (EU) No 600/2014, carried out by entities not subject to its supervision, are being or have been carried out on the territory of another Member State, it shall notify the competent authority of the other Member State and ESMA in as specific a manner as possible. The notified competent authority shall take appropriate action. It shall inform the notifying competent authority and ESMA of the outcome of the action and, to the extent possible, of significant interim developments. This paragraph shall be without prejudice to the competence of the notifying competent authority.

5. Without prejudice to paragraphs 1 and 4, competent authorities shall notify ESMA and other competent authorities of the details of:

(a) any requests to reduce the size of a position or exposure pursuant to point (o) of Article 69(2);

(b) any limits on the ability of persons to enter into a commodity derivative pursuant to point (p) of Article 69(2).

The notification shall include, where relevant, the details of the request or the demand pursuant to point (j) of Article 69(2) including the identity of the person or persons to whom it was addressed and the reasons therefor, as well as the scope of the limits introduced pursuant to point (p) of Article 69(2) including the person concerned, the applicable financial instruments, any limits on the size of positions the person can hold at all times, any exemptions thereto granted in accordance with Article 57, and the reasons therefor.

The notifications shall be made not less than 24 hours before the actions or measures are intended to take effect. In exceptional circumstances, a competent authority may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours' notice.

A competent authority of a Member State that receives notification under this paragraph may take measures in accordance with point (o) or (p) of Article 69(2) where it is satisfied that the measure is necessary to achieve the objective of the other competent authority. The competent authority shall also give notice in accordance with this paragraph where it proposes to take measures.

When an action under points (a) or (b) of the first subparagraph of this paragraph relates to wholesale energy products, the competent authority shall also notify the Agency for the Cooperation of Energy Regulators (ACER) established under Regulation (EC) No 713/2009.

6. In relation to emission allowances, competent authorities shall cooperate with public bodies competent for the oversight of spot and auction markets and competent authorities, registry administrators and other public bodies charged with the supervision of compliance under Directive 2003/87/EC in order to ensure that they can acquire a consolidated overview of emission allowances markets.

7. In relation to agricultural commodity derivatives, competent authorities shall report to and cooperate with public bodies competent for the oversight, administration and regulation of physical agricultural markets under Regulation (EU) No 1308/2013.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to establish the criteria under which the operations of a trading venue in a host Member State could be considered to be of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State.

9. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the cooperation arrangements referred to in paragraph 2.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### Article 80

##### **Cooperation between competent authorities in supervisory activities, for on-site verifications or investigations**

1. A competent authority of one Member State may request the cooperation of the competent authority of another Member State in a supervisory activity or for an on-the-spot verification or in an investigation. In the case of investment firms that are remote members or participants of a regulated market the competent authority of the regulated market may choose to address them directly, in which case it shall inform the competent authority of the home Member State of the remote member or participant accordingly.

Where a competent authority receives a request with respect to an on-the-spot verification or an investigation, it shall, within the framework of its powers:

- (a) carry out the verifications or investigations itself;
- (b) allow the requesting authority to carry out the verification or investigation;
- (c) allow auditors or experts to carry out the verification or investigation.

2. With the objective of converging supervisory practices, ESMA may participate in the activities of the colleges of supervisors, including on-site verifications or investigations, carried out jointly by two or more competent authorities in accordance with Article 21 of Regulation (EU) No 1095/2010.

3. ESMA shall develop draft regulatory technical standards to specify the information to be exchanged between competent authorities when cooperating in supervisory activities, on-the-spot-verifications, and investigations.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2015.

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

4. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for competent authorities to cooperate in supervisory activities, on-site verifications, and investigations.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

#### *Article 81*

##### **Exchange of information**

1. Competent authorities of Member States having been designated as contact points for the purposes of this Directive and of Regulation (EU) No 600/2014 in accordance with Article 79(1) of this Directive shall immediately supply one another with the information required for the purposes of carrying out the duties of the competent authorities, designated in accordance to Article 67(1) of this Directive, set out in the provisions adopted pursuant to this Directive or Regulation (EU) No 600/2014.

Competent authorities exchanging information with other competent authorities under this Directive or Regulation (EU) No 600/2014 may indicate at the time of communication that such information must not be disclosed without their express agreement, in which case such information may be exchanged solely for the purposes for which those authorities gave their agreement.

2. The competent authority having been designated as the contact point in accordance with Article 79(1) may transmit the information received under paragraph 1 of this Article and under Articles 77 and 88 to the authorities referred to in Article 67(1). They shall not transmit it to other bodies or natural or legal persons without the express agreement of the competent authorities which disclosed it and solely for the purposes for which those authorities gave their agreement, except in duly justified circumstances. In this last case, the contact point shall immediately inform the contact point that sent the information.

3. Authorities as referred to in Article 71 as well as other bodies or natural and legal persons receiving confidential information under paragraph 1 of this Article or under Articles 77 and 88 may use it only in the course of their duties, in particular:

(a) to check that the conditions governing the taking-up of the business of investment firms are met and to facilitate the monitoring, on a non-consolidated or consolidated basis, of the conduct of that business, especially with regard to the capital adequacy requirements imposed by Directive 2013/36/EU, administrative and accounting procedures and internal-control mechanisms;

(b) to monitor the proper functioning of trading venues;

(c) to impose sanctions;

(d) in administrative appeals against decisions by the competent authorities;

(e) in court proceedings initiated under Article 74;

(f) in the extra-judicial mechanism for investors' complaints provided for in Article 75.

4. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the exchange of information.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

5. Neither this Article nor Article 76 or 88 shall prevent a competent authority from transmitting to ESMA, the European Systemic Risk Board, central banks, the ESCB and the ECB, in their capacity as monetary authorities, and, where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information intended for the performance of their tasks. Likewise such authorities or bodies shall not be prevented from communicating to the competent authorities such information as they may need for the purpose of performing their functions provided for in this Directive or in Regulation (EU) No 600/2014.

#### *Article 82*

##### **Binding mediation**

1. The competent authorities may refer to ESMA situations where a request relating to one of the following has been rejected or has not been acted upon within a reasonable time:

(a) to carry out a supervisory activity, an on-the-spot verification, or an investigation, as provided for in Article 80; or

(b) to exchange information as provided for in Article 81.

2. In the situations referred to in paragraph 1, ESMA may act in accordance with Article 19 of Regulation (EU) No 1095/2010, without prejudice to the possibilities for refusing to act on a request for information provided for in Article 83 of this Directive and to the possibility of ESMA acting in accordance with Article 17 of Regulation (EU) No 1095/2010.

#### *Article 83*

##### **Refusal to cooperate**

A competent authority may refuse to act on a request for cooperation in carrying out an investigation, on-the-spot verification or supervisory activity as provided for in Article 84 or to exchange information as provided for in Article 81 only where:

(a) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of the Member State addressed;

(b) final judgment has already been delivered in the Member State addressed in respect of the same persons and the same actions.

In the case of such a refusal, the competent authority shall notify the requesting competent authority and ESMA accordingly, providing as detailed information as possible.

*Article 84***Consultation prior to authorisation**

1. The competent authorities of the other Member State involved shall be consulted prior to granting authorisation to an investment firm which is any of the following:

- (a) a subsidiary of an investment firm or market operator or credit institution authorised in another Member State;
- (b) a subsidiary of the parent undertaking of an investment firm or credit institution authorised in another Member State;
- (c) controlled by the same natural or legal persons who control an investment firm or credit institution authorised in another Member State.

2. The competent authority of the Member State responsible for the supervision of credit institutions or insurance undertakings shall be consulted prior to granting an authorisation to an investment firm or market operator which is any of the following:

- (a) a subsidiary of a credit institution or insurance undertaking authorised in the Union;
- (b) a subsidiary of the parent undertaking of a credit institution or insurance undertaking authorised in the Union;
- (c) controlled by the same person, whether natural or legal, who controls a credit institution or insurance undertaking authorised in the Union.

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders or members and the reputation and experience of persons who effectively direct the business involved in the management of another entity of the same group. They shall exchange all information regarding the suitability of shareholders or members and the reputation and experience of persons who effectively direct the business that is of relevance to the other competent authorities involved, for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

4. ESMA shall develop draft implementing technical standards to establish standard forms, templates and procedures for the consultation of other competent authorities prior to granting an authorisation.

ESMA shall submit those draft implementing technical standards to the Commission by 3 January 2016.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

*Article 85***Powers for host Member States**

1. Host Member States shall provide that the competent authority may, for statistical purposes, require all investment firms with branches within their territories to report to them periodically on the activities of those branches.

2. In discharging their responsibilities under this Directive, host Member States shall provide that the competent authority may require branches of investment firms to provide the information necessary for the monitoring of their compliance with the standards set by the host Member State that apply to them for the cases provided for in Article 35(8). Those requirements may not be more stringent than those which the same Member State imposes on established firms for the monitoring of their compliance with the same standards.

#### *Article 86*

##### **Precautionary measures to be taken by host Member States**

1. Where the competent authority of the host Member State has clear and demonstrable grounds for believing that an investment firm acting within its territory under the freedom to provide services infringes the obligations arising from the provisions adopted pursuant to this Directive or that an investment firm that has a branch within its territory infringes the obligations arising from the provisions adopted pursuant to this Directive which do not confer powers on the competent authority of the host Member State, it shall refer those findings to the competent authority of the home Member State.

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the investment firm persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the following shall apply:

- (a) after informing the competent authority of the home Member State, the competent authority of the host Member State shall take all the appropriate measures needed in order to protect investors and the proper functioning of the markets, which shall include the possibility of preventing offending investment firms from initiating any further transactions within their territories. The Commission and ESMA shall be informed of such measures without undue delay; and
- (b) the competent authority of the host Member State may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

2. Where the competent authorities of a host Member State ascertain that an investment firm that has a branch within its territory infringes the legal or regulatory provisions adopted in that Member State pursuant to those provisions of this Directive which confer powers on the host Member State's competent authorities, those authorities shall require the investment firm concerned to put an end to its irregular situation.

If the investment firm concerned fails to take the necessary steps, the competent authorities of the host Member State shall take all appropriate measures to ensure that the investment firm concerned puts an end to its irregular situation. The nature of those measures shall be communicated to the competent authorities of the home Member State.

Where, despite the measures taken by the host Member State, the investment firm persists in infringing the legal or regulatory provisions referred to in the first subparagraph in force in the host Member State, the competent authority of the host Member State shall, after informing the competent authority of the home Member State, take all the appropriate measures needed in order to protect investors and the proper functioning of the markets. The Commission and ESMA shall be informed of such measures without undue delay.

In addition, the competent authority of the host Member State may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

3. Where the competent authority of the host Member State of a regulated market, an MTF or OTF has clear and demonstrable grounds for believing that such regulated market, MTF or OTF infringes the obligations arising from the provisions adopted pursuant to this Directive, it shall refer those findings to the competent authority of the home Member State of the regulated market or the MTF or OTF.

Where, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, that regulated market or the MTF or OTF persists in acting in a manner that is clearly prejudicial to the interests of host Member State investors or the orderly functioning of markets, the competent authority of the host Member State shall, after informing the competent authority of the home Member State, take all the appropriate measures needed in order to protect investors and the proper functioning of the markets, which shall include the possibility of preventing that regulated market or the MTF or OTF from making their arrangements available to remote members or participants established in the host Member State. The Commission and ESMA shall be informed of such measures without undue delay.

In addition, the competent authority of the host Member State may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

4. Any measure adopted pursuant to paragraphs 1, 2 or 3 involving sanctions or restrictions on the activities of an investment firm or of a regulated market shall be properly justified and communicated to the investment firm or to the regulated market concerned.

#### *Article 87*

#### **Cooperation and exchange of information with ESMA**

1. The competent authorities shall cooperate with ESMA for the purposes of this Directive, in accordance with Regulation (EU) No 1095/2010.

2. The competent authorities shall, without undue delay, provide ESMA with all information necessary to carry out its duties under this Directive and under Regulation (EU) No 600/2014 and in accordance with Articles 35 and 36 of Regulation (EU) No 1095/2010.

#### **CHAPTER III**

#### ***Cooperation with third countries***

#### *Article 88*

#### **Exchange of information with third countries**

1. Member States and in accordance with Article 33 of Regulation (EU) No 1095/2010, ESMA, may conclude cooperation agreements providing for the exchange of information with the competent authorities of third countries only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 76. Such exchange of information must be intended for the performance of the tasks of those competent authorities.

Transfer of personal data to a third country by a Member State shall be in accordance with Chapter IV of Directive 95/46/EC.

Transfers of personal data to a third country by ESMA shall be in accordance with Article 9 of Regulation (EU) No 45/2001.

Member States and ESMA may also conclude cooperation agreements providing for the exchange of information with third country authorities, bodies and natural or legal persons responsible for one or more of the following:

- (a) the supervision of credit institutions, other financial institutions, insurance undertakings and the supervision of financial markets;
- (b) the liquidation and bankruptcy of investment firms and other similar procedures;

- (c) the carrying out of statutory audits of the accounts of investment firms and other financial institutions, credit institutions and insurance undertakings, in the performance of their supervisory functions, or which administer compensation schemes, in the performance of their functions;
- (d) oversight of the bodies involved in the liquidation and bankruptcy of investment firms and other similar procedures;
- (e) oversight of persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions;
- (f) oversight of persons active on emission allowance markets for the purpose of ensuring a consolidated overview of financial and spot markets;
- (g) oversight of persons active on agricultural commodity derivatives markets for the purpose of ensuring a consolidated overview of financial and spot markets.

The cooperation agreements referred to in the third subparagraph may be concluded only where the information disclosed is subject to guarantees of professional secrecy at least equivalent to those required under Article 76. Such exchange of information shall be intended for the performance of the tasks of those authorities or bodies or natural or legal persons. Where a cooperation agreement involves the transfer of personal data by a Member State, it shall comply with Chapter IV of Directive 95/46/EC and with Regulation (EC) No 45/2001 in the case ESMA is involved in the transfer.

2. Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have transmitted it and, where appropriate, solely for the purposes for which those authorities gave their agreement. The same provision applies to information provided by third country competent authorities.

## TITLE VII

### DELEGATED ACTS

#### Article 89

##### **Exercise of the delegation**

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of power referred to in Article 2(3), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6), Article 64(7), Article 65(7) and Article 79(8) shall be conferred on the Commission for an indeterminate period of time from 2 July 2014.

3. The delegation of powers referred to in Article 2(3), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4) Article 54(4), Article 58(6), Article 64(7), Article 65(7) and Article 79(8) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 2(3), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6), Article 64(7), Article 65(7) and Article 79(8) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.

## FINAL PROVISIONS

### Article 90

#### Reports and review

1. Before 3 March 2019 the Commission shall, after consulting ESMA, present a report to the European Parliament and the Council on:

(a) the functioning of OTFs, including their specific use of matched principal trading, taking into account supervisory experience acquired by competent authorities, the number of OTFs authorised in the Union and their market share and in particular examining whether any adjustments are needed to the definition of an OTF and whether the range of financial instruments covered by the OTF category remains appropriate;

(b) the functioning of the regime for SME growth markets, taking into account the number of MTFs registered as SME growth markets, numbers of issuers present thereon, and relevant trading volumes;

In particular, the report shall assess whether the threshold in point (a) of Article 33(3) remains an appropriate minimum to pursue the objectives for SME growth markets as stated in this Directive;

(c) the impact of requirements regarding algorithmic trading including high-frequency algorithmic trading;

(d) the experience with the mechanism for banning certain products or practices, taking into account the number of times the mechanisms have been triggered and their effects;

(e) the application of the administrative and criminal sanctions and in particular the need to further harmonise the administrative sanctions set out for the infringement of the requirements set out in this Directive and in Regulation (EU) No 600/2014;

(f) the impact of the application of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets;

(g) the development in prices for pre and post trade transparency data from regulated markets, MTFs, OTFs and APAs;

(h) the impact of the requirement to disclose any fees, commissions and non-monetary benefits in connection with the provision of an investment service or an ancillary service to the client in accordance with Article 24(9), including its impact on the proper functioning of the internal market on cross-border investment advice.

2. The Commission shall, after consulting ESMA, present reports to the European Parliament and the Council on the functioning of the consolidated tape established in accordance with Title V. The report relating to Article 65(1) shall be presented by 3 September 2018. The report relating to Article 65(2) shall be presented by 3 September 2020.

The reports referred to in the first subparagraph shall assess the functioning of the consolidated tape against the following criteria:

- (a) the availability and timeliness of post trade information in a consolidated format capturing all transactions irrespective of whether they are carried out on trading venues or not;
- (b) the availability and timeliness of full and partial post trade information that is of a high quality, in formats that are easily accessible and usable for market participants and available on a reasonable commercial basis.

Where the Commission concludes that the CTPs have failed to provide information in a way that meets the criteria set out in the second subparagraph, the Commission shall accompany its report by a request to ESMA to launch a negotiated procedure for the appointment through a public procurement process run by ESMA of a commercial entity operating a consolidated tape. ESMA shall launch the procedure after receiving the request from the Commission on the conditions specified in the Commission's request and in accordance with Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council<sup>(1)</sup>.

3. The Commission shall, where the procedure outlined in paragraph 2 is initiated, be empowered to adopt delegated acts in accordance with Article 89 amending Articles 59 to 65 and Section D of Annex I of this Directive and point (19) of Article 2(1) of Regulation (EU) No 600/2014, by specifying measures in order to:

- (a) provide for the contract duration of the commercial entity operating a consolidated tape and the process and conditions for renewing the contract and the launching of new public procurement;
- (b) provide that the commercial entity operating a consolidated tape shall do so on an exclusive basis and that no other entity shall be authorised as a CTP in accordance with Article 59;
- (c) empower ESMA to ensure adherence with tender conditions by the commercial entity operating a consolidated tape appointed through a public procurement;
- (d) ensure that the post-trade information provided by the commercial entity operating a consolidated tape is of a high quality, in formats that are easily accessible and usable for market participants and in a consolidated format capturing the entire market;
- (e) ensure that the post trade information is provided on a reasonable commercial basis, on both a consolidated and unconsolidated basis, and meets the needs of the users of that information across the Union;
- (f) ensure that trading venues and APAs shall make their trade data available to the commercial entity operating a consolidated tape appointed through a public procurement process run by ESMA at a reasonable cost;
- (g) specify arrangements applicable where the commercial entity operating a consolidated tape appointed through a public procurement fails to fulfil the tender conditions;
- (h) specify arrangements under which CTPs authorised under Article 59 may continue to operate a consolidated tape where the empowerment provided for in point (b) of this paragraph is not used or, where no entity is appointed through the public procurement, until such time as a new public procurement is completed and a commercial entity is appointed to operate a consolidated tape.

<sup>(1)</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

4. By 1 January 2018 the Commission shall prepare a report, after consulting ESMA and ACER, assessing the potential impact on energy prices and on the functioning of the energy market as well as the feasibility and the benefits in terms of reducing counterparty and systemic risks and the direct costs of C6 energy derivative contracts being made subject to the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012, the risk mitigation techniques set out in Article 11(3) thereof and their inclusion in calculating the clearing threshold pursuant to Article 10 thereof.

If the Commission considers that it would not be feasible and beneficial to include those contracts, it shall submit, if appropriate, a legislative proposal to the European Parliament and the Council. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 of this Directive to extend the 42-month period referred to in Article 95(1) of this Directive once by two years and a further time by one year.

#### Article 91

##### **Amendments to Directive 2002/92/EC**

Directive 2002/92/EC is hereby amended as follows:

(1) Article 2 is amended as follows:

(a) in point 3, the second paragraph is replaced by the following:

'With the exception of Chapter III A of this Directive, those activities, when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered to be insurance mediation or insurance distribution';

(b) the following point is added:

(13) For the purposes of Chapter IIIA, 'insurance-based investment product' means an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations and shall not include:

(a) non-life insurance products as listed in Annex I of Directive 2009/138/EC (Classes of Non-life Insurance);

(b) life insurance contracts where the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or infirmity;

(c) pension products which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement, and which entitles the investor to certain benefits;

(d) officially recognised occupational pension schemes falling under the scope of Directive 2003/41/EC or Directive 2009/138/EC;

(e) individual pension products for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider.';

(2) the following chapter is inserted:

'CHAPTER IIIA

***Additional customer protection requirements in relation to insurance-Based investment products***

*Article 13a*

**Scope**

Subject to the exception in the second subparagraph of Article 2(3), this Chapter lays down additional requirements on insurance mediation activities and to direct sales carried out by insurance undertakings when they are carried out in relation to the sale of insurance-based investment products. Those activities shall be referred to as insurance distribution activities.

*Article 13b*

**Prevention of conflicts of interest**

An insurance intermediary or insurance undertaking shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest, as determined in Article 13c, from adversely affecting the interests of its customers.

*Article 13c*

**Conflicts of interests**

1. Member States shall require insurance intermediaries and insurance undertakings to take all appropriate steps to identify conflicts of interest between themselves, including their managers, employees and tied insurance intermediaries, or any person directly or indirectly linked to them by control and their customers or between one customer and another that arise in the course of carrying out any insurance distribution activities.

2. Where organisational or administrative arrangements made by the insurance intermediary or insurance undertaking in accordance with Article 13b to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to customer interests will be prevented, the insurance intermediary or insurance undertaking shall clearly disclose to the customer the general nature and/or sources of conflicts of interest before undertaking business on its behalf.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 13e to:

- (a) define the steps that insurance intermediaries or insurance undertakings might reasonably be expected to take to identify, prevent, manage and disclose conflicts of interest when carrying out insurance distribution activities;
- (b) establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the customers or potential customers of the insurance intermediary or insurance undertaking.

*Article 13d*

**General principles and information to customers**

1. Member States shall ensure that, when carrying out insurance distribution activities, an insurance intermediary or insurance undertaking acts honestly, fairly and professionally in accordance with the best interests of its customers.

2. All information, including marketing communications, addressed by the insurance intermediary or insurance undertaking to customers or potential customers shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

3. Member States may prohibit the acceptance or receipt of fees, commissions or any monetary benefits paid or provided to insurance intermediaries or insurance undertakings, by any third party or a person acting on behalf of a third party in relation to the distribution of insurance-based investment products to customers.

#### Article 13e

##### **Exercise of the delegation**

1. The power to adopt a delegated act is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt a delegated act referred to in Article 13c shall be conferred on the Commission for an indeterminate period of time from 2 July 2014.

3. The delegation of powers referred to in Article 13c may be revoked at any time by the European Parliament or by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 13c shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or the Council.'.

#### Article 92

##### **Amendments to Directive 2011/61/EU**

Directive 2011/61/EU is amended as follows:

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

'(vii) a Member State, other than the home Member State, in which an EU AIFM provides the services referred to in Article 6(4);;

(2) Article 33 is amended as follows:

(a) the title is replaced by the following:

'Conditions for managing EU AIFs established in other Member States and for providing services in other Member States';

(b) paragraphs 1 and 2 are replaced by the following:

'1. Member States shall ensure that an authorised EU AIFM may, directly or by establishing a branch:

(a) manage EU AIFs established in another Member State, provided that the AIFM is authorised to manage that type of AIF;

(b) provide in another Member State the services referred to in Article 6(4) for which it has been authorised.

2. An AIFM intending to provide the activities and services referred to in paragraph 1 for the first time shall communicate the following information to the competent authorities of its home Member State:

- (a) the Member State in which it intends to manage AIFs directly or to establish a branch, and/or to provide the services referred to in Article 6(4);
- (b) a programme of operations stating in particular the services which it intends to perform and/or identifying the AIFs that it intends to manage.'

#### *Article 93*

##### **Transposition**

1. Member States shall adopt and publish, by 3 July 2016, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

Member States shall apply those measures from 3 January 2017 except for the provisions transposing Article 65(2) which shall apply from 3 September 2018.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall apply the measures referred to in Article 92 from 3 July 2015.

3. Member States shall communicate to the Commission and to ESMA the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 94*

##### **Repeal**

Directive 2004/39/EC, as amended by the acts listed in Annex III, Part A of this Directive, is repealed with effect from 3 January 2017, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex III, Part B of this Directive.

References to Directive 2004/39/EC or to Directive 93/22/EEC shall be construed as references to this Directive or to Regulation (EU) No 600/2014 and shall be read in accordance with the correlation table set out in Annex IV of this Directive.

References to terms defined in, or Articles of, Directive 2004/39/EC or Directive 93/22/EEC shall be construed as references to the equivalent term defined in, or Article of, this Directive.

#### *Article 95*

##### **Transitional provisions**

1. Until 3 July 2020:

- (a) the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012 and the risk mitigation techniques set out in Article 11(3) thereof shall not apply to C6 energy derivative contracts entered into by non-financial counterparties that meet the conditions in Article 10(1) of Regulation (EU) No 648/2012 or by non-financial counterparties that shall be authorised for the first time as investment firms as from 3 January 2017; and

(b) such C6 energy derivative contracts shall not be considered to be OTC derivative contracts for the purposes of the clearing threshold set out in Article 10 of Regulation (EU) No 648/2012.

C6 energy derivative contracts benefiting from the transitional regime set out in the first subparagraph shall be subject to all other requirements laid down in Regulation (EU) No 648/2012.

2. The exemption referred to in paragraph 1 shall be granted by the relevant competent authority. The competent authority shall notify ESMA of the C6 energy derivative contracts which have been granted an exemption in accordance with paragraph 1 and ESMA shall publish on its website a list of those C6 energy derivative contracts.

*Article 96*

**Entry into force**

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

*Article 97*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 15 May 2014.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

D. KOURKOULAS

## ANNEX I

**LISTS OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS**

## SECTION A

**Investment services and activities**

- (1) Reception and transmission of orders in relation to one or more financial instruments;
- (2) Execution of orders on behalf of clients;
- (3) Dealing on own account;
- (4) Portfolio management;
- (5) Investment advice;
- (6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;
- (7) Placing of financial instruments without a firm commitment basis;
- (8) Operation of an MTF;
- (9) Operation of an OTF.

## SECTION B

**Ancillary services**

- (1) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier level;
- (2) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;
- (3) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;
- (4) Foreign exchange services where these are connected to the provision of investment services;
- (5) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;
- (6) Services related to underwriting.
- (7) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under points (5), (6), (7) and (10) of Section C where these are connected to the provision of investment or ancillary services.

## SECTION C

**Financial instruments**

- (1) Transferable securities;
- (2) Money-market instruments;

- (3) Units in collective investment undertakings;
- (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;
- (5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;
- (6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;
- (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;
- (8) Derivative instruments for the transfer of credit risk;
- (9) Financial contracts for differences;
- (10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;
- (11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).

#### SECTION D

##### **Data reporting services**

- (1) Operating an APA;
- (2) Operating a CTP;
- (3) Operating an ARM.

## ANNEX II

**PROFESSIONAL CLIENTS FOR THE PURPOSE OF THIS DIRECTIVE**

Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered to be professional client, the client must comply with the following criteria:

**I. CATEGORIES OF CLIENT WHO ARE CONSIDERED TO BE PROFESSIONALS**

The following shall all be regarded as professionals in all investment services and activities and financial instruments for the purposes of the Directive.

(1) Entities which are required to be authorised or regulated to operate in the financial markets. The list below shall be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a third country:

- (a) Credit institutions;
- (b) Investment firms;
- (c) Other authorised or regulated financial institutions;
- (d) Insurance companies;
- (e) Collective investment schemes and management companies of such schemes;
- (f) Pension funds and management companies of such funds;
- (g) Commodity and commodity derivatives dealers;
- (h) Locals;
- (i) Other institutional investors;

(2) Large undertakings meeting two of the following size requirements on a company basis:

- balance sheet total: EUR 20 000 000
- net turnover: EUR 40 000 000
- own funds: EUR 2 000 000

(3) National and regional governments, including public bodies that manage public debt at national or regional level, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.

(4) Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

The entities referred to above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is an undertaking referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the investment firm, the client is deemed to be a professional client, and will be treated as such unless the investment firm and the client agree otherwise. The investment firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.

It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.

This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime. Such agreement shall specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.

## II. CLIENTS WHO MAY BE TREATED AS PROFESSIONALS ON REQUEST

### II.1. Identification criteria

Clients other than those mentioned in section I, including public sector bodies, local public authorities, municipalities and private individual investors, may also be allowed to waive some of the protections afforded by the conduct of business rules.

Investment firms shall therefore be allowed to treat any of those clients as professionals provided the relevant criteria and procedure mentioned below are fulfilled. Those clients shall not, however, be presumed to possess market knowledge and experience comparable to that of the categories listed in Section I.

Any such waiver of the protection afforded by the standard conduct of business regime shall be considered to be valid only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making investment decisions and understanding the risks involved.

The fitness test applied to managers and directors of entities licensed under Directives in the financial field could be regarded as an example of the assessment of expertise and knowledge. In the case of small entities, the person subject to that assessment shall be the person authorised to carry out transactions on behalf of the entity.

In the course of that assessment, as a minimum, two of the following criteria shall be satisfied:

- the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters,
- the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments exceeds EUR 500 000,
- the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

Member States may adopt specific criteria for the assessment of the expertise and knowledge of municipalities and local public authorities requesting to be treated as professional clients. Those criteria can be alternative or additional to those listed in the fifth paragraph.

## II.2. Procedure

Those clients may waive the benefit of the detailed rules of conduct only where the following procedure is followed:

- they must state in writing to the investment firm that they wish to be treated as a professional client, either generally or in respect of a particular investment service or transaction, or type of transaction or product,
- the investment firm must give them a clear written warning of the protections and investor compensation rights they may lose,
- they must state in writing, in a separate document from the contract, that they are aware of the consequences of losing such protections.

Before deciding to accept any request for waiver, investment firms must be required to take all reasonable steps to ensure that the client requesting to be treated as a professional client meets the relevant requirements stated in Section II.1.

However, if clients have already been categorised as professionals under parameters and procedures similar to those referred to above, it is not intended that their relationships with investment firms shall be affected by any new rules adopted pursuant to this Annex.

Firms must implement appropriate written internal policies and procedures to categorise clients. Professional clients are responsible for keeping the investment firm informed about any change, which could affect their current categorisation. Should the investment firm become aware however that the client no longer fulfils the initial conditions, which made him eligible for a professional treatment, the investment firm shall take appropriate action.

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## ANNEX III

## PART A

**Repealed Directive with list of its successive amendments**

(referred to in Article 94)

Directive 2004/39/EC of the European Parliament and of the Council (OJ L 145, 30.4.2004, p. 1).

Directive 2006/31/EC of the European Parliament and of the Council (OJ L 114, 27.4.2006, p. 60).

Directive 2007/44/EC of the European Parliament and of the Council (OJ L 247, 21.9.2007, p. 1).

Directive 2008/10/EC of the European Parliament and of the Council (OJ L 76, 19.3.2008, p. 33).

Directive 2010/78/EC of the European Parliament and of the Council (OJ L 331, 15.12.2010, p. 120).

## PART B

**List of time-limits for transposition into national law**

(referred to in Article 94)

Directive 2004/39/EC

Transposition period 31 January 2007

Implementation period 1 November 2007

Directive 2006/31/EC

Transposition period 31 January 2007

Implementation period 1 November 2007

Directive 2007/44/EC

Transposition period 21 March 2009

Directive 2010/78/EC

Transposition period 31 December 2011

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## ANNEX IV

**Correlation table referred in Article 94**

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 1(1)	Article 1(1)	
Article 1(2)	Article 1(3)	
Article 2(1)(a)	Article 2(1)(a)	
Article 2(1)(b)	Article 2(1)(b)	
Article 2(1)(c)	Article 2(1)(c)	
Article 2(1)(d)	Article 2(1)(d)	
Article 2(1)(e)	Article 2(1)(f)	
Article 2(1)(f)	Article 2(1)(g)	
Article 2(1)(g)	Article 2(1)(h)	
Article 2(1)(h)	Article 2(1)(i)	
Article 2(1)(i)	Article 2(1)(j)	
Article 2(1)(j)	Article 2(1)(k)	
Article 2(1)(k)	Article 2(1)(i)	
Article 2(1)(l)	—	
Article 2(1)(m)	Article 2(1)(l)	
Article 2(1)(n)	Article 2(1)(m)	
Article 2(2)	Article 2(2)	
Article 2(3)	Article 2(4)	
Article 3(1)	Article 3(1)	
Article 3(2)	Article 3(3)	
Article 4(1)(1)	Article 4(1)(1)	
Article 4(1)(2)	Article 4(1)(2)	
Article 4(1)(3)	Article 4(1)(3)	
Article 4(1)(4)	Article 4(1)(4)	
Article 4(1)(5)	Article 4(1)(5)	
Article 4(1)(6)	Article 4(1)(6)	
Article 4(1)(7)	Article 4(1)(20)	
Article 4(1)(8)	Article 4(1)(7)	
Article 4(1)(9)	Article 4(1)(8)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 4(1)(10)	Article 4(1)(9)	
Article 4(1)(11)	Article 4(1)(10)	
Article 4(1)(12)	Article 4(1)(11)	
Article 4(1)(13)	Article 4(1)(18)	
Article 4(1)(14)	Article 4(1)(21)	
Article 4(1)(15)	Article 4(1)(22)	
Article 4(1)(16)	Article 4(1)(14)	
Article 4(1)(17)	Article 4(1)(15)	
Article 4(1)(18)	Article 4(1)(44)	
Article 4(1)(19)	Article 4(1)(17)	
Article 4(1)(20)	Article 4(1)(55)	
Article 4(1)(21)	Article 4(1)(56)	
Article 4(1)(22)	Article 4(1)(26)	
Article 4(1)(23)	Article 4(1)(27)	
Article 4(1)(24)	Article 4(1)(28)	
Article 4(1)(25)	Article 4(1)(29)	
Article 4(1)(26)	Article 4(1)(30)	
Article 4(1)(27)	Article 4(1)(31)	
Article 4(1)(28)	Article 4(1)(32)	
Article 4(1)(29)	Article 4(1)(33)	
Article 4(1)(30)	Article 4(1)(35)(b)	
Article 4(1)(31)	Article 4(1)(35)	
Article 4(2)	Article 4(2)	
Article 5(1)	Article 5(1)	
Article 5(2)	Article 5(2)	
Article 5(3)	Article 5(3)	
Article 5(4)	Article 5(4)	
Article 5(5)	—	
Article 6(1)	Article 6(1)	
Article 6(2)	Article 6(2)	
Article 6(3)	Article 6(3)	
Article 7(1)	Article 7(1)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 7(2)	Article 7(2)	
Article 7(3)	Article 7(3)	
Article 7(4)	Article 7(4) and (5)	
Article 8(a)	Article 8(a)	
Article 8(b)	Article 8(b)	
Article 8(c)	Article 8(c)	
Article 8(d)	Article 8(d)	
Article 8(e)	Article 8(e)	
Article 9(1)	Article 9(1) and (3)	
Article 9(2)	Article 9(5)	
Article 9(3)	Article 9(4)	
Article 9(4)	Article 9(6)	
Article 10(1)	Article 10(1)	
Article 10(2)	Article 10(2)	
Article 10(3)	Article 11(1)	
Article 10(4)	Article 11(2)	
Article 10(5)	Article 11(3)	
Article 10(6)	Article 10(3), 11(4)	
Article 10a(1)	Article 12(1)	
Article 10a(2)	Article 12(2)	
Article 10a(3)	Article 12(3)	
Article 10a(4)	Article 12(4)	
Article 10a(5)	Article 12(5)	
Article 10a(6)	Article 12(6)	
Article 10a(7)	Article 12(7)	
Article 10a(8)	Article 12(8) and (9)	
Article 10b(1)	Article 13(1)	
Article 10b(2)	Article 13(2)	
Article 10b(3)	Article 13(3)	
Article 10b(4)	Article 13(4)	
Article 10b(5)	Article 13(5)	
Article 11	Article 14	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 12	Article 15	
Article 13(1)	Article 16(1)	
Article 13(2)	Article 16(2)	
Article 13(3)	Article 16(3)	
Article 13(4)	Article 16(4)	
Article 13(5)	Article 16(5)	
Article 13(6)	Article 16(6)	
Article 13(7)	Article 16(8)	
Article 13(8)	Article 16(9)	
Article 13(9)	Article 16(11)	
Article 13(10)	Article 16(12)	
Article 14(1)	Article 18(1), Article 19(1)	
Article 14(2)	Article 18(2)	
Article 14(3)	Article 19(4)	
Article 14(4)	Article 18(3), Article 19(2)	
Article 14(5)	Article 18(6), Article 19(3)	
Article 14(6)	Article 18(8)	
Article 14(7)	Article 18(9)	
Article 15	—	
Article 16(1)	Article 21(1)	
Article 16(2)	Article 21(2)	
Article 16(3)	—	
Article 17(1)	Article 22	
Article 17(2)	—	
Article 18(1)	Article 23(1)	
Article 18(2)	Article 23(2)	
Article 18(3)	Article 23(4)	
Article 19(1)	Article 24(1)	
Article 19(2)	Article 24(3)	
Article 19(3)	Article 24(4)	
Article 19(4)	Article 25(2)	
Article 19(5)	Article 25(3)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 19(6)	Article 25(4)	
Article 19(7)	Article 25(5)	
Article 19(8)	Article 25(6)	
Article 19(9)	Article 24(6), Article 25(7)	
Article 19(10)	Article 24(13), Article 24(14), Article 25(8)	
Article 20	Article 26	
Article 21(1)	Article 27(1)	
Article 21(2)	Article 27(4)	
Article 21(3)	Article 27(5)	
Article 21(4)	Article 27(7)	
Article 21(5)	Article 27(8)	
Article 21(6)	Article 27(9)	
Article 22(1)	Article 28(1)	
Article 22(2)	Article 28(2)	
Article 22(3)	Article 28(3)	
Article 23(1)	Article 29(1)	
Article 23(2)	Article 29(2)	
Article 23(3)	Article 29(3)	
Article 23(4)	Article 29(4)	
Article 23(5)	Article 29(5)	
Article 23(6)	Article 29(6)	
Article 24(1)	Article 30(1)	
Article 24(2)	Article 30(2)	
Article 24(3)	Article 30(3)	
Article 24(4)	Article 30(4)	
Article 24(5)	Article 30(5)	
Article 25(1)		Article 24
Article 25(2)		Article 25(1)
Article 25(3)		Article 26(1) and (2)
Article 25(4)		Article 26(3)
Article 25(5)		Article 26(7)
Article 25(6)		Article 26(8)

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 25(7)		Article 26(9)
Article 26(1)	Article 31(1)	
Article 26(2)	Article 31(2) and (3)	
Article 27(1)		Article 14(1) to (5)
Article 27(2)		Article 14(6)
Article 27(3)		Article 15(1) to (4)
Article 27(4)		Article 16
Article 27(5)		Article 17(1)
Article 27(6)		Article 17(2)
Article 27(7)		Article 17(3)
Article 28(1)		Article 20(1)
Article 28(2)		Article 20(2)
Article 28(3)		Article 20(3)
Article 29(1)		Article 3(1), (2) and (3)
Article 29(2)		Article 4(1), (2) and (3)
Article 29(3)		Article 4(6)
Article 30(1)		Article 6(1) and (2)
Article 30(2)		Article 7(1)
Article 30(3)		Article 7(2)
Article 31(1)	Article 34(1)	
Article 31(2)	Article 34(2)	
Article 31(3)	Article 34(3)	
Article 31(4)	Article 34(4)	
Article 31(5)	Article 34(6)	
Article 31(6)	Article 34(7)	
Article 31(7)	Article 34(8) and (9)	
Article 32(1)	Article 35(1)	
Article 32(2)	Article 35(2)	
Article 32(3)	Article 35(3)	
Article 32(4)	Article 35(4)	
Article 32(5)	Article 35(5)	
Article 32(6)	Article 35(6)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 32(7)	Article 35(8)	
Article 32(8)	Article 35(9)	
Article 32(9)	Article 35(10)	
Article 32(10)	Article 35(11) and (12)	
Article 33(1)	Article 36(1)	
Article 33(2)	Article 36(2)	
Article 34(1)	Article 37(1)	
Article 34(2)	Article 37(2)	
Article 34(3)	—	
Article 35(1)	Article 38(1)	
Article 35(2)	Article 38(2)	
Article 36(1)	Article 44(1)	
Article 36(2)	Article 44(2)	
Article 36(3)	Article 44(3)	
Article 36(4)	Article 44(4)	
Article 36(5)	Article 44(5)	
Article 36(6)	Article 44(6)	
Article 37(1)	Article 45(1) and (8)	
Article 37(2)	Article 45(7) second subparagraph	
Article 38(1)	Article 46(1)	
Article 38(2)	Article 46(2)	
Article 38(3)	Article 46(3)	
Article 39	Article 47(1)	
Article 40(1)	Article 51(1)	
Article 40(2)	Article 51(2)	
Article 40(3)	Article 51(3)	
Article 40(4)	Article 51(4)	
Article 40(5)	Article 51(5)	
Article 40(6)	Article 51(6)	
Article 41(1)	Article 52(1)	
Article 41(2)	Article 52(2)	
Article 42(1)	Article 53(1)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 42(2)	Article 53(2)	
Article 42(3)	Article 53(3)	
Article 42(4)	Article 53(4)	
Article 42(5)	Article 53(5)	
Article 42(6)	Article 53(6)	
Article 42(7)	Article 53(7)	
Article 43(1)	Article 54(1)	
Article 43(2)	Article 54(2) and (3)	
Article 44(1)		Article 3(1), (2) and (3)
Article 44(2)		Article 4(1), (2) and (3)
Article 44(3)		Article 4(6)
Article 45(1)		Article 6(1) and (2)
Article 45(2)		Article 7(1)
Article 45(3)		Article 7(2)
Article 46(1)	Article 55(1)	
Article 46(2)	Article 55(2)	
Article 47	Article 56	
Article 48(1)	Article 67(1)	
Article 48(2)	Article 67(2)	
Article 48(3)	Article 67(3)	
Article 49	Article 68	
Article 50(1)	Article 69(1), 72(1)	
Article 50(2)	Article 69(2)	
Article 51(1)	Article 70(1) and (2)	
Article 51(2)	Article 70(5)	
Article 51(3)	Article 71(1)	
Article 51(4)	Article 71(4)	
Article 51(5)	Article 71(5)	
Article 51(6)	Article 71(6)	
Article 52(1)	Article 74(1)	
Article 52(2)	Article 74(2)	
Article 53(1)	Article 75(1)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 53(2)	Article 75(2)	
Article 53(3)	Article 75(3)	
Article 54(1)	Article 76(1)	
Article 54(2)	Article 76(2)	
Article 54(3)	Article 76(3)	
Article 54(4)	Article 76(4)	
Article 54(5)	Article 76(5)	
Article 55(1)	Article 77(1)	
Article 55(2)	Article 77(2)	
Article 56(1)	Article 79(1)	
Article 56(2)	Article 79(2)	
Article 56(3)	Article 79(3)	
Article 56(4)	Article 79(4)	
Article 56(5)	Article 79(8)	
Article 56(6)	Article 79(9)	
Article 57(1)	Article 80(1)	
Article 57(2)	Article 80(2)	
Article 57(3)	Article 80(3) and (4)	
Article 58(1)	Article 81(1)	
Article 58(2)	Article 81(2)	
Article 58(3)	Article 81(3)	
Article 58(4)	Article 81(4)	
Article 58(5)	Article 81(5)	
Article 58a	Article 82	
Article 59	Article 83	
Article 60(1)	Article 84(1)	
Article 60(2)	Article 84(2)	
Article 60(3)	Article 84(3)	
Article 60(4)	Article 84(4)	
Article 61(1)	Article 85(1)	
Article 61(2)	Article 85(2)	
Article 62(1)	Article 86(1)	

Directive 2004/39/EC	Directive 2014/65/EU	Regulation (EU) No 600/2014
Article 62(2)	Article 86(2)	
Article 62(3)	Article 86(3)	
Article 62(4)	Article 86(4)	
Article 62a(1)	Article 87(1)	
Article 62a(2)	Article 87(2)	
Article 63(1)	Article 88(1)	
Article 63(2)	Article 88(2)	
Article 64	—	—
Article 64a	—	—
Article 65	—	—
Article 66	—	—
Article 67	—	—
Article 68	—	—
Article 69	—	—
Article 70	—	—
Article 71	—	—
Article 72	—	—
Article 73	—	—
Annex I	Annex I	
Annex II	Annex II	



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