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Contents

I *Legislative acts*

## REGULATIONS

- ★ **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 <sup>(1)</sup> ..... 1**
- ★ **Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals <sup>(1)</sup> ..... 60**
- ★ **Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ..... 107**
- ★ **Regulation (EU) No 651/2012 of the European Parliament and of the Council of 4 July 2012 on the issuance of euro coins ..... 135**

## Corrigenda

- ★ **Corrigendum to Regulation (EU) No 1235/2010 of the European Parliament and of the Council of 15 December 2010 amending, as regards pharmacovigilance of medicinal products for human use, Regulation (EC) No 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, and Regulation (EC) No 1394/2007 on advanced therapy medicinal products (OJ L 348, 31.12.2010) ..... 138**

Price: EUR 7

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

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.



## I

(Legislative acts)

## REGULATIONS

## 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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

banking, the insurance and occupational pensions and the securities and markets sectors, and the creation of a European Systemic Risk Council.

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) At the request of the Commission, a report was published on 25 February 2009 by a High-Level Group chaired by Jacques de Larosière and concluded that the supervisory framework of the financial sector of the Union needed to be strengthened to reduce the risk and severity of future financial crises and recommended far-reaching reforms to the structure of supervision of that sector, including the creation of a European System of Financial Supervisors, comprising three European supervisory authorities, one each for the

(2) The Commission Communication of 4 March 2009, entitled 'Driving European Recovery', proposed to strengthen the Union's regulatory framework for financial services. In its Communication of 3 July 2009 entitled 'Ensuring efficient, safe and sound derivatives markets', the Commission assessed the role of derivatives in the financial crisis, and in its Communication of 20 October 2009 entitled 'Ensuring efficient, safe and sound derivative markets: Future policy actions', the Commission outlined the actions it intends to take to reduce the risks associated with derivatives.

(3) On 23 September 2009, the Commission adopted proposals for three regulations establishing the European System of Financial Supervision, including the creation of three European Supervisory Authorities (ESAs) to contribute to a consistent application of Union legislation and to the establishment of high-quality common regulatory and supervisory standards and practices. The ESAs comprise the European Supervisory Authority (European Banking Authority) (EBA) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council <sup>(4)</sup>, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (EIOPA) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council <sup>(5)</sup>, and 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>(6)</sup>. The ESAs have a crucial role to play in safeguarding the stability of the financial sector. It is therefore essential to ensure continuously that the development of their work is a matter of high political priority and that they are adequately resourced.

<sup>(1)</sup> OJ C 57, 23.2.2011, p. 1.

<sup>(2)</sup> OJ C 54, 19.2.2011, p. 44.

<sup>(3)</sup> Position of the European Parliament of 29 March 2012 (not yet published in the Official Journal) and decision of the Council of 4 July 2012.

<sup>(4)</sup> OJ L 331, 15.12.2010, p. 12.

<sup>(5)</sup> OJ L 331, 15.12.2010, p. 48.

<sup>(6)</sup> OJ L 331, 15.12.2010, p. 84.

- (4) Over-the-counter derivatives ('OTC derivative contracts') lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved. The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and, accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.
- (5) At the 26 September 2009 summit in Pittsburgh, G20 leaders agreed that all standardised OTC derivative contracts should be cleared through a central counterparty (CCP) by the end of 2012 and that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of OTC derivative contracts in an internationally consistent and non-discriminatory way.
- (6) The Commission will monitor and endeavour to ensure that those commitments are implemented in a similar way by the Union's international partners. The Commission should cooperate with third-country authorities in order to explore mutually supportive solutions to ensure consistency between this Regulation and the requirements established by third countries and thus avoid any possible overlapping in this respect. With the assistance of ESMA, the Commission should monitor and prepare reports to the European Parliament and the Council on the international application of principles laid down in this Regulation. In order to avoid potential duplicate or conflicting requirements, the Commission might adopt decisions on equivalence of the legal, supervisory and enforcement framework in third countries, if a number of conditions are met. The assessment which forms the basis of such decisions should not prejudice the right of a CCP established in a third country and recognised by ESMA to provide clearing services to clearing members or trading venues established in the Union, as the recognition decision should be independent of this assessment. Similarly, neither an equivalence decision nor the assessment should prejudice the right of a trade repository established in a third country and recognised by ESMA to provide services to entities established in the Union.
- (7) With regard to the recognition of third-country CCPs, 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 legal regimes as equivalent to the legal regime of the Union should be adopted only if the legal regime of the third country provides for an effective equivalent system for the recognition of CCPs authorised under foreign legal regimes in accordance with the general regulatory goals and standards set out by the G20 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 regime is similar to Union requirements and should be considered effective if those rules are being applied in a consistent manner.
- (8) It is appropriate and necessary in this context, taking account of the characteristics of derivative markets and the functioning of CCPs, to verify the effective equivalence of foreign regulatory systems in meeting G20 goals and standards in order to improve transparency in derivatives markets, mitigate systemic risk and protect against market abuse. The very special situation of CCPs requires that the provisions relating to third countries are organised and function in accordance with arrangements that are specific to these market structure entities. Therefore this approach does not constitute a precedent for other legislation.
- (9) The European Council, in its Conclusions of 2 December 2009, agreed that there was a need to substantially improve the mitigation of counterparty credit risk and that it was important to improve transparency, efficiency and integrity for derivative transactions. The European Parliament resolution of 15 June 2010 on 'Derivatives markets: future policy actions' called for mandatory clearing and reporting of OTC derivative contracts.
- (10) ESMA should act within the scope of this Regulation by safeguarding the stability of financial markets in emergency situations, ensuring the consistent application of Union rules by national supervisory authorities and settling disagreements between them. It is also entrusted with developing draft regulatory and implementing technical standards and has a central role in the authorisation and monitoring of CCPs and trade repositories.
- (11) One of the basic tasks to be carried out through the European System of Central Banks (ESCB) is to promote the smooth operation of payment systems. In this respect, the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems, including CCPs. The members of the ESCB are thus closely involved in the authorisation and monitoring of CCPs, recognition of third-country CCPs and the approval of interoperability arrangements. In addition, they are closely involved in respect of the setting of regulatory technical standards as well as guidelines and recommendations. This Regulation is without prejudice

to the responsibilities of the European Central Bank (ECB) and the national central banks (NCBs) to ensure efficient and sound clearing and payment systems within the Union and with other countries. Consequently, and in order to prevent the possible creation of parallel sets of rules, ESMA and the ESCB should cooperate closely when preparing the relevant draft technical standards. Further, the access to information by the ECB and the NCBs is crucial when fulfilling their tasks relating to the oversight of clearing and payment systems as well as to the functions of a central bank of issue.

(12) Uniform rules are required for derivative contracts set out in Annex I, Section C, points (4) to (10) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments <sup>(1)</sup>.

(13) Incentives to promote the use of CCPs have not proven to be sufficient to ensure that standardised OTC derivative contracts are in fact cleared centrally. Mandatory CCP clearing requirements for those OTC derivative contracts that can be cleared centrally are therefore necessary.

(14) It is likely that Member States will adopt divergent national measures which could create obstacles to the smooth functioning of the internal market and be to the detriment of market participants and financial stability. A uniform application of the clearing obligation in the Union is also necessary to ensure a high level of investor protection and to create a level playing field between market participants.

(15) Ensuring that the clearing obligation reduces systemic risk requires a process of identification of classes of derivatives that should be subject to that obligation. That process should take into account the fact that not all CCP-cleared OTC derivative contracts can be considered suitable for mandatory CCP clearing.

(16) This Regulation sets out the criteria for determining whether or not different classes of OTC derivative contracts should be subject to a clearing obligation. On the basis of draft regulatory technical standards developed by ESMA, the Commission should decide whether a class of OTC derivative contract is to be subject to a clearing obligation, and from when the clearing obligation takes effect including, where appropriate, phased-in implementation and the minimum remaining maturity of contracts entered into or novated before the date on which the clearing obligation

takes effect, in accordance with this Regulation. A phased-in implementation of the clearing obligation could be in terms of the types of market participants that must comply with the clearing obligation. In determining which classes of OTC derivative contracts are to be subject to the clearing obligation, ESMA should take into account the specific nature of OTC derivative contracts which are concluded with covered bond issuers or with cover pools for covered bonds.

(17) When determining which classes of OTC derivative contracts are to be subject to the clearing obligation, ESMA should also pay due regard to other relevant considerations, most importantly the interconnectedness between counterparties using the relevant classes of OTC derivative contracts and the impact on the levels of counterparty credit risk as well as promote equal conditions of competition within the internal market as referred to in Article 1(5)(d) of Regulation (EU) No 1095/2010.

(18) Where ESMA has identified that an OTC derivative product is standardised and suitable for clearing but no CCP is willing to clear that product, ESMA should investigate the reason for this.

(19) In determining which classes of OTC derivative contracts are to be subject to the clearing obligation, due account should be taken of the specific nature of the relevant classes of OTC derivative contracts. The predominant risk for transactions in some classes of OTC derivative contracts may relate to settlement risk, which is addressed through separate infrastructure arrangements, and may distinguish certain classes of OTC derivative contracts (such as foreign exchange) from other classes. CCP clearing specifically addresses counterparty credit risk, and may not be the optimal solution for dealing with settlement risk. The regime for such contracts should rely, in particular, on preliminary international convergence and mutual recognition of the relevant infrastructure.

(20) In order to ensure a uniform and coherent application of this Regulation and a level playing field for market participants when a class of OTC derivative contract is declared subject to the clearing obligation, this obligation should also apply to all contracts pertaining to that class of OTC derivative contract entered into on or after the date of notification of a CCP authorisation for the purpose of the clearing obligation received by ESMA but before the date from which the clearing obligation takes effect, provided that those contracts have a remaining maturity above the minimum determined by the Commission.

<sup>(1)</sup> OJ L 145, 30.4.2004, p. 1.

- (21) In determining whether a class of OTC derivative contract is to be subject to clearing requirements, ESMA should aim for a reduction in systemic risk. This includes taking into account in the assessment factors such as the level of contractual and operational standardisation of contracts, the volume and the liquidity of the relevant class of OTC derivative contract as well as the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivative contract.
- (22) For an OTC derivative contract to be cleared, both parties to that contract must be subject to a clearing obligation or must consent. Exemptions to the clearing obligation should be narrowly tailored as they would reduce the effectiveness of the obligation and the benefits of CCP clearing and may lead to regulatory arbitrage between groups of market participants.
- (23) In order to foster financial stability within the Union, it might be necessary also to subject the transactions entered into by entities established in third countries to the clearing and risk-mitigation techniques obligations, provided that the transactions concerned have a direct, substantial and foreseeable effect within the Union or where such obligations are necessary or appropriate to prevent the evasion of any provisions of this Regulation.
- (24) OTC derivative contracts that are not considered suitable for CCP clearing entail counterparty credit and operational risk and therefore, rules should be established to manage that risk. To mitigate counterparty credit risk, market participants that are subject to the clearing obligation should have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral. When preparing draft regulatory technical standards specifying those risk-management procedures, ESMA should take into account the proposals of the international standard setting bodies on margining requirements for non-centrally cleared derivatives. When developing draft regulatory technical standards to specify the arrangements required for the accurate and appropriate exchange of collateral to manage risks associated with uncleared trades, ESMA should take due account of impediments faced by covered bond issuers or cover pools in providing collateral in a number of Union jurisdictions. ESMA should also take into account the fact that preferential claims given to covered bond issuers counterparties on the covered bond issuer's assets provides equivalent protection against counterparty credit risk.
- (25) Rules on clearing OTC derivative contracts, reporting on derivative transactions and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP should apply to financial counterparties, namely investment firms as authorised in accordance with Directive 2004/39/EC, credit institutions as authorised in accordance with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions<sup>(1)</sup>, insurance undertakings as authorised in accordance with First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance<sup>(2)</sup>, assurance undertakings as authorised in accordance with Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance<sup>(3)</sup>, reinsurance undertakings as authorised in accordance with Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance<sup>(4)</sup>, undertakings for collective investments in transferable securities (UCITS) and, where relevant, their management companies, as authorised in accordance with 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)<sup>(5)</sup>, institutions for occupational retirement provision as defined in 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<sup>(6)</sup> and alternative investment funds managed by alternative investment fund managers (AIFM) as authorised or registered in accordance with Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers<sup>(7)</sup>.
- (26) Entities operating pension scheme arrangements, the primary purpose of which is to provide benefits upon retirement, usually in the form of payments for life, but also as payments made for a temporary period or as a lump sum, typically minimise their allocation to cash in order to maximise the efficiency and the return for their policy holders. Hence, requiring such entities to clear OTC derivative contracts centrally would lead to divesting a significant proportion of their assets for cash in order for them to meet the ongoing margin requirements of CCPs. To avoid a likely negative impact of such a requirement on the retirement income of future pensioners, the clearing obligation should not apply to pension schemes until a suitable technical solution for the transfer of non-cash collateral

<sup>(1)</sup> OJ L 177, 30.6.2006, p. 1.

<sup>(2)</sup> OJ L 228, 16.8.1973, p. 3.

<sup>(3)</sup> OJ L 345, 19.12.2002, p. 1.

<sup>(4)</sup> OJ L 323, 9.12.2005, p. 1.

<sup>(5)</sup> OJ L 302, 17.11.2009, p. 32.

<sup>(6)</sup> OJ L 235, 23.9.2003, p. 10.

<sup>(7)</sup> OJ L 174, 1.7.2011, p. 1.

as variation margins is developed by CCPs to address this problem. Such a technical solution should take into account the special role of pension scheme arrangements and avoid materially adverse effects on pensioners. During a transitional period, OTC derivative contracts entered into with a view to decreasing investment risks directly relating to the financial solvency of pension scheme arrangements should be subject not only to the reporting obligation, but also to bilateral collateralisation requirements. The ultimate aim, however, is central clearing as soon as this is tenable.

(27) It is important to ensure that only appropriate entities and arrangements receive special treatment as well as to take into account the diversity of pension systems across the Union, while also to provide for a level playing field for all pension scheme arrangements. Therefore, the temporary derogation should apply to institutions for occupational retirement provision registered in accordance with Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf as referred to in Article 2(1) of that Directive as well as any legal entity set up for the purpose of investment by such institutions, acting solely and exclusively in their interest, and to occupational retirement provision businesses of institutions referred to in Article 3 of Directive 2003/41/EC.

(28) The temporary derogation should also apply to occupational retirement provision businesses of life insurance undertakings provided that all corresponding assets and liabilities are ring-fenced, managed and organised separately, without any possibility of transfer. It should also apply to any other authorised and supervised entities operating on a national basis only or arrangements that are provided mainly in the territory of one Member State, only if both of them are recognised by national law and their primary purpose is to provide benefits upon retirement. The entities and arrangements referred to in this recital should be subject to the decision of the relevant competent authority and in order to ensure consistency, remove possible misalignments and avoid any abuse, the opinion of ESMA, after consulting EIOPA. This could include entities and arrangements that are not necessarily linked to an employer pension programme but still have the primary purpose of providing income at retirement, either on a compulsory or on a voluntary basis. Examples could include legal entities operating pension schemes on a funded basis under national law, provided that they invest in accordance with the 'prudent person' principle, and pension arrangements taken up by individuals directly, which may also be provided by life insurers. The exemption in the case of pension arrangements taken up by individuals directly should not cover OTC derivative contracts relating to other life insurance

products of the insurer which do not have the primary purpose of providing an income at retirement.

Further examples might be retirement provision businesses of insurance undertakings covered by Directive 2002/83/EC, provided that all assets corresponding to the businesses are included in a special register in accordance with the Annex to Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings<sup>(1)</sup> as well as occupational retirement provision arrangements of insurance undertakings based on collective bargaining agreements. Institutions established for the purpose of providing compensation to members of pension scheme arrangements in the case of a default should also be treated as a pension scheme for the purpose of this Regulation.

(29) Where appropriate, rules applicable to financial counterparties, should also apply to non-financial counterparties. It is recognised that non-financial counterparties use OTC derivative contracts in order to cover themselves against commercial risks directly linked to their commercial or treasury financing activities. Consequently, in determining whether a non-financial counterparty should be subject to the clearing obligation, consideration should be given to the purpose for which that non-financial counterparty uses OTC derivative contracts and to the size of the exposures that it has in those instruments. In order to ensure that non-financial institutions have the opportunity to state their views on the clearing thresholds, ESMA should, when preparing the relevant regulatory technical standards, conduct an open public consultation ensuring the participation of non-financial institutions. ESMA should also consult all relevant authorities, for example the Agency for the Cooperation of Energy Regulators, in order to ensure that the particularities of those sectors are fully taken into account. Moreover, by 17 August 2015, the Commission should assess the systemic importance of the transactions of non-financial firms in OTC derivative contracts in different sectors, including in the energy sector.

(30) In determining whether an OTC derivative contract reduces risks directly relating to the commercial activities and treasury activities of a non-financial counterparty, due account should be taken of that non-financial counterparty's overall hedging and risk-mitigation strategies. In particular, consideration should be given to whether an OTC derivative contract is economically appropriate for the reduction of risks in the conduct

<sup>(1)</sup> OJ L 110, 20.4.2001, p. 28.

and management of a non-financial counterparty, where the risks relate to fluctuations in interest rates, foreign exchange rates, inflation rates or commodity prices.

- (31) The clearing threshold is a very important figure for all non-financial counterparties. When the clearing threshold is set, the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivative contract should be taken into account. In that connection, appropriate efforts should be made to recognise the methods of risk mitigation used by non-financial counterparties in the context of their normal business activity.
- (32) Members of the ESCB and other Member States' bodies performing similar functions, other Union public bodies charged with or intervening in the management of the public debt, and the Bank for International Settlements should be excluded from the scope of this Regulation in order to avoid limiting their power to perform their tasks of common interest.
- (33) As not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP, they should have the possibility to access CCPs as clients or indirect clients subject to certain conditions.
- (34) The introduction of a clearing obligation along with a process to establish which CCPs can be used for the purpose of this obligation may lead to unintended competitive distortions of the OTC derivatives market. For example, a CCP could refuse to clear transactions executed on certain trading venues because the CCP is owned by a competing trading venue. In order to avoid such discriminatory practices, CCPs should agree to clear transactions executed in different trading venues, to the extent that those trading venues comply with the operational and technical requirements established by the CCP, without reference to the contractual documents on the basis of which the parties concluded the relevant OTC derivative transaction, provided that those documents are consistent with market standards. Trading venues should provide the CCPs with trade feeds on a transparent and non-discriminatory basis. The right of access of a CCP to a trading venue should allow for arrangements whereby multiple CCPs use trade feeds of the same trading venue. However, this should not lead to interoperability for derivatives clearing or create liquidity fragmentation.
- (35) This Regulation should not block fair and open access between trading venues and CCPs in the internal market, subject to the conditions laid down in this Regulation
- and in the regulatory technical standards developed by ESMA and adopted by the Commission. The Commission should continue to monitor closely the evolution of the OTC derivatives market and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market with the aim of ensuring a level playing field in the financial markets.
- (36) In certain areas within financial services and trading of derivative contracts, commercial and intellectual property rights may also exist. In instances where such property rights relate to products or services which have become, or impact upon, industry standards, licences should be available on proportionate, fair, reasonable and non-discriminatory terms.
- (37) In order to identify the relevant classes of OTC derivative contracts that should be subject to the clearing obligation, the thresholds and systemically relevant non-financial counterparties, reliable data is needed. Therefore, for regulatory purposes, it is important that a uniform derivatives data reporting requirement is established at Union level. Moreover, a retrospective reporting obligation is needed, to the largest possible extent, for both financial counterparties and non-financial counterparties, in order to provide comparative data, including to ESMA and the relevant competent authorities.
- (38) An intragroup transaction is a transaction between two undertakings which are included in the same consolidation on a full basis and are subject to appropriate centralised risk evaluation, measurement and control procedures. They are part of the same institutional protection scheme as referred to in Article 80(8) of Directive 2006/48/EC or, in the case of credit institutions affiliated to the same central body, as referred to in Article 3(1) of that Directive, both are credit institutions or one is a credit institution and the other is a central body. OTC derivative contracts may be recognised within non-financial or financial groups, as well as within groups composed of both financial and non-financial undertakings, and if such a contract is considered an intragroup transaction in respect of one counterparty, then it should also be considered an intragroup transaction in respect of the other counterparty to that contract. It is recognised that intragroup transactions may be necessary for aggregating risks within a group structure and that intragroup risks are therefore specific. Since the submission of those transactions to the clearing obligation may limit the efficiency of those intragroup risk-management processes, an exemption of intragroup transactions from the clearing obligation may be beneficial, provided that this exemption does not increase systemic risk. As a result, adequate exchange

of collateral should be substituted to the CCP clearing those transactions, where that is appropriate to mitigate intragroup counterparty risks.

(39) However, some intragroup transactions could be exempted, in some cases on the basis of the decision of the competent authorities, from the collateralisation requirement provided that their risk-management procedures are adequately sound, robust and consistent with the level of complexity of the transaction and there is no impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties. Those criteria as well as the procedures for the counterparties and the relevant competent authorities to be followed while applying exemptions should be specified in regulatory technical standards adopted in accordance with the relevant regulations establishing the ESAs. Before developing such draft regulatory technical standards, the ESAs should prepare an impact assessment of their potential impact on the internal market as well as on financial market participants and in particular on the operations and the structure of groups concerned. All the technical standards applicable to the collateral exchanged in intragroup transactions, including criteria for the exemption, should take into account the prevailing specificities of those transactions and existing differences between non-financial and financial counterparties as well as their purpose and methods of using derivatives.

(40) Counterparties should be considered to be included in the same consolidation at least where they are both included in a consolidation in accordance with Council Directive 83/349/EEC<sup>(1)</sup> or International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 of the European Parliament and of the Council<sup>(2)</sup> or, in relation to a group the parent undertaking of which has its head office in a third country, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with Commission Regulation (EC) No 1569/2007<sup>(3)</sup> (or accounting standards of a third country the use of which is permitted in accordance with Article 4 of Regulation (EC) No 1569/2007), or where they are both covered by the same consolidated supervision in accordance with Directive 2006/48/EC or with Directive 2006/49/EC of the European Parliament and of the Council<sup>(4)</sup> or, in

relation to a group the parent undertaking of which has its head office in a third country, the same consolidated supervision by a third country competent authority verified as equivalent to that governed by the principles laid down in Article 143 of Directive 2006/48/EC or in Article 2 of Directive 2006/49/EC.

(41) It is important that market participants report all details regarding derivative contracts they have entered into to trade repositories. As a result, information on the risks inherent in derivatives markets will be centrally stored and easily accessible, inter alia, to ESMA, the relevant competent authorities, the European Systemic Risk Board (ESRB) and the relevant central banks of the ESCB.

(42) The provision of trade repository services is characterised by economies of scale, which may hamper competition in this particular field. At the same time, the imposition of a comprehensive reporting requirement on market participants may increase the value of the information maintained by trade repositories also for third parties providing ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression. It is appropriate to ensure that a level playing field in the post-trade sector more generally is not compromised by a possible natural monopoly in the provision of trade repository services. Therefore, trade repositories should be required to provide access to the information held in the repository on fair, reasonable and non-discriminatory terms, subject to necessary precautions on data protection.

(43) In order to allow for a comprehensive overview of the market and for assessing systemic risk, both CCP-cleared and non-CCP-cleared derivative contracts should be reported to trade repositories.

(44) The ESAs should be provided with adequate resources in order to perform the tasks they are given in this Regulation effectively.

<sup>(1)</sup> Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1).

<sup>(2)</sup> Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

<sup>(3)</sup> Commission Regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council (OJ L 340, 22.12.2007, p. 66).

<sup>(4)</sup> Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (OJ L 177, 30.6.2006, p. 201).

(45) Counterparties and CCPs that conclude, modify, or terminate a derivative contract should ensure that the details of that contract are reported to a trade repository. They should be able to delegate the reporting of the contract to another entity. An entity or its employees that report the details of a derivative contract to a trade repository on behalf of a counterparty, in accordance with this Regulation, should not be in breach of any restriction on disclosure. When

preparing the draft regulatory technical standards regarding reporting, ESMA should take into account the progress made in the development of a unique contract identifier and the list of required reporting data in Annex I, Table 1 of Commission Regulation (EC) No 1287/2006 <sup>(1)</sup> implementing Directive 2004/39/EC and consult other relevant authorities such as the Agency for the Cooperation of Energy Regulators.

- (46) Taking into consideration the principles set out in the Commission's Communication on reinforcing sanctioning regimes in the financial services sector and legal acts of the Union adopted as a follow-up to that Communication, Member States should lay down rules on penalties applicable to infringements of this Regulation. Member States should enforce those penalties in a manner that does not reduce the effectiveness of those rules. Those penalties should be effective, proportionate and dissuasive. They should be based on guidelines adopted by ESMA to promote convergence and cross-sector consistency of penalty regimes in the financial sector. Member States should ensure that the penalties imposed are publicly disclosed, where appropriate, and that assessment reports on the effectiveness of existing rules are published at regular intervals.
- (47) A CCP might be established in accordance with this Regulation in any Member State. No Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for clearing services. Nothing in this Regulation should attempt to restrict or impede a CCP in one jurisdiction from clearing a product denominated in the currency of another Member State or in the currency of a third country.
- (48) Authorisation of a CCP should be conditional on a minimum amount of initial capital. Capital, including retained earnings and reserves of a CCP, should be proportionate to the risk stemming from the activities of the CCP at all times in order to ensure that it is adequately capitalised against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources and that it is able to conduct an orderly winding-up or restructuring of its operations if necessary.
- (49) As this Regulation introduces a legal obligation to clear through specific CCPs for regulatory purposes, it is essential to ensure that those CCPs are safe and sound and comply at all times with the stringent organisational, business conduct, and prudential requirements established by this Regulation. In order to ensure uniform

application of this Regulation, those requirements should apply to the clearing of all financial instruments in which the CCPs deal.

- (50) It is therefore necessary, for regulatory and harmonisation purposes, to ensure that counterparties only use CCPs which comply with the requirements laid down in this Regulation. Those requirements should not prevent Member States from adopting or continuing to apply additional requirements in respect of CCPs established in their territory including certain authorisation requirements under Directive 2006/48/EC. However, imposing such additional requirements should not influence the right of CCPs authorised in other Member States or recognised, in accordance with this Regulation, to provide clearing services to clearing members and their clients established in the Member State introducing additional requirements, since those CCPs are not subject to those additional requirements and do not need to comply with them. By 30 September 2014, ESMA should draft a report on the impact of the application of additional requirements by Member States.
- (51) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivative contracts. It is appropriate that competent authorities retain responsibility for all aspects of the authorisation and the supervision of CCPs, including the responsibility for verifying that the applicant CCP complies with this Regulation and with 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 <sup>(2)</sup>, in view of the fact that those national competent authorities remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary.
- (52) Where a CCP risks insolvency, fiscal responsibility may lie predominantly with the Member State in which that CCP is established. It follows that authorisation and supervision of that CCP should be exercised by the relevant competent authority of that Member State. However, since a CCP's clearing members may be established in different Member States and they will be the first to be impacted by the CCP's default, it is imperative that all relevant competent authorities and ESMA be involved in the authorisation and supervisory process. This will avoid divergent national measures or practices and obstacles to the proper functioning of the internal market. Furthermore, no proposal or policy of any member of a college of supervisors should, directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services in any currency. ESMA should be a participant

<sup>(1)</sup> OJ L 241, 2.9.2006, p. 1.

<sup>(2)</sup> OJ L 166, 11.6.1998, p. 45.

- in every college in order to ensure the consistent and correct application of this Regulation. ESMA should involve other competent authorities in the Member States concerned in the work of preparing recommendations and decisions.
- (53) In light of the role assigned to colleges, it is important that all the relevant competent authorities as well as members of the ESCB are involved in performing their tasks. The college should consist not only of the competent authorities supervising the CCP but also of the supervisors of the entities on which the operations of that CCP might have an impact, namely selected clearing members, trading venues, interoperable CCPs and central securities depositories. Members of the ESCB that are responsible for the oversight of the CCP and interoperable CCPs as well as those responsible for the issue of the currencies of the financial instruments cleared by the CCP, should be able to participate in the college. As the supervised or overseen entities would be established in a limited range of Member States in which the CCP operates, a single competent authority or member of the ESCB could be responsible for supervision or oversight of a number of those entities. In order to ensure smooth cooperation between all the members of the college, appropriate procedures and mechanisms should be put in place.
- (54) Since the establishment and functioning of the college is assumed to be based on a written agreement between all of its members, it is appropriate to confer upon them the power to determine the college's decision-making procedures, given the sensitivity of the issue. Therefore, detailed rules on voting procedures should be laid down in a written agreement between the members of the college. However, in order to balance the interests of all the relevant market participants and Member States appropriately, the college should vote in accordance with the general principle whereby each member has one vote, irrespective of the number of functions it performs in accordance with this Regulation. For colleges with up to and including 12 members, a maximum of two college members belonging to the same Member State should have a vote and each voting member should have one vote. For colleges with more than 12 members, a maximum of three college members belonging to the same Member State should have a vote and each voting member should have one vote.
- (55) The very particular situation of CCPs requires that colleges are organised and function in accordance with arrangements that are specific to the supervision of CCPs.
- (56) The arrangements provided for in this Regulation do not constitute a precedent for other legislation on the supervision and oversight of financial market infrastructures, in particular with regard to the voting modalities for referrals to ESMA.
- (57) A CCP should not be authorised where all the members of the college, excluding the competent authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement that the CCP should not be authorised. If, however, a sufficient majority of the college has expressed a negative opinion and any of the competent authorities concerned, based on that majority of two-thirds of the college, has referred the matter to ESMA, the competent authority of the Member State where the CCP is established should defer its decision on the authorisation and await any decision that ESMA may take regarding conformity with Union law. The competent authority of the Member State where the CCP is established should take its decision in accordance with such a decision by ESMA. Where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion to the effect that they consider that the requirements are not met and that the CCP should not receive authorisation, the competent authority of the Member State where the CCP is established should be able to refer the matter to ESMA to decide on conformity with Union law.
- (58) It is necessary to reinforce provisions on exchange of information between competent authorities, ESMA and other relevant authorities and to strengthen the duties of assistance and cooperation between them. Due to increasing cross-border activity, those authorities should provide each other with the relevant information for the exercise of their functions so as to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions.
- (59) In view of the global nature of financial markets, ESMA should be directly responsible for recognising CCPs established in third countries and thus allowing them to provide clearing services within the Union, provided that the Commission has recognised the legal and supervisory framework of that third country as equivalent to the Union framework and that certain other conditions are met. Therefore, a CCP established in a third country, providing clearing services to clearing members or trading venues established in the Union should be recognised by ESMA. However, in order not to hamper the further development of cross-border investment management business in the Union, a third-country CCP providing services to clients established in the Union through a clearing member established in a third country should not have to be recognised by ESMA. In this context, agreements with the Union's major international partners will be of particular importance in order to ensure a global level playing field and financial stability.

- (60) On 16 September 2010, the European Council agreed on the need for the Union to promote its interest and values more assertively and, in a spirit of reciprocity and mutual benefit, in the context of the Union's external relations and to take steps, inter alia, to secure greater market access for European business and deepen regulatory cooperation with major trade partners.
- (61) A CCP should have robust governance arrangements, senior management of good repute and independent members on its board, irrespective of its ownership structure. At least one-third, and no less than two, members of its board should be independent. However, different governance arrangements and ownership structures may influence a CCP's willingness or ability to clear certain products. It is thus appropriate that the independent members of the board and the risk committee to be established by the CCP address any potential conflict of interests within a CCP. Clearing members and clients need to be adequately represented as decisions taken by the CCP may have an impact on them.
- (62) A CCP may outsource functions. The CCP's risk committee should advise on such outsourcing. Major activities linked to risk management should not be outsourced unless this is approved by the competent authority.
- (63) The participation requirements for a CCP should be transparent, proportionate, and non-discriminatory and should allow for remote access to the extent that this does not expose the CCP to additional risks.
- (64) Clients of clearing members that clear their OTC derivative contracts with CCPs should be granted a high level of protection. The actual level of protection depends on the level of segregation that those clients choose. Intermediaries should segregate their assets from those of their clients. For this reason, CCPs should keep updated and easily identifiable records, in order to facilitate the transfer of the positions and assets of a defaulting clearing member's clients to a solvent clearing member or, as the case may be, the orderly liquidation of the clients' positions and the return of excess collateral to the clients. The requirements laid down in this Regulation on the segregation and portability of clients' positions and assets should therefore prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them.
- (65) A CCP should have a sound risk-management framework to manage credit risks, liquidity risks, operational and other risks, including the risks that it bears or poses to other entities as a result of interdependencies. A CCP should have adequate procedures and mechanisms in place to deal with the default of a clearing member. In order to minimise the contagion risk of such a default, the CCP should have in place stringent participation requirements, collect appropriate initial margins, maintain a default fund and other financial resources to cover potential losses. In order to ensure that it benefits from sufficient resources on an ongoing basis, the CCP should establish a minimum amount below which the size of the default fund is not generally to fall. This should not, however, limit the CCP's ability to use the entirety of the default fund to cover the losses caused by a clearing member's default.
- (66) When defining a sound risk-management framework, a CCP should take into account its potential risk and economic impact on the clearing members and their clients. Although the development of a highly robust risk management should remain its primary objective, a CCP may adapt its features to the specific activities and risk profiles of the clients of the clearing members, and if deemed appropriate on the basis of the criteria specified in the regulatory technical standards to be developed by ESMA, may include in the scope of the highly liquid assets accepted as collateral, at least cash, government bonds, covered bonds in accordance with Directive 2006/48/EC subject to adequate haircuts, guarantees callable on first demand granted by a member of the ESCB, commercial bank guarantees under strict conditions, in particular relating to the creditworthiness of the guarantor, and the guarantor's capital links with CCP's clearing members. Where appropriate, ESMA may also consider gold as an asset acceptable as collateral. CCPs should be able to accept, under strict risk-management conditions, commercial bank guarantees from non-financial counterparties acting as clearing members.
- (67) CCPs' risk-management strategies should be sufficiently sound so as to avoid risks for the taxpayer.
- (68) Margin calls and haircuts on collateral may have procyclical effects. CCPs, competent authorities and ESMA should therefore adopt measures to prevent and control possible procyclical effects in risk-management practices adopted by CCPs, to the extent that a CCP's soundness and financial security is not negatively affected.
- (69) Exposure management is an essential part of the clearing process. Access to, and use of, the relevant pricing sources should be granted to provide clearing services

in general. Such pricing sources should include those relating to indices that are used as references to derivatives or other financial instruments.

ESMA should assume responsibility for the registration, withdrawal of registration and supervision of trade repositories.

- (70) Margins are the primary line of defence for a CCP. Although CCPs should invest the margins received in a safe and prudent manner, they should make particular efforts to ensure adequate protection of margins to guarantee that they are returned in a timely manner to the non-defaulting clearing members or to an interoperable CCP where the CCP collecting these margins defaults.
- (71) Access to adequate liquidity resources is essential for a CCP. It is possible for such liquidity to derive from access to central bank liquidity, creditworthy and reliable commercial bank liquidity, or a combination of both. Access to liquidity could result from an authorisation granted in accordance with Article 6 of Directive 2006/48/EC or other appropriate arrangements. In assessing the adequacy of liquidity resources, especially in stress situations, a CCP should take into consideration the risks of obtaining the liquidity by only relying on commercial banks credit lines.
- (72) The 'European Code of Conduct for Clearing and Settlement' of 7 November 2006 established a voluntary framework for establishing links between CCPs. However, the post-trade sector remains fragmented along national lines, making cross-border trades more costly and hindering harmonisation. It is therefore necessary to lay down the conditions for the establishment of interoperability arrangements between CCPs to the extent these do not expose the relevant CCPs to risks that are not appropriately managed.
- (73) Interoperability arrangements are important for greater integration of the post-trading market within the Union and regulation should be provided for. However, as interoperability arrangements may expose CCPs to additional risks, CCPs should have been, for three years, authorised to clear or recognised in accordance with this Regulation, or authorised under a pre-existing national authorisation regime, before competent authorities grant approval of such interoperability arrangements. In addition, given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to restrict the scope of interoperability arrangements to transferable securities and money-market instruments. However, by 30 September 2014, ESMA should submit a report to the Commission on whether an extension of that scope to other financial instruments would be appropriate.
- (74) Trade repositories collect data for regulatory purposes that are relevant to authorities in all Member States.
- (75) Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict operational, record-keeping and data-management requirements.
- (76) Transparency of prices, fees and risk-management models associated with the services provided by CCPs, their members and trade repositories is necessary to enable market participants to make an informed choice.
- (77) In order to carry out its duties effectively, ESMA should be able to require, by simple request or by decision, all necessary information from trade repositories, related third parties and third parties to which the trade repositories have outsourced operational functions or activities. If ESMA requires such information by simple request, the addressee is not obliged to provide the information but, in the event that it does so voluntarily, the information provided should not be incorrect or misleading. Such information should be made available without delay.
- (78) Without prejudice to cases covered by criminal or tax law, the competent authorities, ESMA, bodies or natural or legal persons other than the competent authorities, which receive confidential information should use it only in the performance of their duties and for the exercise of their functions. However, this should not prevent the exercise, in accordance with national law, of the functions of national bodies responsible for the prevention, investigation or correction of cases of maladministration.
- (79) In order to exercise its supervisory powers effectively, ESMA should be able to conduct investigations and on-site inspections.
- (80) ESMA should be able to delegate specific supervisory tasks to the competent authority of a Member State, for instance where a supervisory task requires knowledge and experience with respect to local conditions, which are more easily available at national level. ESMA should be able to delegate the carrying out of specific investigatory tasks and on-site inspections. Prior to the delegation of tasks, ESMA should consult the relevant competent authority about the detailed conditions relating to such delegation of tasks, including the scope of the task to be delegated, the timetable for the performance of the task, and the transmission of necessary information by and to ESMA. ESMA

should compensate the competent authorities for carrying out a delegated task in accordance with a regulation on fees to be adopted by the Commission by means of a delegated act. ESMA should not be able to delegate the power to adopt decisions on registration.

- (81) It is necessary to ensure that competent authorities are able to request that ESMA examine whether the conditions for the withdrawal of a trade repository's registration are met. ESMA should assess such requests and take any appropriate measures.
- (82) ESMA should be able to impose periodic penalty payments to compel trade repositories to put an end to an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection.
- (83) ESMA should also be able to impose fines on trade repositories where it finds that they have committed, intentionally or negligently, an infringement of this Regulation. Fines should be imposed according to the level of seriousness of the infringement. Infringements should be divided into different groups for which specific fines should be allocated. In order to calculate the fine relating to a particular infringement, ESMA should use a two-step methodology consisting of setting a basic amount and adjusting that basic amount, if necessary, by certain coefficients. The basic amount should be established by taking into account the annual turnover of the trade repository concerned and the adjustments should be made by increasing or decreasing the basic amount through the application of the relevant coefficients in accordance with this Regulation.
- (84) This Regulation should establish coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to decide on a fine which is proportionate to the seriousness of the infringement committed by a trade repository, taking into account the circumstances under which that infringement has been committed.
- (85) Before taking a decision to impose fines or periodic penalty payments, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence.
- (86) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of *res judicata* as a result of criminal proceedings under national law.
- (87) ESMA's decisions imposing fines and periodic penalty payments should be enforceable and their enforcement should be subject to the rules of civil procedure which are in force in the State in the territory of which it is carried out. Rules of civil procedure should not include criminal procedural rules but could include administrative procedural rules.
- (88) In the case of an infringement committed by a trade repository, ESMA should be empowered to take a range of supervisory measures, including requiring the trade repository to bring the infringement to an end, and, as a last resort, withdrawing the registration where the trade repository has seriously or repeatedly infringed this Regulation. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons subject to the proceedings an opportunity to be heard in order to comply with their rights of defence.
- (89) It is essential that Member States and ESMA protect the right to privacy of natural persons when processing personal data, in accordance with 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<sup>(1)</sup> and with 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 of the free movement of such data<sup>(2)</sup>.
- (90) It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the existing recommendations developed by the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO) noting that the CPSS-IOSCO principles for financial market infrastructure, including CCPs, were established on 16 April 2012. It creates a Union framework in which CCPs can operate safely. ESMA should consider these existing standards and their future developments when drawing up or proposing to revise the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.
- (91) 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 amendments to the list of entities exempt from this

<sup>(1)</sup> OJ L 281, 23.11.1995, p. 31.

<sup>(2)</sup> OJ L 8, 12.1.2001, p. 1.

Regulation, further rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of the defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; measures to amend Annex II in order to take account of developments in the financial markets; the further specification of the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid. 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.

- (92) In order to ensure consistent harmonisation, power should be delegated to the Commission to adopt the ESAs' draft regulatory technical standards in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 for the application, for the purposes of this Regulation, of points (4) to (10) of Section C of Annex I to Directive 2004/39/EC and in order to specify: the OTC derivative contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation; the types of indirect contractual arrangements that meet the conditions set out in this Regulation; the classes of OTC derivative contracts that should be subject to the clearing obligation, the date or dates from which the clearing obligation is to take effect, including any phase-in, the categories of counterparties to which the clearing obligation applies, and the minimum remaining maturity of the OTC derivative contracts entered into or novated before the date on which the clearing obligation takes effect; the details to be included in a competent authority's notification to ESMA of its authorisation of a CCP to clear a class of OTC derivative contract; particular classes of OTC derivative contracts, the degree of standardisation of the contractual terms and operational processes, the volume and the liquidity, and the availability of fair, reliable and generally accepted pricing information; the details to be included in ESMA's register of classes of OTC derivative contracts subject to the clearing obligation; the details and type of the reports for the different classes of derivatives; criteria to determine which OTC derivative contracts are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity and values of the clearing thresholds, the procedures and the arrangements in regard to risk-mitigation techniques for OTC derivative contracts not cleared by a CCP; the risk-management procedures, including the required levels and type of collateral and segregation arrangements and the required level of capital; the notion of liquidity fragmentation; requirements regarding the capital, retained earnings and reserves of CCPs; the minimum content of the rules and governance arrangements for CCPs; the details of the records and information to be retained by CCPs; the minimum content and requirements for CCPs' business continuity policies and disaster recovery

plans; the appropriate percentage and time horizons for the liquidation period and the calculation of historical volatility to be considered for the different classes of financial instruments taking into account the objective to limit pro-cyclicality and the conditions under which portfolio margining practices can be implemented; the framework for defining extreme but plausible market conditions which should be used when defining the size of the default fund and the resources of CCPs; the methodology for calculating and maintaining the amount of CCPs' own resources; the type of collateral that could be considered highly liquid, such as cash, gold, government and high-quality corporate bonds, covered bonds and the haircuts and the conditions under which commercial bank guarantees can be accepted as collateral; the financial instruments that can be considered highly liquid, bearing minimal credit and market risk, highly secured arrangements and concentration limits; the type of stress tests to be undertaken by CCPs for different classes of financial instruments and portfolios, the involvement of clearing members or other parties in the tests, the frequency and timing of the tests and the key information that the CCP is to disclose on its risk-management model and assumptions adopted to perform the stress tests; the details of the application by trade repositories for registration with ESMA; the frequency and the detail in which trade repositories are to disclose information relating to aggregate positions by class of OTC derivative contract; and the operational standards required in order to aggregate and compare data across repositories.

- (93) Any obligation imposed by this Regulation which is to be further developed by means of delegated or implementing acts adopted under Article 290 or 291 TFEU should be understood as applying only from the date on which those acts take effect.
- (94) As a part of its development of technical guidelines and regulatory technical standards, and in particular when setting the clearing threshold for non-financial counterparties under this Regulation, ESMA should organise public hearings of market participants.
- (95) In order to ensure uniform conditions for the implementation of this Regulation, 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 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<sup>(1)</sup>.
- (96) The Commission should monitor and assess the need for any appropriate measures to ensure the consistent and effective application and development of regulations, standards and practices falling within the scope of this Regulation, taking into consideration the outcome of the work performed by relevant international forums.

<sup>(1)</sup> OJ L 55, 28.2.2011, p. 13.

- (97) In view of the rules regarding interoperable systems, it was deemed appropriate to amend Directive 98/26/EC to protect the rights of a system operator that provides collateral security to a receiving system operator in the event of insolvency proceedings against that receiving system operator.
- (98) In order to facilitate efficient clearing, recording, settlement and payment, CCPs and trade repositories should accommodate in their communication procedures with participants and with the market infrastructures they interface with, the relevant international communication procedures and standards for messaging and reference data.
- (99) Since the objectives of this Regulation, namely to lay down uniform requirements for OTC derivative contracts and for the performance of activities of CCPs and trade repositories, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, 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 those objectives,

(b) the Bank for International Settlements.

5. With the exception of the reporting obligation under Article 9, this Regulation shall not apply to the following entities:

- (a) multilateral development banks, as listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC;
- (b) public sector entities within the meaning of point (18) of Article 4 of Directive 2006/48/EC where they are owned by central governments and have explicit guarantee arrangements provided by central governments;
- (c) the European Financial Stability Facility and the European Stability Mechanism.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 82 to amend the list set out in paragraph 4 of this Article.

HAVE ADOPTED THIS REGULATION:

#### TITLE I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### Article 1

#### Subject matter and scope

1. This Regulation lays down clearing and bilateral risk-management requirements for over-the-counter ('OTC') derivative contracts, reporting requirements for derivative contracts and uniform requirements for the performance of activities of central counterparties ('CCPs') and trade repositories.
2. This Regulation shall apply to CCPs and their clearing members, to financial counterparties and to trade repositories. It shall apply to non-financial counterparties and trading venues where so provided.
3. Title V of this Regulation shall apply only to transferable securities and money-market instruments, as defined in point (18)(a) and (b) and point (19) of Article 4(1) of Directive 2004/39/EC.
4. This Regulation shall not apply to:
- (a) the members of the ESCB and other Member States' bodies performing similar functions and other Union public bodies charged with or intervening in the management of the public debt;

To that end, by 17 November 2012 the Commission shall present to the European Parliament and the Council a report assessing the international treatment of public bodies charged with or intervening in the management of the public debt and central banks.

The report shall include a comparative analysis of the treatment of those bodies and of central banks within the legal framework of a significant number of third countries, including at least the three most important jurisdictions as regards volumes of contracts traded, and the risk-management standards applicable to the derivative transactions entered into by those bodies and by 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 clearing and reporting obligation is necessary, the Commission shall add them to the list set out in paragraph 4.

#### Article 2

#### Definitions

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

- (1) 'CCP' means a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer;

- (2) 'trade repository' means a legal person that centrally collects and maintains the records of derivatives;
- (3) 'clearing' means the process of establishing positions, including the calculation of net obligations, and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions;
- (4) 'trading venue' means a system operated by an investment firm or a market operator within the meaning of Article 4(1)(1) and 4(1)(13) of Directive 2004/39/EC other than a systematic internaliser within the meaning of Article 4(1)(7) thereof, which brings together buying or selling interests in financial instruments in the system, in a way that results in a contract in accordance with Title II or III of that Directive;
- (5) 'derivative' or 'derivative contract' means a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006;
- (6) 'class of derivatives' means a subset of derivatives sharing common and essential characteristics including at least the relationship with the underlying asset, the type of underlying asset, and currency of notional amount. Derivatives belonging to the same class may have different maturities;
- (7) 'OTC derivative' or 'OTC derivative contract' means a derivative contract the execution of which does not take place on a regulated market as within the meaning of Article 4(1)(14) of Directive 2004/39/EC or on a third-country market considered as equivalent to a regulated market in accordance with Article 19(6) of Directive 2004/39/EC;
- (8) 'financial counterparty' means an investment firm authorised in accordance with Directive 2004/39/EC, a credit institution authorised in accordance with Directive 2006/48/EC, an insurance undertaking authorised in accordance with Directive 73/239/EEC, an assurance undertaking authorised in accordance with Directive 2002/83/EC, a reinsurance undertaking authorised in accordance with Directive 2005/68/EC, a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC and an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU;
- (9) 'non-financial counterparty' means an undertaking established in the Union other than the entities referred to in points (1) and (8);
- (10) 'pension scheme arrangement' means:
- (a) institutions for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf as referred to in Article 2(1) of that Directive as well as any legal entity set up for the purpose of investment of such institutions, acting solely and exclusively in their interest;
  - (b) occupational retirement provision businesses of institutions referred to in Article 3 of Directive 2003/41/EC;
  - (c) occupational retirement provision businesses of life insurance undertakings covered by Directive 2002/83/EC, provided that all assets and liabilities corresponding to the business are ring-fenced, managed and organised separately from the other activities of the insurance undertaking, without any possibility of transfer;
  - (d) any other authorised and supervised entities, or arrangements, operating on a national basis, provided that:
    - (i) they are recognised under national law; and
    - (ii) their primary purpose is to provide retirement benefits;
- (11) 'counterparty credit risk' means the risk that the counterparty to a transaction defaults before the final settlement of the transaction's cash flows;
- (12) 'interoperability arrangement' means an arrangement between two or more CCPs that involves a cross-system execution of transactions;
- (13) 'competent authority' means the competent authority referred to in the legislation referred to in point (8) of this Article, the competent authority referred to in Article 10(5) or the authority designated by each Member State in accordance with Article 22;
- (14) 'clearing member' means an undertaking which participates in a CCP and which is responsible for discharging the financial obligations arising from that participation;
- (15) 'client' means an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP;
- (16) 'group' means the group of undertakings consisting of a parent undertaking and its subsidiaries within the meaning of Articles 1 and 2 of Directive 83/349/EEC or the group of undertakings referred to in Article 3(1) and Article 80(7) and (8) of Directive 2006/48/EC;

- (17) 'financial institution' means an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points (2) to (12) of Annex I to Directive 2006/48/EC;
- (18) 'financial holding company' means a financial institution, the subsidiary undertakings of which are either exclusively or mainly credit institutions or financial institutions, at least one of such subsidiary undertakings being a credit institution, and which is not a mixed financial holding company within the meaning of Article 2(15) of 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 <sup>(1)</sup>;
- (19) 'ancillary services undertaking' means an undertaking the principal activity of which consists in owning or managing property, managing data-processing services, or a similar activity which is ancillary to the principal activity of one or more credit institution;
- (20) 'qualifying holding' means any direct or indirect holding in a CCP or trade repository which represents at least 10 % 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 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 <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 CCP or trade repository in which that holding subsists;
- (21) 'parent undertaking' means a parent undertaking as described in Articles 1 and 2 of Directive 83/349/EEC;
- (22) 'subsidiary' means a subsidiary undertaking as described in Articles 1 and 2 of Directive 83/349/EEC, including a subsidiary of a subsidiary undertaking of an ultimate parent undertaking;
- (23) 'control' means the relationship between a parent undertaking and a subsidiary, as described in Article 1 of Directive 83/349/EEC;
- (24) 'close links' means a situation in which two or more natural or legal persons are linked by:
- (a) participation, by way of direct ownership or control, of 20 % or more of the voting rights or capital of an undertaking; or
- (b) control or a similar relationship between any natural or legal person and an undertaking or a subsidiary of a subsidiary also being considered a subsidiary of the parent undertaking which is at the head of those undertakings.
- A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.
- (25) 'capital' means subscribed capital within the meaning of Article 22 of Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions <sup>(3)</sup> in so far it has been paid up, plus the related share premium accounts, it fully absorbs losses in going concern situations, and, in the event of bankruptcy or liquidation, it ranks after all other claims;
- (26) 'reserves' means reserves as set out in Article 9 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies <sup>(4)</sup> and profits and losses brought forward as a result of the application of the final profit or loss;
- (27) 'board' means administrative or supervisory board, or both, in accordance with national company law;
- (28) 'independent member' of the board means a member of the board who has no business, family or other relationship that raises a conflict of interests regarding the CCP concerned or its controlling shareholders, its management or its clearing members, and who has had no such relationship during the five years preceding his membership of the board;
- (29) 'senior management' means the person or persons who effectively direct the business of the CCP or the trade repository, and the executive member or members of the board.

### Article 3

#### Intragroup transactions

1. In relation to a non-financial counterparty, an intragroup transaction is an OTC derivative contract entered into with another counterparty which is part of the same group provided that both counterparties are included in the same consolidation on a full basis and they are subject to an appropriate centralised risk evaluation, measurement and control procedures and that counterparty is established in the Union or, if it is established in a third country, the Commission has adopted an implementing act under Article 13(2) in respect of that third country.

<sup>(1)</sup> OJ L 35, 11.2.2003, p. 1.

<sup>(2)</sup> OJ L 390, 31.12.2004, p. 38.

<sup>(3)</sup> OJ L 372, 31.12.1986, p. 1.

<sup>(4)</sup> OJ L 222, 14.8.1978, p. 11.

2. In relation to a financial counterparty, an intragroup transaction is any of the following:

- (a) an OTC derivative contract entered into with another counterparty which is part of the same group, provided that the following conditions are met:
  - (i) the financial counterparty is established in the Union or, if it is established in a third country, the Commission has adopted an implementing act under Article 13(2) in respect of that third country;
  - (ii) the other counterparty is a financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements;
  - (iii) both counterparties are included in the same consolidation on a full basis; and
  - (iv) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;
- (b) an OTC derivative contract entered into with another counterparty where both counterparties are part of the same institutional protection scheme, referred to in Article 80(8) of Directive 2006/48/EC, provided that the condition set out in point (a)(ii) of this paragraph is met;
- (c) an OTC derivative contract entered into between credit institutions affiliated to the same central body or between such credit institution and the central body, as referred to in Article 3(1) of Directive 2006/48/EC; or
- (d) an OTC derivative contract entered into with a non-financial counterparty which is part of the same group provided that both counterparties are included in the same consolidation on a full basis and they are subject to an appropriate centralised risk evaluation, measurement and control procedures and that counterparty is established in the Union or in a third-country jurisdiction for which the Commission has adopted an implementing act as referred to in Article 13(2) in respect of that third country.

3. For the purposes of this Article, counterparties shall be considered to be included in the same consolidation when they are both either:

- (a) included in a consolidation in accordance with Directive 83/349/EEC or International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 or, in relation to a group the parent undertaking of which has its head office in a third country, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with

Regulation (EC) No 1569/2007 (or accounting standards of a third country the use of which is permitted in accordance with Article 4 of that Regulation); or

- (b) covered by the same consolidated supervision in accordance with Directive 2006/48/EC or Directive 2006/49/EC or, in relation to a group the parent undertaking of which has its head office in a third country, the same consolidated supervision by a third-country competent authority verified as equivalent to that governed by the principles laid down in Article 143 of Directive 2006/48/EC or in Article 2 of Directive 2006/49/EC.

## TITLE II

### CLEARING, REPORTING AND RISK MITIGATION OF OTC DERIVATIVES

#### Article 4

#### Clearing obligation

1. Counterparties shall clear all OTC derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation in accordance with Article 5(2), if those contracts fulfil both of the following conditions:

(a) they have been concluded in one of the following ways:

- (i) between two financial counterparties;
- (ii) between a financial counterparty and a non-financial counterparty that meets the conditions referred to in Article 10(1)(b);
- (iii) between two non-financial counterparties that meet the conditions referred to in Article 10(1)(b);
- (iv) between a financial counterparty or a non-financial counterparty meeting the conditions referred to in Article 10(1)(b) and an entity established in a third country that would be subject to the clearing obligation if it were established in the Union; or
- (v) between two entities established in one or more third countries that would be subject to the clearing obligation if they were established in the Union, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of this Regulation; and

(b) they are entered into or novated either:

- (i) on or after the date from which the clearing obligation takes effect; or

- (ii) on or after notification as referred to in Article 5(1) but before the date from which the clearing obligation takes effect if the contracts have a remaining maturity higher than the minimum remaining maturity determined by the Commission in accordance with Article 5(2)(c).

2. Without prejudice to risk-mitigation techniques under Article 11, OTC derivative contracts that are intragroup transactions as described in Article 3 shall not be subject to the clearing obligation.

The exemption set out in the first subparagraph shall apply only:

- (a) where two counterparties established in the Union belonging to the same group have first notified their respective competent authorities in writing that they intend to make use of the exemption for the OTC derivative contracts concluded between each other. The notification shall be made not less than 30 calendar days before the use of the exemption. Within 30 calendar days after receipt of that notification, the competent authorities may object to the use of this exemption if the transactions between the counterparties do not meet the conditions laid down in Article 3, without prejudice to the right of the competent authorities to object after that period of 30 calendar days has expired where those conditions are no longer met. If there is disagreement between the competent authorities, ESMA may assist those authorities in reaching an agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010;

- (b) to OTC derivative contracts between two counterparties belonging to the same group which are established in a Member State and in a third country, where the counterparty established in the Union has been authorised to apply the exemption by its competent authority within 30 calendar days after it has been notified by the counterparty established in the Union, provided that the conditions laid down in Article 3 are met. The competent authority shall notify ESMA of that decision.

3. The OTC derivative contracts that are subject to the clearing obligation pursuant to paragraph 1 shall be cleared in a CCP authorised under Article 14 or recognised under Article 25 to clear that class of OTC derivatives and listed in the register in accordance with Article 6(2)(b).

For that purpose a counterparty shall become a clearing member, a client, or shall establish indirect clearing arrangements with a clearing member, 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.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation as referred to in paragraph 1(a)(v), and the types of indirect contractual arrangements that meet the conditions referred to in the second subparagraph of paragraph 3.

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

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

#### Article 5

##### Clearing obligation procedure

1. Where a competent authority authorises a CCP to clear a class of OTC derivatives under Article 14 or 15, it shall immediately notify ESMA of that authorisation.

In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details to be included in the notifications referred to in the first subparagraph.

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

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

2. Within six months of receiving notification in accordance with paragraph 1 or accomplishing a procedure for recognition set out in Article 25, ESMA shall, after conducting a public consultation and after consulting the ESRB and, where appropriate, the competent authorities of third countries, develop and submit to the Commission for endorsement draft regulatory technical standards specifying the following:

- (a) the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;
- (b) the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and
- (c) the minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1)(b)(ii).

Power is delegated to the Commission to adopt 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, on its own initiative, after conducting a public consultation and after consulting the ESRB and, where appropriate, the competent authorities of third countries, identify, in accordance with the criteria set out in points (a), (b) and (c) of paragraph 4 and notify to the Commission the classes of derivatives that should be subject to the clearing obligation provided in Article 4, but for which no CCP has yet received authorisation.

Following the notification, ESMA shall publish a call for a development of proposals for the clearing of those classes of derivatives.

4. With the overarching aim of reducing systemic risk, the draft regulatory technical standards for the part referred to in paragraph 2(a) shall take into consideration the following criteria:

- (a) the degree of standardisation of the contractual terms and operational processes of the relevant class of OTC derivatives;
- (b) the volume and liquidity of the relevant class of OTC derivatives;
- (c) the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivatives.

In preparing those draft regulatory technical standards, ESMA may take into consideration the interconnectedness between counterparties using the relevant classes of OTC derivatives, the anticipated impact on the levels of counterparty credit risk between counterparties as well as the impact on competition across the Union.

In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards further specifying the criteria referred to in points (a), (b) and (c) of the first subparagraph.

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

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

5. The draft regulatory technical standards for the part referred to in paragraph 2(b) shall take into consideration the following criteria:

- (a) the expected volume of the relevant class of OTC derivatives;
- (b) whether more than one CCP already clear the same class of OTC derivatives;
- (c) the ability of the relevant CCPs to handle the expected volume and to manage the risk arising from the clearing of the relevant class of OTC derivatives;
- (d) the type and number of counterparties active, and expected to be active within the market for the relevant class of OTC derivatives;
- (e) the period of time a counterparty subject to the clearing obligation needs in order to put in place arrangements to clear its OTC derivative contracts through a CCP;
- (f) the risk management and the legal and operational capacity of the range of counterparties that are active in the market for the relevant class of OTC derivatives and that would be captured by the clearing obligation pursuant to Article 4(1).

6. If a class of OTC derivative contracts no longer has a CCP which is authorised or recognised to clear those contracts under this Regulation, it shall cease to be subject to the clearing obligation referred to in Article 4, and paragraph 3 of this Article shall apply.

#### Article 6

##### Public register

1. ESMA shall establish, maintain and keep up to date a public register in order to identify the classes of OTC derivatives subject to the clearing obligation correctly and unequivocally. The public register shall be available on ESMA's website.

2. The register shall include:

- (a) the classes of OTC derivatives that are subject to the clearing obligation pursuant to Article 4;
- (b) the CCPs that are authorised or recognised for the purpose of the clearing obligation;
- (c) the dates from which the clearing obligation takes effect, including any phased-in implementation;

- (d) the classes of OTC derivatives identified by ESMA in accordance with Article 5(3);
- (e) the minimum remaining maturity of the derivative contracts referred to in Article 4(1)(b)(ii);
- (f) the CCPs that have been notified to ESMA by the competent authority for the purpose of the clearing obligation and the date of notification of each of them.

3. Where a CCP is no longer authorised or recognised in accordance with this Regulation to clear a given class of derivatives, ESMA shall immediately remove it from the public register in relation to that class of OTC derivatives.

4. In order to ensure consistent application of this Article, ESMA may develop draft regulatory technical standards specifying the details to be included in the public register referred to in paragraph 1.

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

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

#### Article 7

##### Access to a CCP

1. A CCP that has been authorised to clear OTC derivative contracts shall accept clearing such contracts on a non-discriminatory and transparent basis, regardless of the trading venue.

A CCP may require that a trading venue comply with the operational and technical requirements established by the CCP, including the risk-management requirements.

2. A CCP shall accede to or refuse a formal request for access by a trading venue within three months of such a request.

3. Where a CCP refuses access under paragraph 2, it shall provide the trading venue with full reasons for such refusal.

4. Save where the competent authority of the trading venue and that of the CCP refuse access, the CCP shall, subject to the second subparagraph, grant access within three months of a decision acceding to the trading venue's formal request in accordance with paragraph 2.

The competent authority of the trading venue and that of the CCP may refuse access to the CCP following a formal request by the trading venue only where such access would threaten the smooth and orderly functioning of the markets or would adversely affect systemic risk.

5. 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.

#### Article 8

##### Access to a trading venue

1. A trading venue shall provide trade feeds on a non-discriminatory and transparent basis to any CCP that has been authorised to clear OTC derivative contracts traded on that trading venue upon request by the CCP.

2. Where a request to access a trading venue has been formally submitted to a trading venue by a CCP, the trading venue shall respond to the CCP within three months.

3. Where access is refused by a trading venue, it shall notify the CCP accordingly, providing full reasons.

4. Without prejudice to the decision by competent authorities of the trading venue and of the CCP, access shall be made possible by the trading venue within three months of a positive response to a request for access.

Access of the CCP to the trading venue shall be granted only where such access would not require interoperability or threaten the smooth and orderly functioning of markets in particular due to liquidity fragmentation and the trading venue has put in place adequate mechanisms to prevent such fragmentation.

5. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the notion of liquidity fragmentation.

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

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

#### Article 9

##### Reporting obligation

1. Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

The reporting obligation shall apply to derivative contracts which:

- (a) were entered into before 16 August 2012 and remain outstanding on that date;
- (b) are entered into on or after 16 August 2012.

A counterparty or a CCP which is subject to the reporting obligation may delegate the reporting of the details of the derivative contract.

Counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication.

2. Counterparties shall keep a record of any derivative contract they have concluded and any modification for at least five years following the termination of the contract.

3. Where a trade repository is not available to record the details of a derivative contract, counterparties and CCPs shall ensure that such details are reported to ESMA.

In this case ESMA shall ensure that all the relevant entities referred to in Article 81(3) have access to all the details of derivative contracts they need to fulfil their respective responsibilities and mandates.

4. A counterparty or a CCP that reports the details of a derivative contract to a trade repository or to ESMA, or an entity that reports such details on behalf of a counterparty or a CCP shall not be considered in breach of any restriction on disclosure of information imposed by that contract or by any legislative, regulatory or administrative provision.

No liability resulting from that disclosure shall lie with the reporting entity or its directors or employees.

5. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details and type of the reports referred to in paragraphs 1 and 3 for the different classes of derivatives.

The reports referred to in paragraphs 1 and 3 shall specify at least:

- (a) the parties to the derivative contract and, where different, the beneficiary of the rights and obligations arising from it;
- (b) the main characteristics of the derivative contracts, including their type, underlying maturity, notional value, price, and settlement date.

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

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

6. In order to ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall develop draft implementing technical standards specifying:

- (a) the format and frequency of the reports referred to in paragraphs 1 and 3 for the different classes of derivatives;
- (b) the date by which derivative contracts are to be reported, including any phase-in for contracts entered into before the reporting obligation applies.

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

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 10

##### Non-financial counterparties

1. Where a non-financial counterparty takes positions in OTC derivative contracts and those positions exceed the clearing threshold as specified under paragraph 3, that non-financial counterparty shall:

- (a) immediately notify ESMA and the competent authority referred to in paragraph 5 thereof;
- (b) become subject to the clearing obligation for future contracts in accordance with Article 4 if the rolling average position over 30 working days exceeds the threshold; and
- (c) clear all relevant future contracts within four months of becoming subject to the clearing obligation.

2. A non-financial counterparty that has become subject to the clearing obligation in accordance with paragraph 1(b) and that subsequently demonstrates to the authority designated in accordance with paragraph 5 that its rolling average position over 30 working days does not exceed the clearing threshold, shall no longer be subject to the clearing obligation set out in Article 4.

3. In calculating the positions referred to in paragraph 1, the non-financial counterparty shall include all the OTC derivative contracts entered into by the non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards, after consulting the ESRB and other relevant authorities, specifying:

- (a) criteria for establishing which OTC derivative contracts are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity referred to in paragraph 3; and
- (b) values of the clearing thresholds, which are determined taking into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives.

After conducting an open public consultation, ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

After consulting the ESRB and other relevant authorities, ESMA shall periodically review the thresholds and, where necessary, propose regulatory technical standards to amend them.

5. Each Member State shall designate an authority responsible for ensuring that the obligation under paragraph 1 is met.

#### Article 11

##### **Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP**

1. Financial counterparties and non-financial counterparties that enter into an OTC derivative contract not cleared by a CCP, shall ensure, exercising due diligence, that appropriate procedures and arrangements are in place to measure, monitor and mitigate operational risk and counterparty credit risk, including at least:

- (a) the timely confirmation, where available, by electronic means, of the terms of the relevant OTC derivative contract;
- (b) formalised processes which are robust, resilient and auditable in order to reconcile portfolios, to manage the associated risk and to identify disputes between parties early and resolve them, and to monitor the value of outstanding contracts.

2. Financial counterparties and non-financial counterparties referred to in Article 10 shall mark-to-market on a daily basis the value of outstanding contracts. Where market conditions prevent marking-to-market, reliable and prudent marking-to-model shall be used.

3. Financial counterparties shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after the clearing threshold is exceeded.

4. Financial counterparties shall hold an appropriate and proportionate amount of capital to manage the risk not covered by appropriate exchange of collateral.

5. The requirement laid down in paragraph 3 of this Article shall not apply to an intragroup transaction referred to in Article 3 that is entered into by counterparties which are established in the same Member State provided that there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between counterparties.

6. An intragroup transaction referred to in Article 3(2)(a), (b) or (c) that is entered into by counterparties which are established in different Member States shall be exempt totally or partially from the requirement laid down in paragraph 3 of this Article, on the basis of a positive decision of both the relevant competent authorities, provided that the following conditions are fulfilled:

- (a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;
- (b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

If the competent authorities fail to reach a positive decision within 30 calendar days of receipt of the application for exemption, ESMA may assist those authorities in reaching agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

7. An intragroup transaction referred to in Article 3(1) that is entered into by non-financial counterparties which are established in different Member States shall be exempt from the requirement laid down in paragraph 3 of this Article, provided that the following conditions are fulfilled:

- (a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;
- (b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

The non-financial counterparties shall notify their intention to apply the exemption to the competent authorities referred to in Article 10(5). The exemption shall be valid unless either of the notified competent authorities does not agree upon fulfilment of the conditions referred to in point (a) or (b) of the first subparagraph within three months of the date of the notification.

8. An intragroup transaction referred to in Article 3(2)(a) to (d) that is entered into by a counterparty which is established in the Union and a counterparty which is established in a third-country jurisdiction shall be exempt totally or partially from the requirement laid down in paragraph 3 of this Article, on the basis of a positive decision of the relevant competent authority responsible for supervision of the counterparty which is established in the Union, provided that the following conditions are fulfilled:

- (a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;
- (b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

9. An intragroup transaction referred to in Article 3(1) that is entered into by a non-financial counterparty which is established in the Union and a counterparty which is established in a third-country jurisdiction shall be exempt from the requirement laid down in paragraph 3 of this Article, provided that the following conditions are fulfilled:

- (a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;
- (b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

The non-financial counterparty shall notify its intention to apply the exemption to the competent authority referred to in Article 10(5). The exemption shall be valid unless the notified competent authority does not agree upon fulfilment of the conditions referred to in point (a) or (b) of the first subparagraph within three months of the date of notification.

10. An intragroup transaction referred to in Article 3(1) that is entered into by a non-financial counterparty and a financial counterparty which are established in different Member States shall be exempt totally or partially from the requirement laid down in paragraph 3 of this Article, on the basis of a positive decision of the relevant competent authority responsible for supervision of the financial counterparty, provided that the following conditions are fulfilled:

- (a) the risk-management procedures of the counterparties are adequately sound, robust and consistent with the level of complexity of the derivative transaction;
- (b) there is no current or foreseen practical or legal impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

The relevant competent authority responsible for supervision of the financial counterparty shall notify any such decision to the competent authority referred to in Article 10(5). The exemption is valid unless the notified competent authority does not agree upon fulfilment of the conditions referred to in point (a) or (b) of the first subparagraph. If there is disagreement between the competent authorities, ESMA may assist those authorities in reaching an agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

11. The counterparty of an intragroup transaction which has been exempted from the requirement laid down in paragraph 3 shall publicly disclose information on the exemption.

A competent authority shall notify ESMA of any decision adopted pursuant to paragraph 6, 8 or 10, or any notification received pursuant to paragraph 7, 9 or 10, and shall provide ESMA with the details of the intragroup transaction concerned.

12. The obligations set out in paragraphs 1 to 11 shall apply to OTC derivative contracts entered into between third country entities that would be subject to those obligations if they were established in the Union, provided that those contracts have 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.

13. ESMA shall regularly monitor the activity in derivatives not eligible for clearing in order to identify cases where a particular class of derivatives may pose systemic risk and to prevent regulatory arbitrage between cleared and non-cleared derivative transactions. In particular, ESMA shall, after consulting the ESRB, take action in accordance with Article 5(3) or review the regulatory technical standards on margin requirements laid down in paragraph 14 of this Article and in Article 41.

14. In order to ensure consistent application of this Article, ESMA shall draft regulatory technical standards specifying:

- (a) the procedures and arrangements referred to in paragraph 1;
- (b) the market conditions that prevent marking-to-market and the criteria for using marking-to-model referred to in paragraph 2;
- (c) the details of the exempted intragroup transactions to be included in the notification referred to in paragraphs 7, 9 and 10;
- (d) the details of the information on exempted intragroup transactions referred to in paragraph 11;
- (e) the contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation as referred to in paragraph 12;

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

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

15. In order to ensure consistent application of this Article, the ESAs shall develop common draft regulatory technical standards specifying:

- (a) the risk-management procedures, including the levels and type of collateral and segregation arrangements, required for compliance with paragraph 3;
- (b) the level of capital required for compliance with paragraph 4;
- (c) the procedures for the counterparties and the relevant competent authorities to be followed when applying exemptions under paragraphs 6 to 10;
- (d) the applicable criteria referred to in paragraphs 5 to 10 including in particular what should be considered as practical or legal impediment to the prompt transfer of own funds and repayment of liabilities between the counterparties.

The ESAs shall submit those common draft regulatory technical standards to the Commission by 30 September 2012.

Depending on the legal nature of the counterparty, power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in

accordance with either Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010.

#### Article 12

##### Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the rules under this Title and shall take all measures necessary to ensure that they are implemented. Those penalties shall include at least administrative fines. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that the competent authorities responsible for the supervision of financial, and, where appropriate, non-financial counterparties disclose every penalty that has been imposed for infringements of Articles 4, 5 and 7 to 11 to the public, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Member States shall, at regular intervals, publish assessment reports on the effectiveness of the penalty rules being applied. Such disclosure and publication shall not contain personal data within the meaning of Article 2(a) of Directive 95/46/EC.

By 17 February 2013, the Member States shall notify the rules referred to in paragraph 1 to the Commission. They shall notify the Commission of any subsequent amendment thereto without delay.

3. An infringement of the rules under this Title shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract. An infringement of the rules under this Title shall not give rise to any right to compensation from a party to an OTC derivative contract.

#### Article 13

##### Mechanism to avoid duplicative or conflicting rules

1. The Commission shall be assisted by ESMA in monitoring and preparing reports to the European Parliament and to the Council on the international application of principles laid down in Articles 4, 9, 10 and 11, in particular with regard to potential duplicative or conflicting requirements on market participants, and recommend possible action.

2. The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country:

- (a) are equivalent to the requirements laid down in this Regulation under Articles 4, 9, 10 and 11;
- (b) ensure protection of professional secrecy that is equivalent to that set out in this Regulation; and

(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 86(2).

3. An implementing act on equivalence as referred to in paragraph 2 shall imply that counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the obligations contained in Articles 4, 9, 10 and 11 where at least one of the counterparties is established in that 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 laid down in Articles 4, 9, 10 and 11 and regularly report, at least on an annual basis, to the European Parliament and the Council. Where the report reveals an insufficient or inconsistent application of the equivalent requirements by third country authorities, the Commission shall, within 30 calendar days of the presentation of the report, withdraw the recognition as equivalent of the third country legal framework in question. Where an implementing act on equivalence is withdrawn, counterparties shall automatically be subject again to all requirements laid down in this Regulation.

### TITLE III

#### AUTHORISATION AND SUPERVISION OF CCPs

##### CHAPTER 1

#### *Conditions and procedures for the authorisation of a CCP*

##### Article 14

#### **Authorisation of a CCP**

1. Where a legal person established in the Union intends to provide clearing services as a CCP, it shall apply for authorisation to the competent authority of the Member State where it is established (the CCP's competent authority), in accordance with the procedure set out in Article 17.

2. Once authorisation has been granted in accordance with Article 17, it shall be effective for the entire territory of the Union.

3. Authorisation referred to in paragraph 1 shall be granted only for activities linked to clearing and shall specify the services or activities which the CCP is authorised to provide or perform including the classes of financial instruments covered by such authorisation.

4. A CCP shall comply at all times with the conditions necessary for authorisation.

A CCP shall, without undue delay, notify the competent authority of any material changes affecting the conditions for authorisation.

5. Authorisation referred to in paragraph 1 shall not prevent Member States from adopting or continuing to apply, in respect of CCPs established in their territory, additional requirements including certain requirements for authorisation under Directive 2006/48/EC.

##### Article 15

#### **Extension of activities and services**

1. A CCP wishing to extend its business to additional services or activities not covered by the initial authorisation shall submit a request for extension to the CCP's competent authority. The offering of clearing services for which the CCP has not already been authorised shall be considered to be an extension of that authorisation.

The extension of authorisation shall be made in accordance with the procedure set out under Article 17.

2. Where a CCP wishes to extend its business into a Member State other than that where it is established, the CCP's competent authority shall immediately notify the competent authority of that other Member State.

##### Article 16

#### **Capital requirements**

1. A CCP shall have a permanent and available initial capital of at least EUR 7,5 million to be authorised pursuant to Article 14.

2. A CCP's capital, including retained earnings and reserves, shall be proportionate to the risk stemming from the activities of the CCP. It shall at all times be sufficient to ensure an orderly winding-down or restructuring of the activities over an appropriate time span and an adequate protection of the CCP against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources as referred to in Articles 41 to 44.

3. In order to ensure consistent application of this Article, EBA shall, in close cooperation with the ESCB and after consulting ESMA, develop draft regulatory technical standards specifying requirements regarding the capital, retained earnings and reserves of a CCP referred to in paragraph 2.

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

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

##### Article 17

#### **Procedure for granting and refusing authorisation**

1. The applicant CCP shall submit an application for authorisation to the competent authority of the Member State where it is established.

2. The applicant CCP shall provide all information necessary to satisfy the competent authority that the applicant CCP has established, at the time of authorisation, all the necessary arrangements to meet the requirements laid down in this Regulation. The competent authority shall immediately transmit all the information received from the applicant CCP to ESMA and the college referred to in Article 18(1).

3. Within 30 working days of receipt of the application, the competent authority shall assess whether the application is complete. If the application is not complete, the competent authority shall set a deadline by which the applicant CCP has to provide additional information. After assessing that an application is complete, the competent authority shall notify the applicant CCP and the members of the college established in accordance with Article 18(1) and ESMA accordingly.

4. The competent authority shall grant authorisation only where it is fully satisfied that the applicant CCP complies with all the requirements laid down in this Regulation and that the CCP is notified as a system pursuant to Directive 98/26/EC.

The competent authority shall duly consider the opinion of the college reached in accordance with Article 19. Where the CCP's competent authority does not agree with a positive opinion of the college, its decision shall contain full reasons and an explanation of any significant deviation from that positive opinion.

The CCP shall not be authorised where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement, pursuant to Article 19(1), that the CCP not be authorised. That opinion shall state in writing the full and detailed reasons why the college consider that the requirements laid down in this Regulation or other Union law are not met.

Where a joint opinion by mutual agreement as referred to in the third subparagraph has not been reached and a majority of two-thirds of the college have expressed a negative opinion, any of the competent authorities concerned, based on that majority of two-thirds of the college, may, within 30 calendar days of the adoption of that negative opinion, refer the matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010.

The referral decision shall state in writing the full and detailed reasons why the relevant members of the college consider that the requirements laid down in this Regulation or other parts of Union law are not met. In that case the CCP's competent authority shall defer its decision on authorisation and await any decision on authorisation that ESMA may take in accordance with Article 19(3) of Regulation (EU) No 1095/2010. The competent authority shall take its decision in conformity with ESMA's decision. The matter shall not be referred to ESMA after the end of the 30-day period referred to in the fourth subparagraph.

Where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement, pursuant to Article 19(1), that the CCP not be authorised, the CCP's competent authority may refer the matter to ESMA in accordance with Article 19 of Regulation (EU) No 1095/2010.

The competent authority of the Member State where the CCP is established shall transmit the decision to the other competent authorities concerned.

5. ESMA shall act in accordance with Article 17 of Regulation (EU) No 1095/2010 in the event that the CCP's competent authority has not applied the provisions of this Regulation, or has applied them in a way which appears to be in breach of Union law.

ESMA may investigate an alleged breach or non-application of Union law upon request from any member of the college or on its own initiative, after having informed the competent authority.

6. While performing their duties, any action taken by any member of the college shall not, directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services in any currency.

7. Within six months of the submission of a complete application, the competent authority shall inform the applicant CCP in writing, with a fully reasoned explanation, whether authorisation has been granted or refused.

#### Article 18

##### College

1. Within 30 calendar days of the submission of a complete application in accordance with Article 17, the CCP's competent authority shall establish, manage and chair a college to facilitate the exercise of the tasks referred to in Articles 15, 17, 49, 51 and 54.

2. The college shall consist of:

- (a) ESMA;
- (b) the CCP's competent authority;
- (c) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States with the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;
- (d) the competent authorities responsible for the supervision of trading venues served by the CCP;
- (e) the competent authorities supervising CCPs with which interoperability arrangements have been established;
- (f) the competent authorities supervising central securities depositories to which the CCP is linked;

(g) the relevant members of the ESCB responsible for the oversight of the CCP and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;

(h) the central banks of issue of the most relevant Union currencies of the financial instruments cleared.

3. The competent authority of a Member State which is not a member of the college may request from the college any information relevant for the performance of its supervisory duties.

4. The college shall, without prejudice to the responsibilities of competent authorities under this Regulation, ensure:

- (a) the preparation of the opinion referred to in Article 19;
- (b) the exchange of information, including requests for information pursuant to Article 84;
- (c) agreement on the voluntary entrustment of tasks among its members;
- (d) the coordination of supervisory examination programmes based on a risk assessment of the CCP; and
- (e) the determination of procedures and contingency plans to address emergency situations, as referred to in Article 24.

5. The establishment and functioning of the college shall be based on a written agreement between all its members.

That agreement shall determine the practical arrangements for the functioning of the college, including detailed rules on voting procedures as referred to in Article 19(3), and may determine tasks to be entrusted to the CCP's competent authority or another member of the college.

6. In order to ensure the consistent and coherent functioning of colleges across the Union, ESMA shall develop draft regulatory technical standards specifying the conditions under which the Union currencies referred to in paragraph 2(h) are to be considered as the most relevant and the details of the practical arrangements referred to in paragraph 5.

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

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

#### Article 19

##### Opinion of the college

1. Within four months of the submission of a complete application by the CCP in accordance with Article 17, the

CCP's competent authority shall conduct a risk assessment of the CCP and submit a report to the college.

Within 30 calendar days of receipt, and on the basis of the findings in, that report, the college shall reach a joint opinion determining whether the applicant CCP complies with all the requirements laid down in this Regulation.

Without prejudice to the fourth subparagraph of Article 17(4) and if no joint opinion is reached in accordance with the second subparagraph, the college shall adopt a majority opinion within the same period.

2. ESMA shall facilitate the adoption of the joint opinion in accordance with its general coordination function under Article 31 of Regulation (EU) No 1095/2010.

3. A majority opinion of the college shall be adopted on the basis of a simple majority of its members. For colleges up to and including 12 members, a maximum of two college members belonging to the same Member State shall have a vote and each voting member shall have one vote. For colleges with more than 12 members, a maximum of three members belonging to the same Member State shall have a vote and each voting member shall have one vote. ESMA shall have no voting rights on the opinions of the college.

#### Article 20

##### Withdrawal of authorisation

1. Without prejudice to Article 22(3), the CCP's competent authority shall withdraw authorisation where the CCP:

- (a) has not made use of the authorisation within 12 months, expressly renounces the authorisation or has provided no services or performed no activity for the preceding six months;
- (b) has obtained authorisation by making false statements or by any other irregular means;
- (c) is no longer in compliance with the conditions under which authorisation was granted and has not taken the remedial action requested by the CCP's competent authority within a set time frame;
- (d) has seriously and systematically infringed any of the requirements laid down in this Regulation.

2. Where the CCP's competent authority considers that one of the circumstances referred to in paragraph 1 applies, it shall, within five working days, notify ESMA and the members of college accordingly.

3. The CCP's competent authority shall consult the members of the college on the necessity to withdraw the authorisation of the CCP, except where a decision is required urgently.
4. Any member of the college may, at any time, request that the CCP's competent authority examine whether the CCP remains in compliance with the conditions under which authorisation was granted.
5. The CCP's competent authority may limit the withdrawal to a particular service, activity, or class of financial instruments.
6. The CCP's competent authority shall send ESMA and the members of the college its fully reasoned decision, which shall take into account the reservations of the members of the college.
7. The decision on the withdrawal of authorisation shall take effect throughout the Union.

#### Article 21

##### Review and evaluation

1. Without prejudice to the role of the college, the competent authorities referred to in Article 22 shall review the arrangements, strategies, processes and mechanisms implemented by CCPs to comply with this Regulation and evaluate the risks to which CCPs are, or might be, exposed.
  2. The review and evaluation referred to in paragraph 1 shall cover all the requirements on CCPs laid down in this Regulation.
  3. The competent authorities shall establish the frequency and depth of the review and evaluation referred to in paragraph 1 having regard to the size, systemic importance, nature, scale and complexity of the activities of the CCPs concerned. The review and evaluation shall be updated at least on an annual basis.
- The CCPs shall be subject to on-site inspections.
4. The competent authorities shall regularly, and at least annually, inform the college of the results of the review and evaluation as referred to in paragraph 1, including any remedial action taken or penalty imposed.
  5. The competent authorities shall require any CCP that does not meet the requirements laid down in this Regulation to take the necessary action or steps at an early stage to address the situation.
  6. ESMA shall fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes.

For the purposes of the first subparagraph, ESMA shall, at least annually:

- (a) conduct a peer review analysis of the supervisory activities of all competent authorities in relation to the authorisation and the supervision of CCPs in accordance with Article 30 of Regulation (EU) No 1095/2010; and
- (b) initiate and coordinate Union-wide assessments of the resilience of CCPs to adverse market developments in accordance with Article 32(2) of Regulation (EU) No 1095/2010.

Where an assessment referred to in point (b) of the second subparagraph exposes shortcomings in the resilience of one or more CCPs, ESMA shall issue the necessary recommendations pursuant to Article 16 of Regulation (EU) No 1095/2010.

#### CHAPTER 2

##### Supervision and oversight of CCPs

#### Article 22

##### Competent authority

1. Each Member State shall designate the competent authority responsible for carrying out the duties resulting from this Regulation for the authorisation and supervision of CCPs established in its territory and shall inform the Commission and ESMA thereof.

Where a Member State designates more than one competent authority, it shall clearly determine the respective roles and shall designate a single authority to be responsible for coordinating cooperation and the exchange of information with the Commission, ESMA, other Member States' competent authorities, EBA and the relevant members of the ESCB, in accordance with Articles 23, 24, 83 and 84.

2. Each Member State shall ensure that the competent authority has the supervisory and investigatory powers necessary for the exercise of its functions.

3. Each Member State shall ensure that appropriate administrative measures, in conformity with national law, can be taken or imposed against the natural or legal persons responsible for non-compliance with this Regulation.

Those measures shall be effective, proportionate and dissuasive and may include requests for remedial action within a set time frame.

4. ESMA shall publish on its website a list of the competent authorities designated in accordance with paragraph 1.

#### CHAPTER 3

##### Cooperation

#### Article 23

##### Cooperation between authorities

1. Competent authorities shall cooperate closely with each other, with ESMA and, if necessary, with the ESCB.

2. Competent authorities shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in all other Member States concerned, in particular the emergency situations referred to in Article 24, based on the available information at the time.

#### Article 24

##### Emergency situations

The CCP's competent authority or any other authority shall inform ESMA, the college, the relevant members of the ESCB and other relevant authorities without undue delay of any emergency situation relating to a CCP, including developments in financial markets, which may have an adverse effect on market liquidity and the stability of the financial system in any of the Member States where the CCP or one of its clearing members are established.

#### CHAPTER 4

##### Relations with third countries

#### Article 25

##### Recognition of a third-country CCP

1. A CCP established in a third country may provide clearing services to clearing members or trading venues established in the Union only where that CCP is recognised by ESMA.

2. ESMA, after consulting the authorities referred to in paragraph 3, may recognise a CCP established in a third country that has applied for recognition to provide certain clearing services or activities where:

- (a) the Commission has adopted an implementing act in accordance with paragraph 6;
- (b) the CCP is authorised in the relevant third country, and is subject to effective supervision and enforcement ensuring full compliance with the prudential requirements applicable in that third country;
- (c) cooperation arrangements have been established pursuant to paragraph 7;
- (d) the CCP is established or authorised in a third country that is considered as having equivalent systems for anti-money-laundering and combating the financing of terrorism to those of the Union in accordance with the criteria set out in the common understanding between Member States on third-country equivalence under Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing <sup>(1)</sup>.

3. When assessing whether the conditions referred to in paragraph 2 are met, ESMA shall consult:

- (a) the competent authority of a Member State in which the CCP provides or intends to provide clearing services and which has been selected by the CCP;

- (b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;

- (c) the competent authorities responsible for the supervision of trading venues located in the Union, served or to be served by the CCP;

- (d) the competent authorities supervising CCPs established in the Union with which interoperability arrangements have been established;

- (e) the relevant members of the ESCB of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;

- (f) the central banks of issue of the most relevant Union currencies of the financial instruments cleared or to be cleared.

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

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

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

ESMA shall consult the authorities and entities referred to in paragraph 3 prior to taking its decision.

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

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

5. ESMA shall, after consulting the authorities and entities referred to in paragraph 3, review the recognition of the CCP established in a third country where that CCP has extended the range of its activities and services in the Union. That review shall be conducted in accordance with paragraphs 2, 3 and 4. ESMA may withdraw the recognition of that CCP where the conditions set out in paragraph 2 are no longer met and in the same circumstances as those described in Article 20.

<sup>(1)</sup> OJ L 309, 25.11.2005, p. 15.

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

7. ESMA shall establish cooperation arrangements with the relevant competent authorities of third countries whose legal and supervisory frameworks have been recognised as equivalent to this Regulation in accordance with paragraph 6. Such arrangements shall specify at least:

- (a) the mechanism for the exchange of information between ESMA and the competent authorities of the third countries concerned, including access to all information requested by ESMA regarding CCPs authorised in third countries;
- (b) the mechanism for prompt notification to ESMA where a third-country competent authority deems a CCP it is supervising to be in breach of the conditions of its authorisation or of other law to which it is subject;
- (c) the mechanism for prompt notification to ESMA by a third-country competent authority where a CCP it is supervising has been granted the right to provide clearing services to clearing members or clients established in the Union;
- (d) the procedures concerning the coordination of supervisory activities including, where appropriate, on-site inspections.

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

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

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

#### TITLE IV

### REQUIREMENTS FOR CCPs

#### CHAPTER 1

### Organisational requirements

#### Article 26

#### General provisions

1. A CCP shall have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes

to identify, manage, monitor and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures.

2. A CCP shall adopt policies and procedures which are sufficiently effective so as to ensure compliance with this Regulation, including compliance of its managers and employees with all the provisions of this Regulation.

3. A CCP shall maintain and operate an organisational structure that ensures continuity and orderly functioning in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

4. A CCP shall maintain a clear separation between the reporting lines for risk management and those for the other operations of the CCP.

5. A CCP shall adopt, implement and maintain a remuneration policy which promotes sound and effective risk management and which does not create incentives to relax risk standards.

6. A CCP shall maintain information technology systems adequate to deal with the complexity, variety and type of services and activities performed so as to ensure high standards of security and the integrity and confidentiality of the information maintained.

7. A CCP shall make its governance arrangements, the rules governing the CCP, and its admission criteria for clearing membership, available publicly free of charge.

8. The CCP shall be subject to frequent and independent audits. The results of those audits shall be communicated to the board and shall be made available to the competent authority.

9. In order to ensure consistent application of this Article, ESMA, after consulting the members of the ESCB, shall develop draft regulatory technical standards specifying the minimum content of the rules and governance arrangements referred to in paragraphs 1 to 8.

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

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

#### Article 27

#### Senior management and the board

1. The senior management of a CCP shall be of sufficiently good repute and shall have sufficient experience so as to ensure the sound and prudent management of the CCP.

2. A CCP shall have a board. At least one third, but no less than two, of the members of that board shall be independent. Representatives of the clients of clearing members shall be invited to board meetings for matters relevant to Articles 38 and 39. The compensation of the independent and other non-executive members of the board shall not be linked to the business performance of the CCP.

The members of a CCP's board, including its independent members, shall be of sufficiently good repute and shall have adequate expertise in financial services, risk management and clearing services.

3. A CCP shall clearly determine the roles and responsibilities of the board and shall make the minutes of the board meetings available to the competent authority and auditors.

#### Article 28

##### **Risk committee**

1. A CCP shall establish a risk committee, which shall be composed of representatives of its clearing members, independent members of the board and representatives of its clients. The risk committee may invite employees of the CCP and external independent experts to attend risk-committee meetings in a non-voting capacity. Competent authorities may request to attend risk-committee meetings in a non-voting capacity and to be duly informed of the activities and decisions of the risk committee. The advice of the risk committee shall be independent of any direct influence by the management of the CCP. None of the groups of representatives shall have a majority in the risk committee.

2. A CCP shall clearly determine the mandate, the governance arrangements to ensure its independence, the operational procedures, the admission criteria and the election mechanism for risk-committee members. The governance arrangements shall be publicly available and shall, at least, determine that the risk committee is chaired by an independent member of the board, reports directly to the board and holds regular meetings.

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

4. Without prejudice to the right of competent authorities to be duly informed, the members of the risk committee shall be bound by confidentiality. Where the chairman of the risk committee determines that a member has an actual or potential conflict of interest on a particular matter, that member shall not be allowed to vote on that matter.

5. A CCP shall promptly inform the competent authority of any decision in which the board decides not to follow the advice of the risk committee.

#### Article 29

##### **Record keeping**

1. A CCP shall maintain, for a period of at least 10 years, all the records on the services and activity provided so as to enable the competent authority to monitor the CCP's compliance with this Regulation.

2. A CCP shall maintain, for a period of at least 10 years following the termination of a contract, all information on all contracts it has processed. That information shall at least enable the identification of the original terms of a transaction before clearing by that CCP.

3. A CCP shall make the records and information referred to in paragraphs 1 and 2 and all information on the positions of cleared contracts, irrespective of the venue where the transactions were executed, available upon request to the competent authority, to ESMA and to the relevant members of the ESCB.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details of the records and information to be retained as referred to in paragraphs 1 to 3.

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

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

5. In order to ensure uniform conditions of application of paragraphs 1 and 2, ESMA shall develop draft implementing technical standards specifying the format of the records and information to be retained.

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

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 30

##### **Shareholders and members with qualifying holdings**

1. The competent authority shall not authorise a CCP unless it has been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings.

2. The competent authority shall refuse to authorise a CCP where it is not satisfied as to the suitability of the shareholders or members that have qualifying holdings in the CCP, taking into account the need to ensure the sound and prudent management of a CCP.

3. Where close links exist between the CCP and other natural or legal persons, the competent authority shall grant authorisation only where those links do not prevent the effective exercise of the supervisory functions of the competent authority.

4. Where the persons referred to in paragraph 1 exercise an influence which is likely to be prejudicial to the sound and prudent management of the CCP, the competent authority shall take appropriate measures to terminate that situation, which may include the withdrawal of the authorisation of the CCP.

5. The competent authority shall refuse authorisation where the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the CCP has close links, or difficulties involved in their enforcement, prevent the effective exercise of the supervisory functions of the competent authority.

#### Article 31

##### Information to competent authorities

1. A CCP shall notify its competent authority of any changes to its management, and shall provide the competent authority with all the information necessary to assess compliance with Article 27(1) and the second subparagraph of Article 27(2).

Where the conduct of a member of the board is likely to be prejudicial to the sound and prudent management of the CCP, the competent authority shall take appropriate measures, which may include removing that member from the board.

2. 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 a CCP or to further increase, directly or indirectly, such a qualifying holding in a CCP as a result of which the proportion of the voting rights or of the capital held would reach or exceed 10 %, 20 %, 30 % or 50 % or so that the CCP would become its subsidiary (the 'proposed acquisition'), shall first notify in writing the competent authority of the CCP 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 32(4).

Any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in a CCP (the 'proposed vendor') shall first notify the competent authority in writing thereof, indicating the size of such holding. Such a person shall likewise notify the competent authority where it has taken a decision to reduce a qualifying holding so that the proportion of the voting rights or of the capital held would fall below 10 %, 20 %, 30 % or 50 % or so that the CCP would cease to be that person's subsidiary.

The competent authority shall, promptly and in any event within two working days of receipt of the notification referred to in this paragraph and of the information referred to in paragraph 3, acknowledge receipt in writing thereof to the proposed acquirer or vendor.

The competent authority shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required to be attached to the notification on the basis of the list referred to in Article 32(4) (the assessment period), to carry out the assessment provided for in Article 32(1) (the assessment).

The competent authority shall inform the proposed acquirer or vendor of the date of the expiry of the assessment period at the time of acknowledging receipt.

3. The competent authority may, during the assessment period, where necessary, but 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.

The assessment period shall be interrupted for the period between the date of request for information by the competent authority and the receipt of a response thereto by the proposed acquirer. The interruption shall not exceed 20 working days. Any further requests by the competent authority for completion or clarification of the information shall be at its discretion but may not result in an interruption of the assessment period.

4. The competent authority may extend the interruption referred to in the second subparagraph of paragraph 3 up to 30 working days where the proposed acquirer or vendor is either:

- (a) situated or regulated outside the Union;
- (b) a natural or legal person not subject to supervision under this Regulation or Directive 73/239/EEC, Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance<sup>(1)</sup> or Directives 2002/83/EC, 2003/41/EC, 2004/39/EC, 2005/68/EC, 2006/48/EC, 2009/65/EC or 2011/61/EU.

5. Where the competent authority, upon completion of the assessment, decides to oppose the proposed acquisition, it shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing and provide the reasons for that decision. The competent authority shall

<sup>(1)</sup> OJ L 228, 11.8.1992, p. 1.

notify the college referred to in Article 18 accordingly. 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. However, Member States may allow a competent authority to make such disclosure in the absence of a request by the proposed acquirer.

6. Where the competent authority does not oppose the proposed acquisition within the assessment period, it shall be deemed to be approved.

7. The competent authority may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

8. Member States shall not impose requirements for notification to, and approval by, the competent authority of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Regulation.

#### Article 32

##### Assessment

1. Where assessing the notification provided for in Article 31(2) and the information referred to in Article 31(3), the competent authority shall, in order to ensure the sound and prudent management of the CCP in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the CCP, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following:

- (a) the reputation and financial soundness of the proposed acquirer;
- (b) the reputation and experience of any person who will direct the business of the CCP as a result of the proposed acquisition;
- (c) whether the CCP will be able to comply and continue to comply with this Regulation;
- (d) 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.

Where assessing the financial soundness of the proposed acquirer, the competent authority shall pay particular attention to the type of business pursued and envisaged in the CCP in which the acquisition is proposed.

Where assessing the CCP's ability to comply with this Regulation, the competent authority shall pay particular attention to

whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, to effectively exchange information among the competent authorities and to determine the allocation of responsibilities among the competent authorities.

2. The competent authorities may oppose the proposed acquisition only where there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or where 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 shall 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 shall be provided to the competent authorities at the time of notification referred to in Article 31(2). The information required shall be proportionate and shall be 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 31(2), (3) and (4), where two or more proposals to acquire or increase qualifying holdings in the same CCP have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

6. The relevant competent authorities shall cooperate closely with each other when carrying out the assessment where the proposed acquirer is one of the following:

- (a) another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State;
- (b) the parent undertaking of another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State;
- (c) a natural or legal person controlling another CCP, a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm, market operator, an operator of a securities settlement system, a UCITS management company or an AIFM authorised in another Member State.

7. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. The competent authorities shall, upon request, communicate all relevant information to each other and shall communicate all essential information at their own initiative. A decision by the competent authority that has authorised the CCP in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

#### Article 33

##### Conflicts of interest

1. A CCP shall maintain and operate effective written organisational and administrative arrangements to identify and manage any potential conflicts of interest between itself, including its managers, employees, or any person with direct or indirect control or close links, and its clearing members or their clients known to the CCP. It shall maintain and implement adequate procedures aiming at resolving possible conflicts of interest.

2. Where the organisational or administrative arrangements of a CCP to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of a clearing member or client are prevented, it shall clearly disclose the general nature or sources of conflicts of interest to the clearing member before accepting new transactions from that clearing member. Where the client is known to the CCP, the CCP shall inform the client and the clearing member whose client is concerned.

3. Where the CCP is a parent undertaking or a subsidiary, the written arrangements shall also take into account any circumstances, of which the CCP is or should be aware, which may give rise to a conflict of interest arising as a result of the structure and business activities of other undertakings with which it has a parent undertaking or a subsidiary relationship.

4. The written arrangements established in accordance with paragraph 1 shall include the following:

- (a) the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of one or more clearing members or clients;
- (b) procedures to be followed and measures to be adopted in order to manage such conflict.

5. A CCP shall take all reasonable steps to prevent any misuse of the information held in its systems and shall prevent the use of that information for other business activities. A natural person who has a close link to a CCP or a legal person that has a parent undertaking or a subsidiary relationship with a CCP shall not use confidential information

recorded in that CCP for any commercial purposes without the prior written consent of the client to whom such confidential information belongs.

#### Article 34

##### Business continuity

1. A CCP shall establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the preservation of its functions, the timely recovery of operations and the fulfilment of the CCP's obligations. Such a plan shall at least allow for the recovery of all transactions at the time of disruption to allow the CCP to continue to operate with certainty and to complete settlement on the scheduled date.

2. A CCP shall establish, implement and maintain an adequate procedure ensuring the timely and orderly settlement or transfer of the assets and positions of clients and clearing members in the event of a withdrawal of authorisation pursuant to a decision under Article 20.

3. In order to ensure consistent application of this Article, ESMA shall, after consulting the members of the ESCB, develop draft regulatory technical standards specifying the minimum content and requirements of the business continuity policy and of the disaster recovery plan.

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

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

#### Article 35

##### Outsourcing

1. Where a CCP outsources operational functions, services or activities, it shall remain fully responsible for discharging all of its obligations under this Regulation and shall ensure at all times that:

- (a) outsourcing does not result in the delegation of its responsibility;
- (b) the relationship and obligations of the CCP towards its clearing members or, where relevant, towards their clients are not altered;
- (c) the conditions for authorisation of the CCP do not effectively change;
- (d) outsourcing does not prevent the exercise of supervisory and oversight functions, including on-site access to acquire any relevant information needed to fulfil those mandates;

- (e) outsourcing does not result in depriving the CCP from the necessary systems and controls to manage the risks it faces;
- (f) the service provider implements equivalent business continuity requirements to those that the CCP must fulfil under this Regulation;
- (g) the CCP retains the necessary expertise and resources to evaluate the quality of the services provided and the organisational and capital adequacy of the service provider, and to supervise the outsourced functions effectively and manage the risks associated with the outsourcing and supervises those functions and manages those risks on an ongoing basis;
- (h) the CCP has direct access to the relevant information of the outsourced functions;
- (i) the service provider cooperates with the competent authority in connection with the outsourced activities;
- (j) the service provider protects any confidential information relating to the CCP and its clearing members and clients or, where that service provider is established in a third country, ensures that the data protection standards of that third country, or those set out in the agreement between the parties concerned, are comparable to the data protection standards in effect in the Union.

A CCP shall not outsource major activities linked to risk management unless such outsourcing is approved by the competent authority.

2. The competent authority shall require the CCP to allocate and set out its rights and obligations, and those of the service provider, clearly in a written agreement.

3. A CCP shall make all information necessary to enable the competent authority to assess the compliance of the performance of the outsourced activities with this Regulation available on request.

## CHAPTER 2

### **Conduct of business rules**

#### Article 36

##### **General provisions**

1. When providing services to its clearing members, and where relevant, to their clients, a CCP shall act fairly and professionally in accordance with the best interests of such clearing members and clients and sound risk management.
2. A CCP shall have accessible, transparent and fair rules for the prompt handling of complaints.

#### Article 37

##### **Participation requirements**

1. A CCP shall establish, where relevant per type of product cleared, the categories of admissible clearing members and the admission criteria, upon the advice of the risk committee pursuant to Article 28(3). Such criteria shall be non-discriminatory, transparent and objective so as to ensure fair and open access to the CCP and shall ensure that clearing members have sufficient financial resources and operational capacity to meet the obligations arising from participation in a CCP. Criteria that restrict access shall be permitted only to the extent that their objective is to control the risk for the CCP.

2. A CCP shall ensure that the application of the criteria referred to in paragraph 1 is met on an ongoing basis and shall have timely access to the information relevant for such assessment. A CCP shall conduct, at least once a year, a comprehensive review of compliance with this Article by its clearing members.

3. Clearing members that clear transactions on behalf of their clients shall have the necessary additional financial resources and operational capacity to perform this activity. The CCP's rules for clearing members shall allow it to gather relevant basic information to identify, monitor and manage relevant concentrations of risk relating to the provision of services to clients. Clearing members shall, upon request, inform the CCP about the criteria and arrangements they adopt to allow their clients to access the services of the CCP. Responsibility for ensuring that clients comply with their obligations shall remain with clearing members.

4. A CCP shall have objective and transparent procedures for the suspension and orderly exit of clearing members that no longer meet the criteria referred to in paragraph 1.

5. A CCP may only deny access to clearing members meeting the criteria referred to in paragraph 1 where duly justified in writing and based on a comprehensive risk analysis.

6. A CCP may impose specific additional obligations on clearing members, such as the participation in auctions of a defaulting clearing member's position. Such additional obligations shall be proportional to the risk brought by the clearing member and shall not restrict participation to certain categories of clearing members.

#### Article 38

##### **Transparency**

1. A CCP and its clearing members shall publicly disclose the prices and fees associated with the services provided. They shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions. A CCP shall allow its clearing members and, where relevant, their clients separate access to the specific services provided.

A CCP shall account separately for costs and revenues of the services provided and shall disclose that information to the competent authority.

2. A CCP shall disclose to clearing members and clients the risks associated with the services provided.

3. A CCP shall disclose to its clearing members and to its competent authority the price information used to calculate its end-of-day exposures to its clearing members.

A CCP shall publicly disclose the volumes of the cleared transactions for each class of instruments cleared by the CCP on an aggregated basis.

4. A CCP shall publicly disclose the operational and technical requirements relating to the communication protocols covering content and message formats it uses to interact with third parties, including the operational and technical requirements referred to in Article 7.

5. A CCP shall publicly disclose any breaches by clearing members of the criteria referred to in Article 37(1) and the requirements laid down in paragraph 1 of this Article, except where the competent authority, after consulting ESMA, considers that such disclosure would constitute a threat to financial stability or to market confidence or would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

#### Article 39

##### Segregation and portability

1. A CCP shall keep separate records and accounts that shall enable it, at any time and without delay, to distinguish in accounts with the CCP the assets and positions held for the account of one clearing member from the assets and positions held for the account of any other clearing member and from its own assets.

2. A CCP shall offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions of that clearing member from those held for the accounts of its clients ('omnibus client segregation').

3. A CCP shall offer to keep separate records and accounts enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients ('individual client segregation'). Upon request, the CCP shall offer clearing members the possibility to open more accounts in their own name or for the account of their clients.

4. A clearing member shall keep separate records and accounts that enable it to distinguish both in accounts held with the CCP and in its own accounts its assets and positions from the assets and positions held for the account of its clients at the CCP.

5. A clearing member shall offer its clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection referred to in paragraph 7 associated with each option. The client shall confirm its choice in writing.

6. When a client opts for individual client segregation, any margin in excess of the client's requirement shall also be posted to the CCP and distinguished from the margins of other clients or clearing members and shall not be exposed to losses connected to positions recorded in another account.

7. CCPs and clearing members shall publicly disclose the levels of protection and the costs associated with the different levels of segregation that they provide and shall offer those services on reasonable commercial terms. Details of the different levels of segregation shall include a description of the main legal implications of the respective levels of segregation offered including information on the insolvency law applicable in the relevant jurisdictions.

8. A CCP shall have a right of use relating to the margins or default fund contributions collected via a security financial collateral arrangement, within the meaning of Article 2(1)(c) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements<sup>(1)</sup> provided that the use of such arrangements is provided for in its operating rules. The clearing member shall confirm its acceptance of the operating rules in writing. The CCP shall publicly disclose that right of use, which shall be exercised in accordance with Article 47.

9. The requirement to distinguish assets and positions with the CCP in accounts is satisfied where:

- (a) the assets and positions are recorded in separate accounts;
- (b) the netting of positions recorded on different accounts is prevented;
- (c) the assets covering the positions recorded in an account are not exposed to losses connected to positions recorded in another account.

10. Assets refer to collateral held to cover positions and include the right to the transfer of assets equivalent to that collateral or the proceeds of the realisation of any collateral, but does not include default fund contributions.

<sup>(1)</sup> OJ L 168, 27.6.2002, p. 43.

## CHAPTER 3

**Prudential requirements**

## Article 40

**Exposure management**

A CCP shall measure and assess its liquidity and credit exposures to each clearing member and, where relevant, to another CCP with which it has concluded an interoperability arrangement, on a near to real-time basis. A CCP shall have access in a timely manner and on a non-discriminatory basis to the relevant pricing sources to effectively measure its exposures. This shall be done on a reasonable cost basis.

## Article 41

**Margin requirements**

1. A CCP shall impose, call and collect margins to limit its credit exposures from its clearing members and, where relevant, from CCPs with which it has interoperability arrangements. Such margins shall be sufficient to cover potential exposures that the CCP estimates will occur until the liquidation of the relevant positions. They shall also be sufficient to cover losses that result from at least 99 % of the exposures movements over an appropriate time horizon and they shall ensure that a CCP fully collateralises its exposures with all its clearing members, and, where relevant, with CCPs with which it has interoperability arrangements, at least on a daily basis. A CCP shall regularly monitor and, if necessary, revise the level of its margins to reflect current market conditions taking into account any potentially procyclical effects of such revisions.

2. A CCP shall adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared and take into account the interval between margin collections, market liquidity and the possibility of changes over the duration of the transaction. The models and parameters shall be validated by the competent authority and subject to an opinion in accordance with Article 19.

3. A CCP shall call and collect margins on an intraday basis, at least when predefined thresholds are exceeded.

4. A CCP shall call and collect margins that are adequate to cover the risk stemming from the positions registered in each account kept in accordance with Article 39 with respect to specific financial instruments. A CCP may calculate margins with respect to a portfolio of financial instruments provided that the methodology used is prudent and robust.

5. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA and the ESCB, develop draft regulatory technical standards specifying the appropriate percentage and time horizons for the liquidation period and the calculation of historical volatility, as referred to in paragraph 1, to be considered for the different classes of financial instruments, taking into account the objective to limit procyclicality, and the conditions under which portfolio

margin practices referred to in paragraph 4 can be implemented.

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

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

## Article 42

**Default fund**

1. To limit its credit exposures to its clearing members further, a CCP shall maintain a pre-funded default fund to cover losses that exceed the losses to be covered by margin requirements laid down in Article 41, arising from the default, including the opening of an insolvency procedure, of one or more clearing members.

The CCP shall establish a minimum amount below which the size of the default fund is not to fall under any circumstances.

2. A CCP shall establish the minimum size of contributions to the default fund and the criteria to calculate the contributions of the single clearing members. The contributions shall be proportional to the exposures of each clearing member.

3. The default fund shall at least enable the CCP to withstand, under extreme but plausible market conditions, the default of the clearing member to which it has the largest exposures or of the second and third largest clearing members, if the sum of their exposures is larger. A CCP shall develop scenarios of extreme but plausible market conditions. The scenarios shall include the most volatile periods that have been experienced by the markets for which the CCP provides its services and a range of potential future scenarios. They shall take into account sudden sales of financial resources and rapid reductions in market liquidity.

4. A CCP may establish more than one default fund for the different classes of instrument that it clears.

5. In order to ensure consistent application of this Article, ESMA shall, in close cooperation with the ESCB and after consulting EBA, develop draft regulatory technical standards specifying the framework for defining extreme but plausible market conditions referred to in paragraph 3, that should be used when defining the size of the default fund and the other financial resources referred to in Article 43.

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

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

*Article 43***Other financial resources**

1. A CCP shall maintain sufficient pre-funded available financial resources to cover potential losses that exceed the losses to be covered by margin requirements laid down in Article 41 and the default fund as referred to in Article 42. Such pre-funded financial resources shall include dedicated resources of the CCP, shall be freely available to the CCP and shall not be used to meet the capital required under Article 16.

2. The default fund referred to in Article 42 and the other financial resources referred to in paragraph 1 of this Article shall at all times enable the CCP to withstand the default of at least the two clearing members to which it has the largest exposures under extreme but plausible market conditions.

3. A CCP may require non-defaulting clearing members to provide additional funds in the event of a default of another clearing member. The clearing members of a CCP shall have limited exposures toward the CCP.

*Article 44***Liquidity risk controls**

1. A CCP shall at all times have access to adequate liquidity to perform its services and activities. To that end, it shall obtain the necessary credit lines or similar arrangements to cover its liquidity needs in case the financial resources at its disposal are not immediately available. A clearing member, parent undertaking or subsidiary of that clearing member together shall not provide more than 25 % of the credit lines needed by the CCP.

A CCP shall measure, on a daily basis, its potential liquidity needs. It shall take into account the liquidity risk generated by the default of at least the two clearing members to which it has the largest exposures.

2. In order to ensure consistent application of this Article, ESMA shall, after consulting the relevant authorities and the members of the ESCB, develop draft regulatory technical standards specifying the framework for managing the liquidity risk that CCPs are to withstand in accordance with paragraph 1.

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

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

*Article 45***Default waterfall**

1. A CCP shall use the margins posted by a defaulting clearing member prior to other financial resources in covering losses.

2. Where the margins posted by the defaulting clearing member are not sufficient to cover the losses incurred by the CCP, the CCP shall use the default fund contribution of the defaulting member to cover those losses.

3. A CCP shall use contributions to the default fund of the non-defaulting clearing members and any other financial resources referred to in Article 43(1) only after having exhausted the contributions of the defaulting clearing member.

4. A CCP shall use dedicated own resources before using the default fund contributions of non-defaulting clearing members. A CCP shall not use the margins posted by non-defaulting clearing members to cover the losses resulting from the default of another clearing member.

5. In order to ensure consistent application of this Article, ESMA, shall, after consulting the relevant competent authorities and the members of the ESCB, develop draft regulatory technical standards specifying the methodology for calculation and maintenance of the amount of the CCP's own resources to be used in accordance with paragraph 4.

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

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

*Article 46***Collateral requirements**

1. A CCP shall accept highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members. For non-financial counterparties, a CCP may accept bank guarantees, taking such guarantees into account when calculating its exposure to a bank that is a clearing member. It shall apply adequate haircuts to asset values that reflect the potential for their value to decline over the interval between their last revaluation and the time by which they can reasonably be assumed to be liquidated. It shall take into account the liquidity risk following the default of a market participant and the concentration risk on certain assets that may result in establishing the acceptable collateral and the relevant haircuts.

2. A CCP may accept, where appropriate and sufficiently prudent, the underlying of the derivative contract or the financial instrument that originates the CCP exposure as collateral to cover its margin requirements.

3. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, the ESRB and the ESCB, develop draft regulatory technical standards specifying:

- (a) the type of collateral that could be considered highly liquid, such as cash, gold, government and high-quality corporate bonds and covered bonds;
- (b) the haircuts referred to in paragraph 1; and
- (c) the conditions under which commercial bank guarantees may be accepted as collateral under paragraph 1.

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

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

#### Article 47

##### Investment policy

1. A CCP shall invest its financial resources only in cash or in highly liquid financial instruments with minimal market and credit risk. A CCP's investments shall be capable of being liquidated rapidly with minimal adverse price effect.

2. The amount of capital, including retained earnings and reserves of a CCP which are not invested in accordance with paragraph 1, shall not be taken into account for the purposes of Article 16(2) or Article 45(4).

3. Financial instruments posted as margins or as default fund contributions shall, where available, be deposited with operators of securities settlement systems that ensure the full protection of those financial instruments. Alternatively, other highly secure arrangements with authorised financial institutions may be used.

4. Cash deposits of a CCP shall be performed through highly secure arrangements with authorised financial institutions or, alternatively, through the use of the standing deposit facilities of central banks or other comparable means provided for by central banks.

5. Where a CCP deposits assets with a third party, it shall ensure that the assets belonging to the clearing members are identifiable separately from the assets belonging to the CCP and from assets belonging to that third party by means of differently titled accounts on the books of the third party or any other equivalent measures that achieve the same level of protection. A CCP shall have prompt access to the financial instruments when required.

6. A CCP shall not invest its capital or the sums arising from the requirements laid down in Article 41, 42, 43 or 44 in its

own securities or those of its parent undertaking or its subsidiary.

7. A CCP shall take into account its overall credit risk exposures to individual obligors in making its investment decisions and shall ensure that its overall risk exposure to any individual obligor remains within acceptable concentration limits.

8. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA and the ESCB, develop draft regulatory technical standards specifying the financial instruments that can be considered highly liquid, bearing minimal credit and market risk as referred to in paragraph 1, the highly secured arrangements referred to in paragraphs 3 and 4 and the concentration limits referred to in paragraph 7.

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

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

#### Article 48

##### Default procedures

1. A CCP shall have detailed procedures in place to be followed where a clearing member does not comply with the participation requirements of the CCP laid down in Article 37 within the time limit and in accordance with the procedures established by the CCP. The CCP shall set out in detail the procedures to be followed in the event the default of a clearing member is not declared by the CCP. Those procedures shall be reviewed annually.

2. A CCP shall take prompt action to contain losses and liquidity pressures resulting from defaults and shall ensure that the closing out of any clearing member's positions does not disrupt its operations or expose the non-defaulting clearing members to losses that they cannot anticipate or control.

3. Where a CCP considers that the clearing member will not be able to meet its future obligations, it shall promptly inform the competent authority before the default procedure is declared or triggered. The competent authority shall promptly communicate that information to ESMA, to the relevant members of the ESCB and to the authority responsible for the supervision of the defaulting clearing member.

4. A CCP shall verify that its default procedures are enforceable. It shall take all reasonable steps to ensure that it has the legal powers to liquidate the proprietary positions of the defaulting clearing member and to transfer or liquidate the clients' positions of the defaulting clearing member.

5. Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's clients in accordance with Article 39(2), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member designated by all of those clients, on their request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept those assets and positions only where it has previously entered into a contractual relationship with the clients by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients.

6. Where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's client in accordance with Article 39(3), the CCP shall, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of the client to another clearing member designated by the client, on the client's request and without the consent of the defaulting clearing member. That other clearing member shall be obliged to accept these assets and positions only where it has previously entered into a contractual relationship with the client by which it has committed itself to do so. If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of the client.

7. Clients' collateral distinguished in accordance with Article 39(2) and (3) shall be used exclusively to cover the positions held for their account. Any balance owed by the CCP after the completion of the clearing member's default management process by the CCP shall be readily returned to those clients when they are known to the CCP or, if they are not, to the clearing member for the account of its clients.

#### Article 49

##### Review of models, stress testing and back testing

1. A CCP shall regularly review the models and parameters adopted to calculate its margin requirements, default fund contributions, collateral requirements and other risk control mechanisms. It shall subject the models to rigorous and

frequent stress tests to assess their resilience in extreme but plausible market conditions and shall perform back tests to assess the reliability of the methodology adopted. The CCP shall obtain independent validation, shall inform its competent authority and ESMA of the results of the tests performed and shall obtain their validation before adopting any significant change to the models and parameters.

The adopted models and parameters, including any significant change thereto, shall be subject to an opinion of the college pursuant to Article 19.

ESMA shall ensure that information on the results of the stress tests is passed on to the ESAs to enable them to assess the exposure of financial undertakings to the default of CCPs.

2. A CCP shall regularly test the key aspects of its default procedures and take all reasonable steps to ensure that all clearing members understand them and have appropriate arrangements in place to respond to a default event.

3. A CCP shall publicly disclose key information on its risk-management model and assumptions adopted to perform the stress tests referred to in paragraph 1.

4. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, other relevant competent authorities and the members of the ESCB, develop draft regulatory technical standards specifying:

- (a) the type of tests to be undertaken for different classes of financial instruments and portfolios;
- (b) the involvement of clearing members or other parties in the tests;
- (c) the frequency of the tests;
- (d) the time horizons of the tests;
- (e) the key information referred to in paragraph 3.

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

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

#### Article 50

##### Settlement

1. A CCP shall, where practical and available, use central bank money to settle its transactions. Where central bank money is not used, steps shall be taken to strictly limit cash settlement risks.

2. A CCP shall clearly state its obligations with respect to deliveries of financial instruments, including whether it has an obligation to make or receive delivery of a financial instrument or whether it indemnifies participants for losses incurred in the delivery process.

3. Where a CCP has an obligation to make or receive deliveries of financial instruments, it shall eliminate principal risk through the use of delivery-versus-payment mechanisms to the extent possible.

## TITLE V

### INTEROPERABILITY ARRANGEMENTS

#### Article 51

##### Interoperability arrangements

1. A CCP may enter into an interoperability arrangement with another CCP where the requirements laid down in Articles 52, 53 and 54 are fulfilled.

2. When establishing an interoperability arrangement with another CCP for the purpose of providing services to a particular trading venue, the CCP shall have non-discriminatory access, both to the data that it needs for the performance of its functions from that particular trading venue, to the extent that the CCP complies with the operational and technical requirements established by the trading venue, and to the relevant settlement system.

3. Entering into an interoperability arrangement or accessing a data feed or a settlement system referred to in paragraphs 1 and 2 shall be rejected or restricted, directly or indirectly, only in order to control any risk arising from that arrangement or access.

#### Article 52

##### Risk management

1. CCPs that enter into an interoperability arrangement shall:

- (a) put in place adequate policies, procedures and systems to effectively identify, monitor and manage the risks arising from the arrangement so that they can meet their obligations in a timely manner;
- (b) agree on their respective rights and obligations, including the applicable law governing their relationships;
- (c) identify, monitor and effectively manage credit and liquidity risks so that a default of a clearing member of one CCP does not affect an interoperable CCP;
- (d) identify, monitor and address potential interdependences and correlations that arise from an interoperability

arrangement that may affect credit and liquidity risks relating to clearing member concentrations, and pooled financial resources.

For the purposes of point (b) of the first subparagraph, CCPs shall use the same rules concerning the moment of entry of transfer orders into their respective systems and the moment of irrevocability as set out in Directive 98/26/EC, where relevant.

For the purposes of point (c) of the first subparagraph, the terms of the arrangement shall outline the process for managing the consequences of the default where one of the CCPs with which an interoperability arrangement has been concluded is in default.

For the purposes of point (d) of the first subparagraph, CCPs shall have robust controls over the re-use of clearing members' collateral under the arrangement, if permitted by their competent authorities. The arrangement shall outline how those risks have been addressed taking into account sufficient coverage and need to limit contagion.

2. Where the risk-management models used by the CCPs to cover their exposure to their clearing members or their reciprocal exposures are different, the CCPs shall identify those differences, assess risks that may arise therefrom and take measures, including securing additional financial resources, that limit their impact on the interoperability arrangement as well as their potential consequences in terms of contagion risks and ensure that these differences do not affect each CCP's ability to manage the consequences of the default of a clearing member.

3. Any associated costs that arise from paragraphs 1 and 2 shall be borne by the CCP requesting interoperability or access, unless otherwise agreed between the parties.

#### Article 53

##### Provision of margins among CCPs

1. A CCP shall distinguish in accounts the assets and positions held for the account of CCPs with whom it has entered into an interoperability arrangement.

2. If a CCP that enters into an interoperability arrangement with another CCP only provides initial margins to that CCP under a security financial collateral arrangement, the receiving CCP shall have no right of use over the margins provided by the other CCP.

3. Collateral received in the form of financial instruments shall be deposited with operators of securities settlement systems notified under Directive 98/26/EC.

4. The assets referred to in paragraphs 1 and 2 shall be available to the receiving CCP only in case of default of the CCP which has provided the collateral in the context of an interoperability arrangement.

5. In case of default of the CCP which has received the collateral in the context of an interoperability arrangement, the collateral referred to in paragraphs 1 and 2 shall be readily returned to the providing CCP.

#### Article 54

##### Approval of interoperability arrangements

1. An interoperability arrangement shall be subject to the prior approval of the competent authorities of the CCPs involved. The procedure under Article 17 shall apply.

2. The competent authorities shall grant approval of the interoperability arrangement only where the CCPs involved have been authorised to clear under Article 17 or recognised under Article 25 or authorised under a pre-existing national authorisation regime for a period of at least three years, the requirements laid down in Article 52 are met and the technical conditions for clearing transactions under the terms of the arrangement allow for a smooth and orderly functioning of financial markets and the arrangement does not undermine the effectiveness of supervision.

3. Where a competent authority considers that the requirements laid down in paragraph 2 are not met, it shall provide explanations in writing regarding its risk considerations to the other competent authorities and the CCPs involved. It shall also notify ESMA, which shall issue an opinion on the effective validity of the risk considerations as grounds for denial of the interoperability arrangement. ESMA's opinion shall be made available to all the CCPs involved. Where ESMA's opinion differs from the assessment of the relevant competent authority, that competent authority shall reconsider its position, taking into account ESMA's opinion.

4. By 31 December 2012, ESMA shall issue guidelines or recommendations with a view to establishing consistent, efficient and effective assessments of interoperability arrangements, in accordance with the procedure laid down in Article 16 of Regulation (EU) No 1095/2010.

ESMA shall develop drafts of those guidelines or recommendations after consulting the members of the ESCB.

#### TITLE VI

### REGISTRATION AND SUPERVISION OF TRADE REPOSITORIES

#### CHAPTER 1

### *Conditions and procedures for registration of a trade repository*

#### Article 55

##### Registration of a trade repository

1. A trade repository shall register with ESMA for the purposes of Article 9.

2. To be eligible to be registered under this Article, a trade repository shall be a legal person established in the Union and meet the requirements laid down in Title VII.

3. The registration of a trade repository shall be effective for the entire territory of the Union.

4. A registered trade repository shall comply at all times with the conditions for registration. A trade repository shall, without undue delay, notify ESMA of any material changes to the conditions for registration.

#### Article 56

##### Application for registration

1. A trade repository shall submit an application for registration to ESMA.

2. ESMA shall assess whether the application is complete within 20 working days of receipt of the application.

Where the application is not complete, ESMA shall set a deadline by which the trade repository is to provide additional information.

After assessing an application as complete, ESMA shall notify the trade repository accordingly.

3. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details of the application for registration referred to in paragraph 1.

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

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

4. In order to ensure uniform conditions of application of paragraph 1, ESMA shall develop draft implementing technical standards specifying the format of the application for registration to ESMA.

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

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 57

##### **Notification of and consultation with competent authorities prior to registration**

1. If a trade repository which is applying for registration is an entity which is authorised or registered by a competent authority in the Member State where it is established, ESMA shall, without undue delay, notify and consult that competent authority prior to the registration of the trade repository.

2. ESMA and the relevant competent authority shall exchange all information that is necessary for the registration of the trade repository as well as for the supervision of the entity's compliance with the conditions of its registration or authorisation in the Member State where it is established.

#### Article 58

##### **Examination of the application**

1. ESMA shall, within 40 working days from the notification referred to in the third subparagraph of Article 56(2), examine the application for registration based on the compliance of the trade repository with Articles 78 to 81 and shall adopt a fully reasoned registration decision or decision refusing registration.

2. A decision issued by ESMA pursuant to paragraph 1 shall take effect on the fifth working day following its adoption.

#### Article 59

##### **Notification of ESMA decisions relating to registration**

1. Where ESMA adopts a registration decision or a decision refusing or withdrawing registration, it shall notify the trade repository within five working days with a fully reasoned explanation of its decision.

ESMA shall, without undue delay, notify the relevant competent authority referred to in Article 57(1) of its decision.

2. ESMA shall communicate any decision taken in accordance with paragraph 1 to the Commission.

3. ESMA shall publish on its website a list of trade repositories registered in accordance with this Regulation. That list shall be updated within five working days following the adoption of a decision under paragraph 1.

#### Article 60

##### **Exercise of the powers referred to in Articles 61 to 63**

The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 61 to 63 shall not be used to require the disclosure of information or documents which are subject to legal privilege.

#### Article 61

##### **Request for information**

1. ESMA may by simple request or by decision require trade repositories and related third parties to whom the trade repositories have outsourced operational functions or activities to provide all information that is necessary in order to carry out its duties under this Regulation.

2. When sending a simple request for information under paragraph 1, ESMA shall:

- (a) refer to this Article as the legal basis of the request;
- (b) state the purpose of the request;
- (c) specify what information is required;
- (d) set a time limit within which the information is to be provided;
- (e) inform the person from whom the information is requested that he is not obliged to provide the information but that in case of a voluntary reply to the request the information provided must not be incorrect and misleading; and
- (f) indicate the fine provided for in Article 65 in conjunction with point (a) of Section IV of Annex I where the answers to questions asked are incorrect or misleading.

3. When requiring to supply information under paragraph 1 by decision, ESMA shall:

- (a) refer to this Article as the legal basis of the request;
- (b) state the purpose of the request;
- (c) specify what information is required;

- (d) set a time limit within which the information is to be provided;
  - (e) indicate the periodic penalty payments provided for in Article 66 where the production of the required information is incomplete;
  - (f) indicate the fine provided for in Article 65 in conjunction with point (a) of Section IV of Annex I, where the answers to questions asked are incorrect or misleading; and
  - (g) indicate the right to appeal the decision before ESMA's Board of Appeal and to have the decision reviewed by the Court of Justice of the European Union ('Court of Justice') in accordance with Articles 60 and 61 of Regulation (EU) No 1095/2010.
4. The persons referred to in paragraph 1 or their representatives and, in the case of legal persons or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
5. ESMA shall, without delay, send a copy of the simple request or of its decision to the competent authority of the Member State where the persons referred to in paragraph 1 concerned by the request for information are domiciled or established.

#### Article 62

##### General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct necessary investigations of persons referred to in Article 61(1). To that end, the officials and other persons authorised by ESMA shall be empowered to:
- (a) examine any records, data, procedures and any other material relevant to the execution of its tasks irrespective of the medium on which they are stored;
  - (b) take or obtain certified copies of or extracts from such records, data, procedures and other material;
  - (c) summon and ask any person referred to in Article 61(1) or their representatives or staff for oral or written explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers;
  - (d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;
  - (e) request records of telephone and data traffic.

2. The officials and other persons authorised by ESMA for the purposes of the investigations referred to in paragraph 1 shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments provided for in Article 66 where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 61(1) are not provided or are incomplete, and the fines provided for in Article 65 in conjunction with point (b) of Section IV of Annex I, where the answers to questions asked to persons referred to in Article 61(1) are incorrect or misleading.

3. The persons referred to in Article 61(1) are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 66, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.

4. In good time before the investigation, ESMA shall inform the competent authority of the Member State where the investigation is to be carried out of the investigation and of the identity of the authorised persons. Officials of the competent authority concerned shall, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the competent authority concerned may also attend the investigations upon request.

5. If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

6. Where authorisation as referred to in paragraph 5 is applied for, the national judicial authority shall control that the decision of ESMA is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the investigations. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the investigation or demand that it be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No 1095/2010.

*Article 63***On-site inspections**

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises or land of the legal persons referred to in Article 61(1). Where the proper conduct and efficiency of the inspection so require, ESMA may carry out the on-site inspection without prior announcement.

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises or land of the legal persons subject to an investigation decision adopted by ESMA and shall have all the powers stipulated in Article 62(1). They shall also have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.

3. The officials and other persons authorised by ESMA to conduct an on-site inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the periodic penalty payments provided for in Article 66 where the persons concerned do not submit to the inspection. In good time before the inspection, ESMA shall give notice of the inspection to the competent authority of the Member State where the inspection is to be conducted.

4. The persons referred to in Article 61(1) shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 66, the legal remedies available under Regulation (EU) No 1095/2010 as well as the right to have the decision reviewed by the Court of Justice. ESMA shall take such decisions after consulting the competent authority of the Member State where the inspection is to be conducted.

5. Officials of, as well as those authorised or appointed by, the competent authority of the Member State where the inspection is to be conducted shall, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. To that end, they shall enjoy the powers set out in paragraph 2. Officials of the competent authority of the Member State concerned may also attend the on-site inspections on request.

6. ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 62(1) on its behalf. To that end, competent authorities shall enjoy the same powers as ESMA as set out in this Article and in Article 62(1).

7. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary

assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their on-site inspection.

8. If the on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7 requires authorisation by a judicial authority according to national law, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

9. Where authorisation as referred to in paragraph 8 is applied for, the national judicial authority shall verify that ESMA's decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures. However, the national judicial authority may not review the necessity for the inspection or demand to be provided with the information on ESMA's file. The lawfulness of ESMA's decision shall be subject to review only by the Court of Justice following the procedure set out in Regulation (EU) No 1095/2010.

*Article 64***Procedural rules for taking supervisory measures and imposing fines**

1. Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I, ESMA shall appoint an independent investigation officer within ESMA to investigate the matter. The appointed officer shall not be involved or have been directly or indirectly involved in the supervision or the registration process of the trade repository concerned and shall perform his functions independently from ESMA.

2. The investigation officer shall investigate the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations, and shall submit a complete file with his findings to ESMA.

In order to carry out his tasks, the investigation officer may exercise the power to request information in accordance with Article 61 and to conduct investigations and on-site inspections in accordance with Articles 62 and 63. When using those powers, the investigation officer shall comply with Article 60.

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

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

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

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

5. On the basis of the file containing the investigation officer's findings and, when requested by the persons concerned, after having heard the persons subject to the investigations in accordance with Article 67, ESMA shall decide if one or more of the infringements listed in Annex I has been committed by the persons who have been subject to the investigations and, in such a case, shall take a supervisory measure in accordance with Article 73 and impose a fine in accordance with Article 65.

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

7. The Commission shall adopt further rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on the rights of the defence, temporal provisions, and the collection of fines or periodic penalty payments, and shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties.

The rules referred to in the first subparagraph shall be adopted by means of delegated acts in accordance with Article 82.

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

## Article 65

### Fines

1. Where, in accordance with Article 64(5), ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article.

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

2. The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000;

(b) for the infringements referred to in points (a), (b) and (d) to (h) of Section I of Annex I, and in points (a), (b) and (h) of Section II of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed EUR 10 000.

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.

3. The basic amounts set out in paragraph 2 shall be adjusted, if need be, by taking into account aggravating or mitigating factors in accordance with the relevant coefficients set out in Annex II.

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

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

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

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

#### Article 66

##### Periodic penalty payments

1. ESMA shall, by decision, impose periodic penalty payments in order to compel:

(a) a trade repository to put an end to an infringement in accordance with a decision taken pursuant to Article 73(1)(a); or

(b) a person referred to in Article 61(1):

(i) to supply complete information which has been requested by a decision pursuant to Article 61;

(ii) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision pursuant to Article 62; or

(iii) to submit to an on-site inspection ordered by a decision taken pursuant to Article 63.

2. A periodic penalty payment shall be effective and proportionate. The periodic penalty payment shall be imposed for each day of delay.

3. Notwithstanding paragraph 2, the amount of the periodic penalty payments shall be 3 % of the average daily turnover in the preceding business year, or, in the case of natural persons, 2 % of the average daily income in the preceding calendar year. It shall be calculated from the date stipulated in the decision imposing the periodic penalty payment.

4. A periodic penalty payment shall be imposed for a maximum period of six months following the notification of ESMA's decision. Following the end of the period, ESMA shall review the measure.

#### Article 67

##### Hearing of the persons concerned

1. Before taking any decision on a fine or periodic penalty payment under Articles 65 and 66, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons subject to the proceedings have had an opportunity to comment.

2. The rights of the defence of the persons subject to the proceedings shall be fully respected in the proceedings. They shall be entitled to have access to ESMA's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or ESMA's internal preparatory documents.

#### Article 68

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

1. ESMA shall disclose to the public every fine and periodic penalty payment that has been imposed pursuant to Articles 65 and 66 unless such disclosure to the public would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. Such disclosure shall not contain personal data within the meaning of Regulation (EC) No 45/2001.

2. Fines and periodic penalty payments imposed pursuant to Articles 65 and 66 shall be of an administrative nature.

3. Where ESMA decides to impose no fines or penalty payments, it shall inform the European Parliament, the Council, the Commission, and the competent authorities of the Member State concerned accordingly and shall set out the reasons for its decision.

4. Fines and periodic penalty payments imposed pursuant to Articles 65 and 66 shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision without other formality than verification of the authenticity of the decision by the authority which the government of each Member State shall designate for that purpose and shall make known to ESMA and to the Court of Justice.

When those formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent body.

Enforcement may be suspended only by a decision of the Court of Justice. However, the courts of the Member State concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

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

#### Article 69

### Review by the Court of Justice

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

#### Article 70

### Amendments to Annex II

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

#### Article 71

### Withdrawal of registration

1. Without prejudice to Article 73, ESMA shall withdraw the registration of a trade repository where the trade repository:

- (a) expressly renounces the registration or has provided no services for the preceding six months;
- (b) obtained the registration by making false statements or by any other irregular means;
- (c) no longer meets the conditions under which it was registered.

2. ESMA shall, without undue delay, notify the relevant competent authority referred to in Article 57(1) of a decision to withdraw the registration of a trade repository.

3. The competent authority of a Member State in which the trade repository performs its services and activities and which considers that one of the conditions referred to in paragraph 1 has been met, may request ESMA to examine whether the conditions for the withdrawal of registration of the trade repository concerned are met. Where ESMA decides not to withdraw the registration of the trade repository concerned, it shall provide full reasons.

4. The competent authority referred to in paragraph 3 shall be the authority designated under Article 22.

#### Article 72

### Supervisory fees

1. ESMA shall charge fees to the trade repositories in accordance with this Regulation and in accordance with the delegated acts adopted pursuant to paragraph 3. Those fees shall fully cover ESMA's necessary expenditure relating to the registration and supervision of trade repositories and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation in particular as a result of any delegation of tasks in accordance with Article 74.

2. The amount of a fee charged to a trade repository shall cover all administrative costs incurred by ESMA for its registration and supervision activities and be proportionate to the turnover of the trade repository concerned.

3. The Commission shall adopt a delegated act in accordance with Article 82 to specify further the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

#### Article 73

### Supervisory measures by ESMA

1. Where, in accordance with Article 64(5), ESMA finds that a trade repository has committed one of the infringements listed in Annex I, it shall take one or more of the following decisions:

- (a) requiring the trade repository to bring the infringement to an end;
- (b) imposing fines under Article 65;
- (c) issuing public notices;
- (d) as a last resort, withdrawing the registration of the trade repository.

2. When taking the decisions referred to in paragraph 1, ESMA shall take into account the nature and seriousness of the infringement, having regard to the following criteria:

- (a) the duration and frequency of the infringement;
- (b) whether the infringement has revealed serious or systemic weaknesses in the undertaking's procedures or in its management systems or internal controls;
- (c) whether financial crime has been occasioned, facilitated or otherwise attributable to the infringement;

(d) whether the infringement has been committed intentionally or negligently.

3. Without undue delay, ESMA shall notify any decision adopted pursuant to paragraph 1 to the trade repository concerned, and shall communicate it to the competent authorities of the Member States and to the Commission. It shall publicly disclose any such decision on its website within 10 working days from the date when it was adopted.

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

#### Article 74

##### Delegation of tasks by ESMA to competent authorities

1. Where necessary for the proper performance of a supervisory task, ESMA may delegate specific supervisory tasks to the competent authority of a Member State in accordance with the guidelines issued by ESMA pursuant to Article 16 of Regulation (EU) No 1095/2010. Such specific supervisory tasks may, in particular, include the power to carry out requests for information in accordance with Article 61 and to conduct investigations and on-site inspections in accordance with Article 62 and Article 63(6).

2. Prior to delegation of a task, ESMA shall consult the relevant competent authority. Such consultation shall concern:

- (a) the scope of the task to be delegated;
- (b) the timetable for the performance of the task; and
- (c) the transmission of necessary information by and to ESMA.

3. In accordance with the regulation on fees adopted by the Commission pursuant to Article 72(3), ESMA shall reimburse a competent authority for costs incurred as a result of carrying out delegated tasks.

4. ESMA shall review the decision referred to in paragraph 1 at appropriate intervals. A delegation may be revoked at any time.

5. A delegation of tasks shall not affect the responsibility of ESMA and shall not limit ESMA's ability to conduct and oversee the delegated activity. Supervisory responsibilities under this Regulation, including registration decisions, final assessments

and follow-up decisions concerning infringements, shall not be delegated.

#### CHAPTER 2

##### Relations with third countries

#### Article 75

##### Equivalence and international agreements

1. The Commission may adopt an implementing act determining that the legal and supervisory arrangements of a third country ensure that:

- (a) trade repositories authorised in that third country comply with legally binding requirements which are equivalent to those laid down in this Regulation;
- (b) effective supervision and enforcement of trade repositories takes place in that third country on an ongoing basis; and
- (c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and they are at least equivalent to those set out in this Regulation.

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

2. Where appropriate, and in any case after adopting an implementing act as referred to in paragraph 1, the Commission shall submit recommendations to the Council for the negotiation of international agreements with the relevant third countries regarding mutual access to, and exchange of information on, derivative contracts held in trade repositories which are established in that third country, in a way that ensures that Union authorities, including ESMA, have immediate and continuous access to all the information needed for the exercise of their duties.

3. After conclusion of the agreements referred to in paragraph 2, and in accordance with them, ESMA shall establish cooperation arrangements with the competent authorities of the relevant third countries. Those arrangements shall specify at least:

- (a) a mechanism for the exchange of information between ESMA and any other Union authorities that exercise responsibilities in accordance with this Regulation on the one hand and the relevant competent authorities of third countries concerned on the other; and
- (b) procedures concerning the coordination of supervisory activities.

4. ESMA shall apply Regulation (EC) No 45/2001 with regard to the transfer of personal data to a third country.

#### Article 76

##### Cooperation arrangements

Relevant authorities of third countries that do not have any trade repository established in their jurisdiction may contact ESMA with a view to establishing cooperation arrangements to access information on derivatives contracts held in Union trade repositories.

ESMA may establish cooperation arrangements with those relevant authorities regarding access to information on derivatives contracts held in Union trade repositories that these authorities need to fulfil their respective responsibilities and mandates, provided that guarantees of professional secrecy exist, including the protection of business secrets shared by the authorities with third parties.

#### Article 77

##### Recognition of trade repositories

1. A trade repository established in a third country may provide its services and activities to entities established in the Union for the purposes of Article 9 only after its recognition by ESMA in accordance with paragraph 2.

2. A trade repository referred to in paragraph 1 shall submit to ESMA its application for recognition together with all necessary information, including at least the information necessary to verify that the trade repository is authorised and subject to effective supervision in a third country which:

- (a) has been recognised by the Commission, by means of an implementing act pursuant to Article 75(1), as having an equivalent and enforceable regulatory and supervisory framework;
- (b) has entered into an international agreement with the Union pursuant to Article 75(2); and
- (c) has entered into cooperation arrangements pursuant to Article 75(3) to ensure that Union authorities, including ESMA, have immediate and continuous access to all the necessary information.

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 trade repository has to provide additional information.

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

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

#### TITLE VII

##### REQUIREMENTS FOR TRADE REPOSITORIES

#### Article 78

##### General requirements

1. A trade repository shall have robust governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility and adequate internal control mechanisms, including sound administrative and accounting procedures, which prevent any disclosure of confidential information.

2. A trade repository shall maintain and operate effective written organisational and administrative arrangements to identify and manage any potential conflicts of interest concerning its managers, employees, or any person directly or indirectly linked to them by close links.

3. A trade repository shall establish adequate policies and procedures sufficient to ensure its compliance, including of its managers and employees, with all the provisions of this Regulation.

4. A trade repository shall maintain and operate an adequate organisational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities. It shall employ appropriate and proportionate systems, resources and procedures.

5. Where a trade repository offers ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services, the trade repository shall maintain those ancillary services operationally separate from the trade repository's function of centrally collecting and maintaining records of derivatives.

6. The senior management and members of the board of a trade repository shall be of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository.

7. A trade repository shall have objective, non-discriminatory and publicly disclosed requirements for access by undertakings subject to the reporting obligation under Article 9. A trade repository shall grant service providers non-discriminatory access to information maintained by the trade repository, on condition that the relevant counterparties have provided their consent. Criteria that restrict access shall only be permitted to the extent that their objective is to control the risk to the data maintained by a trade repository.

8. A trade repository shall publicly disclose the prices and fees associated with services provided under this Regulation. It shall disclose the prices and fees of each service provided separately, including discounts and rebates and the conditions to benefit from those reductions. It shall allow reporting entities to access specific services separately. The prices and fees charged by a trade repository shall be cost-related.

#### Article 79

##### Operational reliability

1. A trade repository shall identify sources of operational risk and minimise them through the development of appropriate systems, controls and procedures. Such systems shall be reliable and secure and have adequate capacity to handle the information received.

2. A trade repository shall establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the maintenance of its functions, the timely recovery of operations and the fulfilment of the trade repository's obligations. Such a plan shall at least provide for the establishment of backup facilities.

3. A trade repository from which registration has been withdrawn shall ensure orderly substitution including the transfer of data to other trade repositories and the redirection of reporting flows to other trade repositories.

#### Article 80

##### Safeguarding and recording

1. A trade repository shall ensure the confidentiality, integrity and protection of the information received under Article 9.

2. A trade repository may only use the data it receives under this Regulation for commercial purposes if the relevant counterparties have provided their consent.

3. A trade repository shall promptly record the information received under Article 9 and shall maintain it for at least 10 years following the termination of the relevant contracts. It shall employ timely and efficient record keeping procedures to document changes to recorded information.

4. A trade repository shall calculate the positions by class of derivatives and by reporting entity based on the details of the derivative contracts reported in accordance with Article 9.

5. A trade repository shall allow the parties to a contract to access and correct the information on that contract in a timely manner.

6. A trade repository shall take all reasonable steps to prevent any misuse of the information maintained in its systems.

A natural person who has a close link with a trade repository or a legal person that has a parent undertaking or a subsidiary relationship with the trade repository shall not use confidential information recorded in a trade repository for commercial purposes.

#### Article 81

##### Transparency and data availability

1. A trade repository shall regularly, and in an easily accessible way, publish aggregate positions by class of derivatives on the contracts reported to it.

2. A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

3. A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

- (a) ESMA;
- (b) the ESRB;
- (c) the competent authority supervising CCPs accessing the trade repository;
- (d) the competent authority supervising the trading venues of the reported contracts;
- (e) the relevant members of the ESCB;
- (f) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;
- (g) supervisory authorities appointed under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>(1)</sup>;
- (h) the relevant Union securities and market authorities;
- (i) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA as referred to in Article 76;
- (j) the Agency for the Cooperation of Energy Regulators.

<sup>(1)</sup> OJ L 142, 30.4.2004, p. 12.

4. ESMA shall share the information necessary for the exercise of their duties with other relevant Union authorities.

5. In order to ensure consistent application of this Article, ESMA shall, after consulting the members of the ESCB, develop draft regulatory technical standards specifying the frequency and the details of the information referred to in paragraphs 1 and 3 as well as operational standards required in order to aggregate and compare data across repositories and for the entities referred to in paragraph 3 to have access to information as necessary. Those draft regulatory technical standards shall aim to ensure that the information published under paragraph 1 is not capable of identifying a party to any contract.

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

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

#### Article 82

##### Exercise of the delegation

1. The power to adopt delegated acts is conferred to the Commission subject to the conditions laid down in this Article.
2. The delegation of power referred to in Article 1(6), Article 64(7), Article 70, Article 72(3) and Article 85(2) shall be conferred to the Commission for an indeterminate period of time.
3. Before adopting a delegated act, the Commission shall endeavour to consult ESMA.
4. A delegation of power referred to in Article 1(6), Article 64(7), Article 70, Article 72(3) and Article 85(2) 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 power specified in that decision. The decision to revoke shall take effect on the day following that of its publication in the *Official Journal of the European Union* or on a later date specified therein. It shall not affect the validity of any delegated acts already in force.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 1(6), Article 64(7), Article 70, Article 72(3) and Article 85(2) shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of three months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament or 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.

#### TITLE VIII

##### COMMON PROVISIONS

#### Article 83

##### Professional secrecy

1. The obligation of professional secrecy shall apply to all persons who work or have worked for the competent authorities designated in accordance with Article 22 and the authorities referred to in Article 81(3), for ESMA, or for auditors and experts instructed by the competent authorities or ESMA. No confidential information that those persons receive in the course of their duties shall be divulged to any person or authority, except in summary or aggregate form such that an individual CCP, trade repository or any other person cannot be identified, without prejudice to cases covered by criminal or tax law or to this Regulation.
2. Where a CCP 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 where necessary for carrying out the proceeding.
3. Without prejudice to cases covered by criminal or tax law, the competent authorities, ESMA, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Regulation 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 Regulation or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them or in the context of administrative or judicial proceedings specifically relating to the exercise of those functions, or both. Where ESMA, the competent authority or another authority, body or person communicating information consents thereto, the authority receiving the information may use it for other non-commercial purposes.
4. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 1, 2 and 3. However, those conditions shall not prevent ESMA, the competent authorities or the relevant central banks from exchanging or transmitting confidential information in accordance with this Regulation and with other legislation applicable to investment firms, credit institutions, pension funds, UCITS, AIFMs, insurance and reinsurance intermediaries, insurance undertakings, regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. Paragraphs 1, 2 and 3 shall not prevent the competent authorities from exchanging or transmitting confidential information, in accordance with national law, that has not been received from a competent authority of another Member State.

#### Article 84

##### Exchange of information

1. Competent authorities, ESMA, and other relevant authorities shall, without undue delay, provide one another with the information required for the purposes of carrying out their duties.

2. Competent authorities, ESMA, other relevant authorities and other bodies or natural and legal persons receiving confidential information in the exercise of their duties under this Regulation shall use it only in the course of their duties.

3. Competent authorities shall communicate information to the relevant members of the ESCB where such information is relevant for the exercise of their duties.

#### TITLE IX

##### TRANSITIONAL AND FINAL PROVISIONS

#### Article 85

##### Reports and review

1. By 17 August 2015, the Commission shall review and prepare a general report on this Regulation. The Commission shall submit the report to the European Parliament and the Council, together with any appropriate proposals.

The Commission shall in particular:

- (a) assess, in cooperation with the members of the ESCB, the need for any measure to facilitate the access of CCPs to central bank liquidity facilities;
- (b) assess, in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;
- (c) assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs;

(d) assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area;

(e) assess in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users.

The assessment referred to in point (a) of the first subparagraph shall take into account any result of ongoing work between central banks at Union and international level. The assessment shall also take into account the principle of independence of central banks and their right to provide access to liquidity facilities at their own discretion as well as the potential unintended effect on the behaviour of the CCPs or the internal market. Any accompanying proposals shall not, either directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services.

2. By 17 August 2014, the Commission shall prepare a report, after consulting ESMA and EIOPA, assessing the progress and effort made by CCPs in developing technical solutions for the transfer by pension scheme arrangements of non-cash collateral as variation margins, as well as the need for any measures to facilitate such solution. If the Commission considers that the necessary effort to develop appropriate technical solutions has not been made and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remain unchanged, it shall be empowered to adopt delegated acts in accordance with Article 82 to extend the three-year period referred to in Article 89(1) once by two years and once by one year.

3. ESMA shall submit to the Commission reports:

- (a) on the application of the clearing obligation under Title II and in particular the absence of clearing obligation for OTC derivative contracts entered into before the date of entry into force of this Regulation;
- (b) on the application of the identification procedure under Article 5(3);
- (c) on the application of the segregation requirements laid down in Article 39;
- (d) on the extension of the scope of interoperability arrangements under Title V to transactions in classes of financial instruments other than transferable securities and money-market instruments;

- (e) on the access of CCPs to trading venues, the effects on competitiveness of certain practices, and the impact on liquidity fragmentation;
- (f) on ESMA's staffing and resources needs arising from the assumption of its powers and duties in accordance with this Regulation;
- (g) on the impact of the application of additional requirements by Member States pursuant to Article 14(5).

Those reports shall be communicated to the Commission by 30 September 2014 for the purposes of paragraph 1. They shall also be submitted to the European Parliament and the Council.

4. The Commission shall, in cooperation with the Member States and ESMA, and after requesting the assessment of the ESRB, draw up an annual report assessing any possible systemic risk and cost implications of interoperability arrangements.

The report shall focus at least on the number and complexity of such arrangements, and the adequacy of risk-management systems and models. The Commission shall submit the report to the European Parliament and the Council, together with any appropriate proposals.

The ESRB shall provide the Commission with its assessment of any possible systemic risk implications of interoperability arrangements.

5. ESMA shall present an annual report to the European Parliament, the Council and the Commission on the penalties imposed by competent authorities, including supervisory measures, fines and periodic penalty payments.

#### Article 86

##### 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.

#### Article 87

##### Amendment to Directive 98/26/EC

1. In Article 9(1) of Directive 98/26/EC, the following subparagraph is added:

'Where a system operator has provided collateral security to another system operator in connection with an interoperable system, the rights of the providing system operator to that collateral security shall not be affected by insolvency proceedings against the receiving system operator.'

2. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with point (1) by 17 August 2014. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to Directive 98/26/EC or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

#### Article 88

##### Websites

1. ESMA shall maintain a website which provides details of the following:

- (a) contracts eligible for the clearing obligation under Article 5;
- (b) penalties imposed for breaches of Articles 4, 5 and 7 to 11;
- (c) CCPs authorised to offer services or activities in the Union that are established in the Union, and the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation;
- (d) penalties imposed for breaches of Titles IV and V;
- (e) CCPs authorised to offer services or activities in the Union established in a third country, and the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation;
- (f) trade repositories authorised to offer services or activities in the Union;
- (g) fines and periodic penalty payments imposed in accordance with Articles 65 and 66;
- (h) the public register referred to in Article 6.

<sup>(1)</sup> OJ L 191, 13.7.2001, p. 45.

2. For the purposes of points (b), (c) and (d) of paragraph 1, competent authorities shall maintain websites, which shall be linked to the ESMA website.

3. All websites referred to in this Article shall be publicly accessible and regularly updated, and shall provide information in a clear format.

#### Article 89

##### Transitional provisions

1. For three years after the entry into force of this Regulation, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10). The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default.

The OTC derivative contracts, which would otherwise be subject to the clearing obligation under Article 4, entered into by those entities during this period shall be subject to the requirements laid down in Article 11.

2. In relation to pension scheme arrangements referred to in Article 2(10)(c) and (d) the exemption referred to in paragraph 1 of this Article shall be granted by the relevant competent authority for types of entities or types of arrangements. After receiving the request, the competent authority shall notify ESMA and EIOPA. Within 30 calendar days of receipt of the notification ESMA, after consulting EIOPA, shall issue an opinion assessing compliance of the type of entities or the type of arrangements with Article 2(10)(c) or (d) as well as the reasons why an exemption is justified due to difficulties in meeting the variation margin requirements. The competent authority shall only grant an exemption where it is fully satisfied that the type of entities or the type of arrangements complies with Article 2(10)(c) or (d) and that they encounter difficulties in meeting the variation margin requirements. The competent authority shall adopt a decision within ten working days of receipt of ESMA's opinion, taking due account of that opinion. If the competent authority does not agree with ESMA's opinion, it shall give full reasons in its decision and shall explain any significant deviation therefrom.

ESMA shall publish on its website a list of types of entities and types of arrangements referred to in Article 2(10)(c) and (d) which has been granted an exemption in accordance with the first subparagraph. To further strengthen consistency in supervisory outcomes, ESMA shall conduct a peer review of the entities included on the list every year in accordance with Article 30 of Regulation (EU) No 1095/2010.

3. A CCP that has been authorised in its Member State of establishment to provide clearing services in accordance with the national law of that Member State before all the regulatory technical standards under Articles 4, 5, 8 to 11, 16, 18, 25, 26, 29, 34, 41, 42, 44, 45, 46, 47, 49, 56 and 81 are adopted by the Commission, shall apply for authorisation under Article 14 for the purposes of this Regulation within six months of the date of entry into force of all the regulatory technical standards under Articles 16, 25, 26, 29, 34, 41, 42, 44, 45, 47 and 49.

A CCP established in a third country, which has been recognised to provide clearing services in a Member State in accordance with the national law of that Member State before all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 44, 45, 47 and 49 are adopted by the Commission, shall apply for recognition under Article 25 for the purposes of this Regulation within six months of the date of entry into force of all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 44, 45, 47 and 49.

4. Until a decision is made under this Regulation on the authorisation or recognition of a CCP, the respective national rules on authorisation and recognition of CCPs shall continue to apply and the CCP shall continue to be supervised by the competent authority of its Member State of establishment or recognition.

5. Where a competent authority authorised a CCP to clear a given class of derivatives in accordance with the national law of its Member State before all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 45, 47 and 49 are adopted by the Commission, the competent authority of that Member State shall notify ESMA of that authorisation within one month of the date of entry into force of the regulatory technical standards under Article 5(1).

Where a competent authority recognised a CCP established in a third country to provide clearing services in accordance with the national law of its Member State before all the regulatory technical standards under Articles 16, 26, 29, 34, 41, 42, 45, 47 and 49 are adopted by the Commission, the competent authority of that Member State shall notify ESMA of that recognition within one month of the date of entry into force of the regulatory technical standards under Article 5(1).

6. A trade repository that has been authorised or registered in its Member State of establishment to collect and maintain the records of derivatives in accordance with the national law of that Member State before all the regulatory and implementing technical standards under Articles 9, 56 and 81 are adopted by the Commission, shall apply for registration under Article 55 within six months of the date of entry into force of those regulatory and implementing technical standards.

A trade repository established in a third country, which is allowed to collect and maintain the records of derivatives in a Member State in accordance with the national law of that Member State before all the regulatory and implementing technical standards under Articles 9, 56 and 81 are adopted by the Commission, shall apply for recognition under Article 77 within six months of the date of entry into force of those regulatory and implementing technical standards.

7. Until a decision is made under this Regulation on the registration or recognition of a trade repository, the respective national rules on authorisation, registration and recognition of trade repositories shall continue to apply and the trade repository shall continue to be supervised by the competent authority of its Member State of establishment or recognition.

8. A trade repository that has been authorised or registered in its Member State of establishment to collect and maintain the records of derivatives in accordance with the national law of that Member State before the regulatory and implementing technical standards under Articles 56 and 81 are adopted by the Commission, can be used to meet the reporting requirement under Article 9 until the time a decision is made on the registration of the trade repository under this Regulation.

A trade repository established in a third country which has been allowed to collect and maintain the records of derivatives in accordance with the national law of a Member State before all the regulatory and implementing technical standards under

Articles 56 and 81 are adopted by the Commission, can be used to meet the reporting requirement under Article 9 until the time a decision is made on the recognition of the trade repository under this Regulation.

9. Notwithstanding Article 81(3)(f), where no international agreement is in place between a third country and the Union as referred to in Article 75, a trade repository may make the necessary information available to the relevant authorities of that third country until 17 August 2013 provided that it notifies ESMA.

#### Article 90

##### **Staff and resources of ESMA**

By 31 December 2012, ESMA shall assess the staffing and resources needs arising from the assumption of its powers and duties in accordance with this Regulation and submit a report to the European Parliament, the Council and the Commission.

#### Article 91

##### **Entry into force**

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

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

Done at Strasbourg, 4 July 2012.

*For the European Parliament*  
*The President*  
M. SCHULZ

*For the Council*  
*The President*  
A. D. MAVROYIANNIS

## ANNEX I

**List of infringements referred to in Article 65(1)**

## I. Infringements relating to organisational requirements or conflicts of interest:

- (a) a trade repository infringes Article 78(1) by not having robust governance arrangements which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility and adequate internal control mechanisms, including sound administrative and accounting procedures, which prevent the disclosure of confidential information;
- (b) a trade repository infringes Article 78(2) by not maintaining or operating effective written organisational and administrative arrangements to identify and manage any potential conflicts of interest concerning its managers, its employees, and any person directly or indirectly linked to them by close links;
- (c) a trade repository infringes Article 78(3) by not establishing adequate policies and procedures sufficient to ensure compliance, including that of its managers and employees, with all the provisions of this Regulation;
- (d) a trade repository infringes Article 78(4) by not maintaining or operating an adequate organisational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities;
- (e) a trade repository infringes Article 78(5) by not separating operationally its ancillary services from its function of centrally collecting and maintaining records of derivatives;
- (f) a trade repository infringes Article 78(6) by not ensuring that its senior management and the members of the board are of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository;
- (g) a trade repository infringes Article 78(7) by not having objective non-discriminatory and publicly disclosed requirements for access by services providers and undertakings subject to the reporting obligation under Article 9;
- (h) a trade repository infringes Article 78(8) by not publicly disclosing the prices and fees associated with services provided under this Regulation, by not allowing reporting entities to access specific services separately or by charging prices and fees that are not cost related.

## II. Infringements relating to operational requirements:

- (a) a trade repository infringes Article 79(1) by not identifying sources of operational risk or by not minimising those risks through the development of appropriate systems, controls and procedures;
- (b) a trade repository infringes Article 79(2) by not establishing, implementing or maintaining an adequate business continuity policy and disaster recovery plan aimed at ensuring the maintenance of its functions, the timely recovery of operations and the fulfilment of the trade repository's obligations;
- (c) a trade repository infringes Article 80(1) by not ensuring the confidentiality, integrity or protection of the information received under Article 9;
- (d) a trade repository infringes Article 80(2) by using the data that it receives under this Regulation for commercial purposes without the relevant counterparties having provided their consent;
- (e) a trade repository infringes Article 80(3) by not promptly recording the information received under Article 9 or by not maintaining it for at least 10 years following the termination of the relevant contracts or by not employing timely and efficient record-keeping procedures to document changes to recorded information;
- (f) a trade repository infringes Article 80(4) by not calculating the positions by class of derivatives and by reporting entity based on the details of the derivative contracts reported in accordance with Article 9;
- (g) a trade repository infringes Article 80(5) by not allowing the parties to a contract to access and correct the information on that contract in a timely manner;
- (h) a trade repository infringes Article 80(6) by not taking all reasonable steps to prevent any misuse of the information maintained in its systems.

III. Infringements relating to transparency and the availability of information:

- (a) a trade repository infringes Article 81(1) by not regularly publishing, in an easily accessible way, aggregate positions by class of derivatives on the contracts reported to it;
- (b) a trade repository infringes Article 81(2) by not allowing the entities referred to in Article 81(3) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

IV. Infringements relating to obstacles to the supervisory activities:

- (a) a trade repository infringes Article 61(1) by providing incorrect or misleading information in response to a simple request for information by ESMA in accordance with Article 61(2) or in response to a decision by ESMA requiring information in accordance with Article 61(3);
  - (b) a trade repository provides incorrect or misleading answers to questions asked pursuant to Article 62(1)(c);
  - (c) a trade repository does not comply in due time with a supervisory measure adopted by ESMA pursuant to Article 73.
-

## ANNEX II

**List of the coefficients linked to aggravating and mitigating factors for the application of Article 65(3)**

The following coefficients shall be applicable, cumulatively, to the basic amounts referred to in Article 65(2):

I. Adjustment coefficients linked to aggravating factors:

- (a) if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply;
- (b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply;
- (c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply;
- (d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply;
- (e) if the infringement has been committed intentionally, a coefficient of 2 shall apply;
- (f) if no remedial action has been taken since the breach has been identified, a coefficient of 1,7 shall apply;
- (g) if the trade repository's senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1,5 shall apply.

II. Adjustment coefficients linked to mitigating factors:

- (a) if the infringement has been committed for less than 10 working days, a coefficient of 0,9 shall apply;
  - (b) if the trade repository's senior management can demonstrate to have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply;
  - (c) if the trade repository has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply;
  - (d) if the trade repository has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply.
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**REGULATION (EU) No 649/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 4 July 2012**  
**concerning the export and import of hazardous chemicals**  
(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 192(1) and Article 207 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>,

After consulting the Committee of the Regions,

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

Whereas:

(1) Regulation (EC) No 689/2008 of the European Parliament and of the Council of 17 June 2008 concerning the export and import of dangerous chemicals <sup>(3)</sup> has been substantially amended several times. Since further amendments are to be made, Regulation (EC) No 689/2008 should be recast in the interest of clarity.

(2) Regulation (EC) No 689/2008 implements the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade <sup>(4)</sup> (the 'Convention'), which entered into force on 24 February 2004, and replaces Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals <sup>(5)</sup>.

(3) For reasons of clarity and consistency with other relevant Union legislation, certain definitions should be

introduced or clarified and terminology should be aligned with that used in Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency <sup>(6)</sup>, on the one hand, and Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures <sup>(7)</sup> on the other hand. It is appropriate to ensure that this Regulation reflects the transitional provisions of Regulation (EC) No 1272/2008, in order to avoid any inconsistencies between the timetable of application of that Regulation and this Regulation.

(4) The Convention allows Parties the right to take action that is more stringently protective of human health and the environment than that called for in the Convention, provided that such action is consistent with the provisions of the Convention and is in accordance with international law. It is necessary and appropriate, in order to ensure a higher level of protection of the environment and the general public of importing countries, to go further than the provisions of the Convention in certain respects.

(5) As regards the participation of the Union in the Convention, it is essential to have a single contact point for Union interaction with the Secretariat of the Convention (the 'Secretariat') and other Parties to the Convention as well as with other countries. The Commission should act as that contact point.

(6) There is a need to ensure the effective coordination and management of technical and administrative aspects of this Regulation at Union level. The Member States and the European Chemicals Agency established by Regulation (EC) No 1907/2006 (the 'Agency') have the competence and experience in implementing Union legislation on chemicals and international agreements on chemicals. The Member States and the Agency should, therefore, carry out tasks with regard to the administrative, technical and scientific aspects of the implementation of the Convention through this Regulation, as well as the exchange of information. In addition, the Commission, the Member States and the Agency should cooperate in order to implement the Union's international obligations under the Convention effectively.

<sup>(1)</sup> OJ C 318, 29.10.2011, p. 163.

<sup>(2)</sup> Position of the European Parliament of 10 May 2012 (not yet published in the Official Journal) and decision of the Council of 26 June 2012.

<sup>(3)</sup> OJ L 204, 31.7.2008, p. 1.

<sup>(4)</sup> OJ L 63, 6.3.2003, p. 29.

<sup>(5)</sup> OJ L 63, 6.3.2003, p. 1.

<sup>(6)</sup> OJ L 396, 30.12.2006, p. 1.

<sup>(7)</sup> OJ L 353, 31.12.2008, p. 1.

- (7) Given that certain tasks of the Commission should be transferred to the Agency, the European Database on Export and Import of Dangerous Chemicals initially established by the Commission should be further developed and maintained by the Agency.
- (8) Exports of hazardous chemicals that are banned or severely restricted within the Union should continue to be subject to a common export notification procedure. Accordingly, hazardous chemicals, whether in the form of substances on their own or in mixtures or in articles, which have been banned or severely restricted by the Union as plant protection products, as other forms of pesticides, or as industrial chemicals for use by professional users or by the public, should be subject to export notification rules similar to those applicable to such chemicals when they are banned or severely restricted within either or both of the use categories laid down in the Convention, namely as pesticides or chemicals for industrial use. In addition, chemicals subject to the international prior informed consent (PIC) procedure (the 'PIC procedure') should also be subject to the same export notification rules. That common export notification procedure should apply to Union exports to all third countries, whether or not they are Parties to the Convention or participate in its procedures. Member States should be permitted to charge administrative fees, in order to cover their costs in carrying out this procedure.
- (9) Exporters and importers should be obliged to provide information concerning the quantities of chemicals in international trade covered by this Regulation so that the impact and effectiveness of the arrangements laid down therein can be monitored and assessed.
- (10) Notifications to the Secretariat of Union or Member State final regulatory actions banning or severely restricting chemicals, with a view to their inclusion in the PIC procedure, should be submitted by the Commission in cases where the criteria laid down in the Convention in this regard are met. Additional information to support such notifications should be sought where necessary.
- (11) In cases where Union or Member State final regulatory actions do not qualify for notification because they do not meet the criteria laid down in the Convention, information concerning the actions should nevertheless be conveyed to the Secretariat and other Parties to the Convention in the interests of exchange of information.
- (12) It is also necessary to ensure that the Union takes decisions with regard to the import into the Union of chemicals that are subject to the PIC procedure. These decisions should be based on applicable Union legislation and take into account bans or severe restrictions imposed by Member States. Where justified, amendments to Union legislation should be proposed.
- (13) Arrangements are needed to ensure that Member States and exporters are aware of the decisions of importing countries as regards chemicals that are subject to the PIC procedure, and that exporters comply with those decisions. Furthermore, in order to prevent undesired exports, no chemicals banned or severely restricted within the Union that meet the criteria for notification under the Convention or that are subject to the PIC procedure should be exported unless the explicit consent of the importing country concerned has been sought and obtained, whether or not that country is a Party to the Convention. At the same time, an exemption from this obligation is appropriate in relation to exports of certain chemicals to countries that are members of the Organisation for Economic Cooperation and Development (OECD) provided that certain conditions are met. Furthermore, a procedure is needed to deal with cases in which, despite all reasonable efforts, no response is obtained from the importing country, so that exports of certain chemicals may proceed on a temporary basis under specified conditions. It is also necessary to provide for periodic review of all such cases as well as those in which explicit consent is obtained.
- (14) It is also important that all chemicals exported have an adequate shelf-life so that they may be used effectively and safely. As regards pesticides, in particular those exported to developing countries, it is essential that information about appropriate storage conditions be provided and that suitable packaging and sizes of containers be used to avoid creating obsolete stocks.
- (15) Articles containing chemicals do not fall within the scope of the Convention. Nevertheless, it seems appropriate that articles, as defined in this Regulation, containing chemicals that could be released under certain conditions of use or disposal and that are banned or severely restricted in the Union within one or more of the use categories laid down in the Convention or are subject to the PIC procedure should also be subject to the export notification rules. Furthermore, certain chemicals and articles containing specific chemicals falling outside the scope of the Convention but giving rise to particular concern should not be exported at all.
- (16) In accordance with the Convention, information on transit movements of chemicals subject to the PIC procedure should be provided to Parties to the Convention who request such information.
- (17) Union rules on packaging and labelling and other safety information should apply to all chemicals when intended for export to Parties and other countries unless those provisions would conflict with any specific requirements of those countries, taking into account relevant international standards. Since Regulation (EC) No 1272/2008 established new provisions on classification, labelling and packaging of substances and mixtures, a reference to that Regulation should be included in this Regulation.

- (18) In order to ensure effective control and enforcement, Member States should designate authorities such as customs authorities that should have the responsibility of controlling imports and exports of chemicals covered by this Regulation. The Commission, supported by the Agency, and the Member States have a key role to play and should act in a targeted and coordinated way. Member States should provide for appropriate penalties in the event of infringements.
- (19) In order to facilitate customs control and to reduce the administrative burden for both exporters and authorities, a system of codes to be used in export declarations should be established. Special codes should also be used, as appropriate, for chemicals exported for the purpose of research or analysis in quantities that are unlikely to affect human health or the environment and that in any event do not exceed 10 kg from each exporter to each importing country per calendar year.
- (20) Exchange of information, shared responsibility and cooperative efforts between the Union and the Member States and third countries should be promoted with a view to ensuring sound management of chemicals, whether or not those third countries are Parties to the Convention. In particular, technical assistance to developing countries and countries with economies in transition should be provided directly by the Commission and the Member States, or indirectly via support for projects by non-governmental organisations, especially assistance seeking to enable those countries to implement the Convention, thereby contributing to the prevention of harmful effects of chemicals on human health and the environment.
- (21) There should be regular monitoring of the operation of the procedures if they are to be effective. To this end, Member States and the Agency should regularly submit reports in standardised form to the Commission, which should in turn regularly report to the European Parliament and the Council.
- (22) Technical notes for guidance should be drawn up by the Agency to assist the designated authorities, including such authorities as customs authorities controlling exports, exporters and importers, in the application of this Regulation.
- (23) In order to adapt this Regulation to technical progress, 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 inclusion of chemicals in Part 1 or 2 of Annex I and other amendments to that Annex, inclusion of chemicals in Part 1 or 2 of Annex V and other amendments to that Annex, and amendments to Annexes II, III, IV and VI. 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.
- (24) In order to ensure uniform conditions for the implementation of this Regulation, 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 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<sup>(1)</sup>.
- (25) Since the objectives of this Regulation, namely to ensure coherent and effective implementation of the Union's obligations under the Convention, cannot be sufficiently achieved by the Member States and can therefore, by reason of the necessity to harmonise the rules concerning imports and exports of hazardous chemicals, 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 those objectives.
- (26) Regulation (EC) No 689/2008 should be repealed.
- (27) It is appropriate to provide for the deferred application of this Regulation so as to allow the Agency sufficient time to prepare for its new role and allowing industry to familiarise itself with the new procedures,
- HAVE ADOPTED THIS REGULATION:
- Article 1*
- Objectives**
1. The objectives of this Regulation are to:
- (a) implement the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the 'Convention');
- (b) promote shared responsibility and cooperative efforts in the international movement of hazardous chemicals in order to protect human health and the environment from potential harm;
- (c) contribute to the environmentally sound use of hazardous chemicals.

<sup>(1)</sup> OJ L 55, 28.2.2011, p. 13.

The objectives set out in the first subparagraph shall be achieved by facilitating the exchange of information concerning the characteristics of hazardous chemicals, by providing for a decision-making process within the Union on their import and export and by disseminating decisions to Parties and other countries as appropriate.

2. In addition to the objectives set out in paragraph 1, this Regulation shall ensure that the provisions of Regulation (EC) No 1272/2008 relating to classification, labelling and packaging apply to all chemicals when they are exported from the Member States to other Parties or other countries, unless those provisions would conflict with any specific requirements of those Parties or other countries.

## Article 2

### Scope

1. This Regulation shall apply to:

- (a) certain hazardous chemicals that are subject to the prior informed consent procedure under the Convention (the 'PIC procedure');
- (b) certain hazardous chemicals that are banned or severely restricted within the Union or a Member State;
- (c) chemicals when exported in so far as their classification, labelling and packaging are concerned.

2. This Regulation shall not apply to any of the following:

- (a) narcotic drugs and psychotropic substances covered by Council Regulation (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors <sup>(1)</sup>;
- (b) radioactive materials and substances covered by Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation <sup>(2)</sup>;
- (c) wastes covered by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste <sup>(3)</sup>;

<sup>(1)</sup> OJ L 22, 26.1.2005, p. 1.

<sup>(2)</sup> OJ L 159, 29.6.1996, p. 1.

<sup>(3)</sup> OJ L 312, 22.11.2008, p. 3.

(d) chemical weapons covered by 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 <sup>(4)</sup>;

(e) food and food additives covered by Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules <sup>(5)</sup>;

(f) feedingstuffs covered by Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety <sup>(6)</sup>, including additives, whether processed, partially processed or unprocessed, intended to be used for oral feeding to animals;

(g) genetically modified organisms covered by Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms <sup>(7)</sup>;

(h) save to the extent covered by Article 3(5)(b) of this Regulation, proprietary medicinal products and veterinary medicinal products covered by Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use <sup>(8)</sup> and Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products <sup>(9)</sup> respectively.

3. This Regulation shall not apply to chemicals exported for the purpose of research or analysis in quantities that are unlikely to affect human health or the environment and that in any event do not exceed 10 kg from each exporter to each importing country per calendar year.

Notwithstanding the first subparagraph, exporters of the chemicals referred to therein shall obtain a special reference identification number using the Database referred to in Article 6(1)(a) and provide that reference identification number in their export declaration.

<sup>(4)</sup> OJ L 134, 29.5.2009, p. 1.

<sup>(5)</sup> OJ L 165, 30.4.2004, p. 1.

<sup>(6)</sup> OJ L 31, 1.2.2002, p. 1.

<sup>(7)</sup> OJ L 106, 17.4.2001, p. 1.

<sup>(8)</sup> OJ L 311, 28.11.2001, p. 67.

<sup>(9)</sup> OJ L 311, 28.11.2001, p. 1.

## Article 3

**Definitions**

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

- (1) 'chemical' means a substance, whether by itself or in a mixture, or a mixture, whether manufactured or obtained from nature, but does not include living organisms, which belongs to either of the following categories:
- (a) pesticides, including severely hazardous pesticide formulations;
- (b) industrial chemicals;
- (2) 'substance' means any chemical element and its compounds as defined in point 1 of Article 3 of Regulation (EC) No 1907/2006;
- (3) 'mixture' means a mixture or a solution as defined in point 8 of Article 2 of Regulation (EC) No 1272/2008;
- (4) 'article' means a finished product containing or including a chemical, the use of which has been banned or severely restricted by Union legislation in that particular product where that product does not fall under point 2 or 3;
- (5) 'pesticides' means chemicals in either of the following subcategories:
- (a) pesticides used as plant protection products covered by Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market <sup>(1)</sup>;
- (b) other pesticides, such as:
- (i) biocidal products under Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market <sup>(2)</sup>; and
- (ii) disinfectants, insecticides and parasiticides covered by Directives 2001/82/EC and 2001/83/EC;
- (6) 'industrial chemicals' means chemicals in either of the following subcategories:
- (a) chemicals for use by professionals;
- (b) chemicals for use by the public;
- (7) 'chemical subject to export notification' means any chemical that is banned or severely restricted within the Union within one or more categories or subcategories, and any chemical listed in Part 1 of Annex I that is subject to the PIC procedure;
- (8) 'chemical qualifying for PIC notification' means any chemical that is banned or severely restricted within the Union or a Member State within one or more categories. Chemicals banned or severely restricted in the Union within one or more categories are listed in Part 2 of Annex I;
- (9) 'chemical subject to the PIC procedure' means any chemical listed in Annex III to the Convention and in Part 3 of Annex I to this Regulation;
- (10) 'banned chemical' means either of the following:
- (a) a chemical all uses of which within one or more categories or subcategories have been prohibited by final regulatory action by the Union in order to protect human health or the environment;
- (b) a chemical that has been refused approval for first-time use or has been withdrawn by industry either from the Union market or from further consideration in a notification, registration or approval process and where there is evidence that the chemical raises concern for human health or the environment;
- (11) 'severely restricted chemical' means either of the following:
- (a) a chemical, virtually all use of which within one or more categories or subcategories has been prohibited by final regulatory action by the Union in order to protect human health or the environment, but for which certain specific uses remain allowed;
- (b) a chemical that has, for virtually all uses, been refused for approval or been withdrawn by industry either from the Union market or from further consideration in a notification, registration or approval process, and where there is evidence that the chemical raises concern for human health or the environment;

<sup>(1)</sup> OJ L 309, 24.11.2009, p. 1.

<sup>(2)</sup> OJ L 123, 24.4.1998, p. 1.

- (12) 'chemical banned or severely restricted by a Member State' means any chemical that is banned or severely restricted by national final regulatory action of a Member State;
- (13) 'final regulatory action' means a legally binding act the purpose of which is to ban or severely restrict a chemical;
- (14) 'severely hazardous pesticide formulation' means a chemical formulated for use as a pesticide that produces severe health or environmental effects observable within a short period of time after single or multiple exposure, under conditions of use;
- (15) 'customs territory of the Union' means the territory as determined in Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code <sup>(1)</sup>;
- (16) 'export' means the following:
- (a) the permanent or temporary export of a chemical meeting the conditions of Article 28(2) TFEU;
  - (b) the re-export of a chemical not meeting the conditions of Article 28(2) TFEU which is placed under a customs procedure other than the external Union transit procedure for movement of goods through the customs territory of the Union;
- (17) 'import' means the physical introduction into the customs territory of the Union of a chemical that is placed under a customs procedure other than the external Union transit procedure for movement of goods through the customs territory of the Union;
- (18) 'exporter' means any of the following persons, whether natural or legal:
- (a) the person on whose behalf an export declaration is made, that is to say the person who, at the time the declaration is accepted, holds the contract with the consignee in a Party or other country and has the power to determine that the chemical be sent out of the customs territory of the Union;
  - (b) where no export contract has been concluded or where the holder of the contract does not act on its own behalf, the person who has the power to determine that the chemical be sent out of the customs territory of the Union;
  - (c) where the benefit of a right to dispose of the chemical belongs to a person established outside the Union
- pursuant to the contract on which the export is based, the contracting party established in the Union;
- (19) 'importer' means any natural or legal person who at the time of import into the customs territory of the Union is the consignee for the chemical;
- (20) 'Party to the Convention' or 'Party' means a State or a regional economic integration organisation that has consented to be bound by the Convention and for which the Convention is in force;
- (21) 'other country' means any country that is not a Party;
- (22) 'Agency' means the European Chemicals Agency established under Regulation (EC) No 1907/2006;
- (23) 'Secretariat' means the Secretariat of the Convention, unless otherwise specified in this Regulation.

#### Article 4

##### Designated national authorities of the Member States

Each Member State shall designate the authority or authorities (the 'designated national authority' or the 'designated national authorities') to carry out the administrative functions required by this Regulation, unless it has already done so before the entry into force of this Regulation.

It shall inform the Commission of such designation by 17 November 2012, unless that information has been already provided before entry into force of this Regulation, and shall also inform the Commission of any change of designated national authority.

#### Article 5

##### Participation of the Union in the Convention

1. Participation in the Convention shall be a joint responsibility of the Commission and the Member States, in particular as regards technical assistance, the exchange of information and matters relating to dispute settlement, participation in subsidiary bodies and voting.

2. The Commission shall act as a common designated authority for the administrative functions of the Convention with reference to the PIC procedure on behalf of and in close cooperation and consultation with all the designated national authorities of the Member States.

<sup>(1)</sup> OJ L 302, 19.10.1992, p. 1.

The Commission shall, in particular, be responsible for the following:

- (a) the transmission of Union export notifications to Parties and other countries pursuant to Article 8;
- (b) the submission to the Secretariat of notifications of relevant final regulatory actions concerning chemicals qualifying for PIC notification pursuant to Article 11;
- (c) the transmission of information concerning other final regulatory actions involving chemicals not qualifying for PIC notification in accordance with Article 12;
- (d) the receiving of information from the Secretariat more generally.

The Commission shall also provide the Secretariat with Union import responses for chemicals subject to the PIC procedure pursuant to Article 13.

In addition, the Commission shall coordinate the Union input on all technical issues relating to the following:

- (a) the Convention;
- (b) the preparation of the Conference of the Parties established by Article 18(1) of the Convention;
- (c) the Chemical Review Committee established in accordance with Article 18(6) of the Convention (the 'Chemical Review Committee');
- (d) other subsidiary bodies of the Conference of the Parties.

3. The Commission and the Member States shall take the necessary initiatives to ensure appropriate representation of the Union in the various bodies implementing the Convention.

#### Article 6

##### Tasks of the Agency

1. The Agency shall, in addition to the tasks allocated to it under Articles 7, 8, 9, 10, 11, 13, 14, 15, 18, 19, 20, 21, 22 and 25, carry out the following tasks:

- (a) maintain, further develop and regularly update a database on export and import of hazardous chemicals (the 'Database');
- (b) make the Database publicly available on its website;
- (c) where appropriate, provide, with the agreement of the Commission and after consultations with Member States, assistance and technical and scientific guidance and tools for the industry in order to ensure the effective application of this Regulation;
- (d) provide, with the agreement of the Commission, the designated national authorities of the Member States with

assistance and technical and scientific guidance in order to ensure the effective application of this Regulation;

- (e) at the request of Member State or Commission experts of the Chemical Review Committee, and within the available resources, provide input in drafting of decision guidance documents referred to in Article 7 of the Convention and other technical documents related to the implementation of the Convention;
- (f) upon request, provide the Commission with technical and scientific input and assist it in order to ensure the effective implementation of this Regulation;
- (g) upon request, provide the Commission with technical and scientific input and assist it in exercising its role as the common designated authority of the Union.

2. The Secretariat of the Agency shall carry out the tasks allocated to the Agency under this Regulation.

#### Article 7

##### Chemicals subject to export notification, chemicals qualifying for PIC notification, and chemicals subject to the PIC procedure

1. The chemicals subject to export notification, the chemicals qualifying for PIC notification and the chemicals subject to the PIC procedure shall be as listed in Annex I.

2. Chemicals listed in Annex I shall be assigned to one or more of three groups of chemicals, set out as Parts 1, 2 and 3 of that Annex.

The chemicals listed in Part 1 of Annex I shall be subject to the export notification procedure laid down in Article 8, with detailed information being given on the identity of the substance, on the use category and/or subcategory subject to restriction, the type of restriction and, where appropriate, additional information, in particular on exemptions to requirements for export notification.

The chemicals listed in Part 2 of Annex I shall, in addition to being subject to the export notification procedure laid down in Article 8, qualify for the PIC notification procedure set out in Article 11, with detailed information being given on the identity of the substance and on the use category.

The chemicals listed in Part 3 of Annex I shall be subject to the PIC procedure with the use category being given and, where appropriate, additional information, in particular on any requirements for export notification.

3. The lists set out in Annex I shall be made publicly available by means of the Database.

*Article 8***Export notifications forwarded to Parties and other countries**

1. In the case of substances listed in Part 1 of Annex I or mixtures containing such substances in a concentration that triggers labelling obligations under Regulation (EC) No 1272/2008 irrespective of the presence of any other substances, paragraphs 2 to 8 of this Article shall apply regardless of the intended use of the chemical in the importing Party or other country.

2. When an exporter is due to export a chemical referred to in paragraph 1 from the Union to a Party or other country for the first time on or after the date on which it becomes subject to this Regulation, the exporter shall notify the designated national authority of the Member State in which he is established (the 'exporter's Member State'), no later than 35 days before the expected date of export. Thereafter the exporter shall notify that designated national authority of the first export of the chemical each calendar year no later than 35 days before the export takes place. The notifications shall comply with the information requirements laid down in Annex II and shall be made available to the Commission and to the Member States by means of the Database.

The designated national authority of the exporter's Member State shall check compliance of the information with Annex II and if the notification is complete forward it to the Agency no later than 25 days before the expected date of export.

The Agency shall, on behalf of the Commission, transmit the notification to the designated national authority of the importing Party or the appropriate authority of the importing other country and take the measures necessary to ensure that they receive that notification no later than 15 days before the first intended export of the chemical and thereafter no later than 15 days before the first export in any subsequent calendar year.

The Agency shall register each export notification and assign it a reference identification number in the Database. The Agency shall also make available to the public and the designated national authorities of the Member States, as appropriate, an updated list of the chemicals concerned and the importing Parties and other countries for each calendar year by means of the Database.

3. If the Agency does not receive from the importing Party or other country an acknowledgement of receipt of the first export notification made after the chemical is included in Part 1 of Annex I within 30 days of the dispatch of such notification, it shall, on behalf of the Commission, submit a second notification. The Agency shall, on behalf of the Commission, make reasonable efforts to ensure that the designated national authority of the importing Party or the appropriate authority of the importing other country receives the second notification.

4. A new export notification shall be made in accordance with paragraph 2 for exports which take place subsequent to the entry into force of amendments to Union legislation concerning the marketing, use or labelling of the substances in question or whenever the composition of the mixture in question changes so that the labelling of such mixture is altered. The new notification shall comply with the information requirements laid down in Annex II and shall indicate that it is a revision of a previous notification.

5. Where the export of a chemical relates to an emergency situation in which any delay may endanger public health or the environment in the importing Party or other country, an exemption from the obligations set out in paragraphs 2, 3 and 4 in whole or in part may be granted at the reasoned request of the exporter or the importing Party or other country and at the discretion of the designated national authority of the exporter's Member State, in consultation with the Commission assisted by the Agency. A decision on the request shall be considered to have been made in consultation with the Commission if there is no dissenting response from the Commission within 10 days of the designated national authority of the Member State sending it details of the request.

6. Without prejudice to the obligations set out in Article 19(2), the obligations set out in paragraphs 2, 3 and 4 of this Article shall cease when all of the following conditions are fulfilled:

- (a) the chemical has become a chemical subject to the PIC procedure;
- (b) the importing country is a Party to the Convention and has provided the Secretariat with a response in accordance with Article 10(2) of the Convention indicating whether or not it consents to import of the chemical; and
- (c) the Commission has been informed of that response by the Secretariat and has forwarded that information to the Member States and the Agency.

Notwithstanding the first subparagraph of this paragraph, the obligations set out in paragraphs 2, 3 and 4 of this Article shall not cease where an importing country is a Party to the Convention and explicitly requires continued export notification by exporting Parties, for example through its import decision or otherwise.

Without prejudice to the obligations set out in Article 19(2), the obligations set out in paragraphs 2, 3 and 4 of this Article shall also cease when both of the following conditions are fulfilled:

- (a) the designated national authority of the importing Party or the appropriate authority of the importing other country has waived the requirement to be notified before the export of the chemical; and

(b) the Commission has received the information from the Secretariat or from the designated national authority of the importing Party or the appropriate authority of the importing other country and has forwarded it to the Member States and the Agency, which has made it available by means of the Database.

7. The Commission, the relevant designated national authorities of the Member States, the Agency and the exporters shall, on request, provide importing Parties and other countries with available additional information concerning the exported chemicals.

8. Member States may establish, in a transparent manner, systems obliging exporters to pay an administrative fee for each export notification made and for each request for explicit consent made, corresponding to the costs they incur in carrying out the procedures set out in paragraphs 2 and 4 of this Article and in Article 14(6) and (7).

#### Article 9

##### **Export notifications received from Parties and other countries**

1. Export notifications received by the Agency from the designated national authorities of Parties or the appropriate authorities of other countries concerning the export to the Union of a chemical the manufacture, use, handling, consumption, transport or sale of which is subject to prohibition or severe restriction under that Party's or other country's legislation shall be made available by means of the Database within 15 days of the Agency's receipt of such notification.

The Agency shall, on behalf of the Commission, acknowledge receipt of the first export notification received for each chemical from each Party or other country.

The designated national authority of the Member State receiving that import shall receive a copy of any notification received by the Agency, within 10 days of its receipt, together with all available information. Other Member States shall be entitled to receive copies on request.

2. Where the Commission or the designated national authorities of the Member States receive any export notifications either directly or indirectly from the designated national authorities of Parties or the appropriate authorities of other countries, they shall immediately forward those notifications to the Agency together with all available information.

#### Article 10

##### **Information on export and import of chemicals**

1. Each exporter of one or more of the following:

(a) substances listed in Annex I;

(b) mixtures containing such substances in a concentration that triggers labelling obligations under Regulation (EC) No 1272/2008 irrespective of the presence of any other substances; or

(c) articles containing substances listed in Part 2 or 3 of Annex I in unreacted form or mixtures containing such substances in a concentration that triggers labelling obligations under Regulation (EC) No 1272/2008 irrespective of the presence of any other substances;

shall, during the first quarter of each year, inform the designated national authority of the exporter's Member State regarding the quantity of the chemical, as a substance and as contained in mixtures or in articles, shipped to each Party or other country during the preceding year. That information shall be given together with a list of the names and addresses of each natural or legal person importing the chemical into a Party or other country to which shipment took place during the same period. That information shall list separately exports pursuant to Article 14(7).

Each importer within the Union shall provide the equivalent information for the quantities imported into the Union.

2. At the request of the Commission, assisted by the Agency, or the designated national authority of its Member State, the exporter or importer shall provide any additional information relating to chemicals that is necessary to implement this Regulation.

3. Each Member State shall provide the Agency each year with aggregated information in accordance with Annex III. The Agency shall summarise that information at Union level and shall make the non-confidential information publicly available by means of the Database.

#### Article 11

##### **Notification of banned or severely restricted chemicals under the Convention**

1. The Commission shall notify the Secretariat in writing of the chemicals listed in Part 2 of Annex I, which qualify for PIC notification.

2. Whenever further chemicals are added to Part 2 of Annex I pursuant to the second subparagraph of Article 23(2), the Commission shall notify those chemicals to the Secretariat. That PIC notification shall be submitted as soon as possible after adoption of the relevant final regulatory action at Union level banning or severely restricting the chemical, and no later than 90 days after the date on which the final regulatory action is to be applied.

3. The PIC notification shall provide all relevant information required in Annex IV.

4. In determining priorities for notifications, the Commission shall take into account whether the chemical is already listed in Part 3 of Annex I, the extent to which the information requirements laid down in Annex IV can be met, and the severity of the risks presented by the chemical, in particular for developing countries.

Where a chemical qualifies for PIC notification, but the information is insufficient to meet the requirements of Annex IV, identified exporters or importers shall, upon request by the Commission, provide all relevant information available to them, including that from other national or international chemical control programmes, within 60 days of the request.

5. The Commission shall notify the Secretariat in writing when a final regulatory action notified under paragraphs 1 or 2 is amended as soon as possible after adoption of the new final regulatory action, and no later than 60 days after the date on which the new final regulatory action is to be applied.

The Commission shall provide all relevant information that was not available at the time the initial notification was made under paragraphs 1 or 2 respectively.

6. At the request of any Party or the Secretariat, the Commission shall provide additional information concerning the chemical or the final regulatory action, as far as practicable.

The Member States and the Agency shall, upon request, assist the Commission as necessary in compiling that information.

7. The Commission shall forward immediately to the Member States and the Agency information that it receives from the Secretariat regarding chemicals notified as banned or severely restricted by other Parties.

Where appropriate, the Commission shall evaluate, in close cooperation with the Member States and the Agency, the need to propose measures at Union level in order to prevent any unacceptable risks to human health or the environment within the Union.

8. Where a Member State takes national final regulatory action in accordance with the relevant Union legislation to ban or severely restrict a chemical, it shall provide the Commission with relevant information. The Commission shall make that information available to the Member States. Within four weeks of that information having been made available, Member States may send comments on a possible PIC notification, including, in particular, relevant information about their national regulatory position in respect of the chemical to the Commission and to the Member State which submitted the national final regulatory action. After consideration of the comments, the submitting Member State shall inform the Commission whether the latter has to:

(a) make a PIC notification to the Secretariat, pursuant to this Article; or

(b) provide the information to the Secretariat, pursuant to Article 12.

#### Article 12

#### **Information to be transmitted to the Secretariat concerning banned or severely restricted chemicals not qualifying for PIC notification**

In the case of chemicals listed only in Part 1 of Annex I or following receipt of information from a Member State pursuant to point (b) of Article 11(8), the Commission shall provide the Secretariat with information concerning the relevant final regulatory actions, so that the information can be disseminated to other Parties to the Convention as appropriate.

#### Article 13

#### **Obligations in relation to import of chemicals**

1. The Commission shall immediately forward to the Member States and the Agency any decision guidance documents which it receives from the Secretariat.

The Commission shall, by means of an implementing act, adopt an import decision in the form of a final or interim import response on behalf of the Union concerning the future import of the chemical concerned. That implementing act shall be adopted in accordance with the advisory procedure referred to in Article 27(2). The Commission shall communicate the decision to the Secretariat as soon as possible, and no later than nine months after the date of dispatch of the decision guidance document by the Secretariat.

Where a chemical becomes subject to additional or amended restrictions under Union legislation, the Commission shall, by means of an implementing act, adopt a revised import decision. That implementing act shall be adopted in accordance with the advisory procedure referred to in Article 27(2). The Commission shall communicate the revised import decision to the Secretariat.

2. In the case of a chemical banned or severely restricted by one or more Member States, the Commission shall, at the written request of the Member States concerned, take the information into account in its import decision.

3. An import decision under paragraph 1 shall relate to the category or categories specified for the chemical in the decision guidance document.

4. When communicating the import decision to the Secretariat, the Commission shall provide a description of the legislative or administrative measure upon which it is based.

5. Each designated national authority of the Member States shall make the import decisions under paragraph 1 available to those concerned within its competence, in accordance with its legislative or administrative measures. The Agency shall make the import decisions under paragraph 1 publicly available by means of the Database.

6. Where appropriate, the Commission shall evaluate, in close cooperation with the Member States and the Agency, the need to propose measures at Union level in order to prevent any unacceptable risks to human health or the environment within the Union, taking into account the information given in the decision guidance document.

#### Article 14

#### Obligations in relation to export of chemicals other than export notification

1. The Commission shall immediately forward to the Member States, the Agency and European industry associations the information which it receives, whether in the form of circulars or otherwise, from the Secretariat regarding chemicals subject to the PIC procedure and the decisions of importing Parties regarding import conditions applicable to those chemicals. It shall also immediately forward to the Member States and the Agency information concerning any cases of failure to transmit a response in accordance with Article 10(2) of the Convention. The Agency shall assign each import decision a reference identification number and keep all information regarding such decisions publicly available by means of the Database, and provide anyone with that information upon request.

2. The Commission shall assign each chemical listed in Annex I a classification in the European Union's Combined Nomenclature. Those classifications shall be revised as necessary in the light of any changes made in the World Customs Organisation's Harmonised System Nomenclature or in the European Union's Combined Nomenclature for the chemicals concerned.

3. Each Member State shall communicate the information and decisions forwarded by the Commission under paragraph 1 to those concerned within its jurisdiction.

4. Exporters shall comply with decisions in each import response no later than six months after the Secretariat first informs the Commission of such decisions under paragraph 1.

5. The Commission, assisted by the Agency, and the Member States shall advise and assist importing Parties, upon request and as appropriate, in obtaining further information needed to prepare a response to the Secretariat concerning the import of a given chemical.

6. Substances listed in Part 2 or 3 of Annex I or mixtures containing such substances in a concentration that triggers labelling obligations under Regulation (EC) No 1272/2008 irrespective of the presence of any other substances shall, regardless of their intended use in the importing Party or other country, not be exported unless either of the following conditions is fulfilled:

(a) explicit consent to import has been sought and received by the exporter through the designated national authority of the exporter's Member State in consultation with the Commission, assisted by the Agency, and the designated national authority of the importing Party or an appropriate authority in an importing other country;

(b) in the case of chemicals listed in Part 3 of Annex I, the latest circular issued by the Secretariat pursuant to paragraph 1 indicates that the importing Party has given consent to import.

In the case of chemicals listed in Part 2 of Annex I that are to be exported to OECD countries, the designated national authority of the exporter's Member State may, at the request of the exporter, in consultation with the Commission and on a case-by-case basis, decide that no explicit consent is required if the chemical, at the time of importation into the OECD country concerned, is licensed, registered or authorised in that OECD country.

Where explicit consent has been sought pursuant to point (a) of the first subparagraph, if the Agency has not received a response to the request within 30 days, the Agency shall, on behalf of the Commission, send a reminder unless the Commission or the designated national authority of the exporter's Member State received a response and forwarded it to the Agency. Where appropriate, if there is still no response within a further 30 days, the Agency may send further reminders as necessary.

7. In the case of chemicals listed in Part 2 or 3 of Annex I, the designated national authority of the exporter's Member State may, in consultation with the Commission assisted by the Agency, on a case-by-case basis and subject to the second subparagraph, decide that the export may proceed, if no evidence from official sources of final regulatory action to ban or severely restrict the use of the chemical taken by the importing Party or other country exists and if, after all reasonable efforts, no response to a request for explicit consent pursuant to point (a) of paragraph 6 has been received within 60 days and where one of the following conditions is met:

(a) there is evidence from official sources in the importing Party or other country that the chemical is licensed, registered or authorised; or

(b) the intended use declared in the export notification and confirmed in writing by the natural or legal person importing the chemical into a Party or other country, is not in a category for which the chemical is listed in Part 2 or 3 of Annex I, and there is evidence from official sources that the chemical has in the last five years been used in or imported into the importing Party or other country concerned.

In the case of chemicals listed in Part 3 of Annex I, an export based on the fulfilment of the condition under point (b) may not proceed if the chemical has been classified in accordance with Regulation (EC) No 1272/2008 as carcinogenic category 1A or 1B, or mutagenic category 1A or 1B, or toxic for reproduction category 1A or 1B or the chemical fulfils the criteria of Annex XIII to Regulation (EC) No 1907/2006 for being persistent, bioaccumulative and toxic or very persistent and very bioaccumulative.

When deciding on the export of chemicals listed in Part 3 of Annex I, the designated national authority of the exporter's Member State shall, in consultation with the Commission assisted by the Agency, consider the possible impact on human health or the environment of the use of the chemical in the importing Party or other country, and submit relevant documentation to the Agency, to be made available by means of the Database.

8. The validity of each explicit consent obtained pursuant to point (a) of paragraph 6 or decision to proceed with export in the absence of explicit consent pursuant to paragraph 7 shall be subject to periodic review by the Commission in consultation with the Member States concerned as follows:

- (a) for each explicit consent obtained pursuant to point (a) of paragraph 6 a new explicit consent shall be required by the end of the third calendar year after the consent was given, unless the terms of that consent require otherwise;
- (b) unless a response to a request has been received in the meantime, each decision to proceed without explicit consent pursuant to paragraph 7 shall be valid for a maximum period of 12 months, upon expiry of which explicit consent shall be required.

In the cases referred to in point (a) of the first subparagraph, exports may, however, continue after the end of the relevant period, pending a response to a new request for explicit consent, for an additional period of 12 months.

9. The Agency shall register all requests for explicit consent, responses obtained and decisions to proceed without explicit consent, including the documentation referred to in the third subparagraph of paragraph 7, in the Database. Each explicit consent obtained or decision to proceed without explicit consent shall be assigned a reference identification number and shall be listed with all relevant information concerning any conditions attached, such as validity dates. The non-confidential information shall be made publicly available by means of the Database.

10. No chemical shall be exported later than six months before its expiry date, where such a date exists or can be inferred from the production date, unless the intrinsic properties

of the chemical render that impracticable. In particular, in the case of pesticides, exporters shall ensure that the size and packaging of containers is optimised so as to minimise the risk of creating obsolete stocks.

11. When exporting pesticides, exporters shall ensure that the label contains specific information about storage conditions and storage stability under the climatic conditions of the importing Party or other country. In addition, they shall ensure that the pesticides exported comply with the purity specification laid down in Union legislation.

#### Article 15

##### Export of certain chemicals and articles

1. Articles shall be subject to the export notification procedure laid down in Article 8 if they contain any of the following:

- (a) substances listed in Part 2 or 3 of Annex I in unreacted form;
- (b) mixtures containing such substances in a concentration that triggers labelling obligations under Regulation (EC) No 1272/2008 irrespective of the presence of any other substances.

2. Chemicals and articles the use of which is prohibited in the Union for the protection of human health or the environment, as listed in Annex V, shall not be exported.

#### Article 16

##### Information on transit movements

1. Parties to the Convention requiring information concerning transit movements of chemicals subject to the PIC procedure, together with the information requested by each Party to the Convention through the Secretariat, shall be as listed in Annex VI.

2. Where a chemical listed in Part 3 of Annex I is transported through the territory of a Party to the Convention listed in Annex VI, the exporter shall, as far as practicable, provide the designated national authority of the exporter's Member State with the information required by the Party to the Convention in accordance with Annex VI no later than 30 days before the first transit movement takes place and no later than eight days before each subsequent transit movement.

3. The designated national authority of the exporter's Member State shall forward to the Commission with a copy to the Agency, the information received from the exporter under paragraph 2 together with any additional information available.

4. The Commission shall forward the information received under paragraph 3 to the designated national authorities of Parties to the Convention which requested that information, together with any additional information available, no later than 15 days before the first transit movement and prior to any subsequent transit movement.

#### Article 17

##### Information to accompany exported chemicals

1. Chemicals that are intended for export shall be subject to the provisions on packaging and labelling established in, or pursuant to, Regulation (EC) No 1107/2009, Directive 98/8/EC and Regulation (EC) No 1272/2008, or any other relevant Union legislation.

The first subparagraph shall apply unless those provisions would conflict with any specific requirements of the importing Parties or other countries.

2. Where appropriate, the expiry date and the production date of chemicals referred to in paragraph 1 or listed in Annex I shall be indicated on the label, and if necessary such expiry dates shall be given for different climate zones.

3. A safety data sheet in accordance with Regulation (EC) No 1907/2006 shall accompany chemicals referred to in paragraph 1 when exported. The exporter shall send such a safety data sheet to each natural or legal person importing the chemical into a Party or other country.

4. The information on the label and on the safety data sheet shall as far as practicable be given in the official languages, or in one or more of the principal languages, of the country of destination or of the area of intended use.

#### Article 18

##### Obligations of the authorities of the Member States for controlling import and export

1. Each Member State shall designate authorities such as customs authorities that shall have the responsibility of controlling the import and export of chemicals listed in Annex I, unless it has already done so before the entry into force of this Regulation.

The Commission, supported by the Agency, and the Member States shall act in a targeted and coordinated way in monitoring exporters' compliance with this Regulation.

2. The Forum for Exchange of Information on Enforcement established by Regulation (EC) No 1907/2006 shall be used to

coordinate a network of the Member States' authorities responsible for enforcement of this Regulation.

3. Each Member State shall, in its regular reports on the operation of procedures pursuant to Article 22(1), include details of the activities of its authorities in that regard.

#### Article 19

##### Further obligations of exporters

1. Exporters of chemicals subject to the obligations set out in Article 8(2) and (4) shall provide the applicable reference identification numbers in their export declaration (box 44 of the Single Administrative Documents or corresponding data element in an electronic export declaration) as referred to in Article 161(5) of Regulation (EEC) No 2913/92.

2. Exporters of chemicals exempted by Article 8(5) from the obligations set out in paragraphs 2 and 4 of that Article or of chemicals for which those obligations have ceased in accordance with Article 8(6) shall obtain a special reference identification number using the Database and provide that reference identification number in their export declaration.

3. Where requested by the Agency, exporters shall use the Database for the submission of information required for the fulfilment of their obligations under this Regulation.

#### Article 20

##### Exchange of information

1. The Commission, assisted by the Agency, and the Member States shall, as appropriate, facilitate the provision of scientific, technical, economic and legal information concerning chemicals subject to this Regulation, including toxicological, ecotoxicological and safety information.

The Commission, with the support of the Member States and the Agency as necessary, shall, as appropriate, ensure the following:

- (a) the provision of publicly available information concerning regulatory actions relevant to the objectives of the Convention;
- (b) the provision of information for Parties and other countries directly or through the Secretariat concerning those actions which substantially restrict one or more uses of a chemical.

2. The Commission, the Member States and the Agency shall protect any confidential information received from a Party or other country as mutually agreed.

3. As regards the transmission of information under this Regulation, and without prejudice to Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information<sup>(1)</sup>, the following information at least shall not be regarded as confidential:

- (a) the information specified in Annex II and Annex IV;
  - (b) the information contained in safety data sheets referred to in Article 17(3);
  - (c) the expiry date of a chemical;
  - (d) the production date of a chemical;
  - (e) information concerning precautionary measures, including hazard classification, the nature of the risk and the relevant safety advice;
  - (f) the summary results of toxicological and ecotoxicological tests;
  - (g) information concerning handling packaging after chemicals have been removed.
4. A compilation of the information transmitted shall be prepared every two years by the Agency.

#### Article 21

##### Technical assistance

The Commission, the designated national authorities of the Member States and the Agency shall, taking into account in particular the needs of developing countries and countries with economies in transition, cooperate in promoting technical assistance, including training, for the development of the infrastructure, the capacity and the expertise necessary to manage chemicals properly throughout their lifecycles.

In particular, and with a view to enabling those countries to implement the Convention, technical assistance shall be promoted by means of the provision of technical information concerning chemicals, the promotion of the exchange of experts, support for the establishment or maintenance of designated national authorities and the provision of technical expertise for the identification of hazardous pesticide formulations and for the preparation of notifications to the Secretariat.

The Commission and the Member States shall actively participate in international activities in capacity-building in

chemicals management, by providing information concerning the projects they are supporting or financing to improve the management of chemicals in developing countries and countries with economies in transition. The Commission and the Member States shall also consider giving support to non-governmental organisations.

#### Article 22

##### Monitoring and reporting

1. Member States and the Agency shall forward information to the Commission every three years concerning the operation of the procedures provided for in this Regulation, including customs controls, infringements, penalties and remedial action, as appropriate. The Commission shall adopt an implementing act laying down in advance a common format for reporting. That implementing act shall be adopted in accordance with the advisory procedure referred to in Article 27(2).

2. The Commission shall compile a report every three years on the performance of the functions provided for in this Regulation for which it is responsible and shall incorporate it in a synthesis report integrating the information provided by the Member States and the Agency under paragraph 1. A summary of that report, which shall be published on the internet, shall be forwarded to the European Parliament and to the Council.

3. As regards the information supplied pursuant to paragraphs 1 and 2, the Commission, the Member States and the Agency shall comply with relevant obligations to protect the confidentiality and ownership of data.

#### Article 23

##### Updating annexes

1. The list of chemicals in Annex I shall be reviewed by the Commission at least every year, on the basis of developments in Union law and under the Convention.

2. When determining whether a final regulatory action at Union level constitutes a ban or a severe restriction, the effect of that action shall be assessed at the level of the subcategories within the categories 'pesticides' and 'industrial chemicals'. If the final regulatory action bans or severely restricts a chemical within any one of the subcategories it shall be included in Part 1 of Annex I.

When determining whether a final regulatory action at Union level constitutes a ban or a severe restriction such that the chemical concerned qualifies for PIC notification under Article 11, the effect of that action shall be assessed at the level of the categories 'pesticides' and 'industrial chemicals'. If the final regulatory action bans or severely restricts a chemical within either of the categories it shall also be included in Part 2 of Annex I.

<sup>(1)</sup> OJ L 41, 14.2.2003, p. 26.

3. The decision to include chemicals in Annex I, or to modify their entry where appropriate, shall be taken without undue delay.

4. In order to adapt this Regulation to technical progress, the Commission shall be empowered to adopt delegated acts in accordance with Article 26 concerning the following measures:

- (a) inclusion of a chemical in Part 1 or 2 of Annex I pursuant to paragraph 2 of this Article following final regulatory action at Union level, and other amendments of Annex I, including modifications to existing entries;
- (b) inclusion of a chemical that is subject to Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants <sup>(1)</sup> in Part 1 of Annex V;
- (c) inclusion of a chemical already subject to an export ban at Union level in Part 2 of Annex V;
- (d) modifications to existing entries in Annex V;
- (e) amendments of Annexes II, III, IV and VI.

#### Article 24

##### The budget of the Agency

1. For the purposes of this Regulation, the revenues of the Agency shall consist of:

- (a) a subsidy from the Union, entered in the general budget of the Union (Commission Section);
- (b) any voluntary contribution from the Member States.

2. Revenues and expenditure for activities under this Regulation and those relating to activities under other Regulations shall be dealt with separately, through different sections in the Agency's budget.

The revenues of the Agency referred to in paragraph 1 shall be used for carrying out its tasks under this Regulation.

3. The Commission shall examine whether it is appropriate for the Agency to charge a fee for the services provided to exporters within five years of 1 March 2014 and, if necessary, submit a relevant proposal.

<sup>(1)</sup> OJ L 158, 30.4.2004, p. 7.

#### Article 25

##### Formats and software for submission of information to the Agency

The Agency shall specify formats and software packages and make them available free of charge on its website for any submission of information to the Agency. Member States and other parties subject to this Regulation shall use those formats and packages in their submissions to the Agency pursuant to this Regulation.

#### Article 26

##### 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 23(4) shall be conferred on the Commission for a period of five years from 1 March 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 no later than three months before the end of each period.

3. The delegation of power referred to in Article 23(4) 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 23(4) 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 27

##### Committee procedure

1. The Commission shall be assisted by the committee established by Article 133 of Regulation (EC) No 1907/2006. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

*Article 28***Penalties**

Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure correct implementation of these provisions. The penalties provided for must be effective, proportionate and dissuasive. If they have not already done so before the entry into force of this Regulation, Member States shall notify those provisions to the Commission by 1 March 2014 and shall notify it without delay of any subsequent amendment affecting them.

*Article 29***Transitional period on the classification, labelling and packaging of chemicals**

References in this Regulation to Regulation (EC) No 1272/2008 shall be construed, where appropriate, as references to the Union legislation which applies by virtue of Article 61 of that Regulation and in accordance with the timetable set out therein.

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

Done at Strasbourg, 4 July 2012.

*For the European Parliament*  
*The President*  
M. SCHULZ

*Article 30***Repeal**

Regulation (EC) No 689/2008 shall be repealed with effect from 1 March 2014.

References to Regulation (EC) No 689/2008 shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex VII.

*Article 31***Entry into force**

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

It shall apply from 1 March 2014.

*For the Council*  
*The President*  
A. D. MAVROYIANNIS

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## ANNEX I

## LIST OF CHEMICALS

(referred to in Article 7)

## PART 1

## List of chemicals subject to export notification procedure

(referred to in Article 8)

It should be noted that where chemicals listed in this part of the Annex are subject to the PIC procedure, the export notification obligations set out in Article 8(2), (3) and (4) shall not apply provided that the conditions laid down in points (b) and (c) of the first subparagraph of Article 8(6) have been fulfilled. Such chemicals, which are identified by the symbol '#' in the list below, are listed again in Part 3 of this Annex for ease of reference.

It should also be noted that where the chemicals listed in this part of the Annex qualify for PIC notification because of the nature of the Union's final regulatory action, those chemicals are also listed in Part 2 of this Annex. Such chemicals are identified by the symbol '+' in the list below.

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
1,1,1-Trichloroethane	71-55-6	200-756-3	2903 19 10	i(2)	b	
1,2-Dibromoethane (Ethylene dibromide) (#)	106-93-4	203-444-5	2903 31 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
1,2-Dichloroethane (ethylene dichloride) (#)	107-06-2	203-458-1	2903 15 00	p(1)-p(2) i(2)	b-b b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Cis- 1,3-dichloropropene ((1Z)-1,3-dichloroprop-1-ene)	10061-01-5	233-195-8	2903 29 00	p(1)-p(2)	b-b	
1,3-dichloropropene (1) (*)	542-75-6	208-826-5	2903 29 00	p(1)	b	
2-aminobutane	13952-84-6	237-732-7	2921 19 80	p(1)-p(2)	b-b	
2-Naphthylamine (naphthalen-2-amine) and its salts (*)	91-59-8, 553-00-4, 612-52-2 and others	202-080-4, 209-030-0, 210-313-6 and others	2921 45 00	i(1) i(2)	b b	
2-Naphthoxyacetic acid	120-23-0	204-380-0	2918 99 90	p(1)	b	
2,4,5-T and its salts and esters (#)	93-76-5 and others	202-273-3 and others	2918 91 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
4-Aminobiphenyl (biphenyl-4-amine) and its salts (*)	92-67-1, 2113-61-3 and others	202-177-1 and others	2921 49 80	i(1) i(2)	b b	
4-Nitrobiphenyl (*)	92-93-3	202-204-7	2904 20 00	i(1) i(2)	b b	
Acephate (*)	30560-19-1	250-241-2	2930 90 85	p(1)-p(2)	b-b	
Acifluorfen	50594-66-6	256-634-5	2916 39 00	p(1)-p(2)	b-b	
Alachlor (*)	15972-60-8	240-110-8	2924 29 95	p(1)	b	
Aldicarb (*)	116-06-3	204-123-2	2930 90 85	p(1)-p(2)	sr-b	
Ametryn	834-12-8	212-634-7	2933 69 80	p(1)-p(2)	b-b	
Amitraz (*)	33089-61-1	251-375-4	2925 29 00	p(1)-p(2)	b-b	
Anthraquinone (*)	84-65-1	201-549-0	2914 61 00	p(1)-p(2)	b-b	
Arsenic compounds				p(2)	sr	
Asbestos Fibres (*):	1332-21-4 and others					Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Crocidolite (#)	12001-28-4		2524 10 00	i	b	
Amosite (#)	12172-73-5		2524 90 00	i	b	
Antophyllite (#)	77536-67-5		2524 90 00	i	b	
Actinolite (#)	77536-66-4		2524 90 00	i	b	
Tremolite (#)	77536-68-6		2524 90 00	i	b	
Chrysotile (*)	12001-29-5 or 132207-32-0		2524 90 00	i	b	
Atrazine (*)	1912-24-9	217-617-8	2933 69 10	p(1)	b	
Azinphos-ethyl	2642-71-9	220-147-6	2933 99 90	p(1)-p(2)	b-b	
Azinphos-methyl (*)	86-50-0	201-676-1	2933 99 90	p(1)	b	
Benfuracarb (*)	82560-54-1		2932 99 00	p(1)	b	
Bensultap	17606-31-4		2930 90 85	p(1)-p(2)	b-b	

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Benzene (3)	71-43-2	200-753-7	2902 20 00	i(2)	sr	
Benzidine and its salts (*) Benzidine derivatives (*)	92-87-5, 36341-27-2 and others	202-199-1, 252-984-8 and others	2921 59 90	i(1)-i(2) i(2)	sr-b b	
Bifenthrin	82657-04-3		2916 20 00	p(1)	b	
Binapacryl (#)	485-31-4	207-612-9	2916 19 50	p(1)-p(2) i(2)	b-b b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Butralin (*)	33629-47-9	251-607-4	2921 49 00	p(1)	b	
Cadmium and its compounds	7440-43-9 and others	231-152-8 and others	8107 3206 49 30 and others	i(1)	sr	
Cadusafos (*)	95465-99-9	n.a.	2930 90 85	p(1)	b	
Calciferol	50-14-6	200-014-9	2936 29 90	p(1)	b	
Captafol (#)	2425-06-1	219-363-3	2930 50 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Carbaryl (*)	63-25-2	200-555-0	2924 29 95	p(1)-p(2)	b-b	
Carbofuran (*)	1563-66-2	216-353-0	2932 99 85	p(1)	b	
Carbon tetrachloride	56-23-5	200-262-8	2903 14 00	i(2)	b	
Carbosulfan (*)	55285-14-8	259-565-9	2932 99 85	p(1)	b	
Cartap	15263-53-3		2930 20 00	p(1)-p(2)	b-b	
Chinomethionat	2439-01-2	219-455-3	2934 99 90	p(1)-p(2)	b-b	
Chlorate (*)	7775-09-9 10137-74-3	231-887-4 233-378-2	2829 11 00 2829 19 00	p(1)	b	
Chlordimeform (#)	6164-98-3	228-200-5	2925 21 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Chlorfenapyr (*)	122453-73-0		2933 99 90	p(1)	b	
Chlorfenvinphos	470-90-6	207-432-0	2919 90 90	p(1)-p(2)	b-b	
Chlormephos	24934-91-6	246-538-1	2930 90 85	p(1)-p(2)	b-b	
Chlorobenzilate (#)	510-15-6	208-110-2	2918 18 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Chloroform	67-66-3	200-663-8	2903 13 00	i(2)	b	
Chlorthal-dimethyl (*)	1861-32-1	217-464-7	2917 39 95	p(1)	b	
Chlozolinate (*)	84332-86-5	282-714-4	2934 99 90	p(1)-p(2)	b-b	
Cholecalciferol	67-97-0	200-673-2	2936 29 90	p(1)	b	
Coumafuryl	117-52-2	204-195-5	2932 29 85	p(1)-p(2)	b-b	
Creosote and creosote related substances	8001-58-9 61789-28-4 84650-04-4 90640-84-9 65996-91-0 90640-80-5 65996-85-2 8021-39-4 122384-78-5	232-287-5 263-047-8 283-484-8 292-605-3 266-026-1 292-602-7 266-019-3 232-419-1 310-191-5	2707 91 00  3807 00 90	    i(2)	    b	
Crimidine	535-89-7	208-622-6	2933 59 95	p(1)	b	
Cyanamide (*)	420-04-2	206-992-3	2853 00 90	p(1)	b	
Cyanazine	21725-46-2	244-544-9	2933 69 80	p(1)-p(2)	b-b	
Cyhalothrine	68085-85-8	268-450-2	2926 90 95	p(1)	b	
DBB (Di- $\mu$ -oxo-di-n-butylstannio-hydroxyborane/dioxastannaboretan-4-ol)	75113-37-0	401-040-5	2931 00 95	i(1)	b	

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Diazinon (*)	333-41-5	206-373-8	2933 59 10	p(1)	b	
Dichlobenil (*)	1194-65-6	214-787-5	2926 90 95	p(1)	b	
Dicloran (*)	99-30-9	202-746-4	2921 42 00	p(1)	b	
Dichlorvos (*)	62-73-7	200-547-7	2919 90 90	p(1)	b	
Dicofol (*)	115-32-2	204-082-0	2906 29 00	p(1)-p(2)	b-b	
Dicofol containing < 78 % p, p'-Dicofol or 1 g/kg of DDT and DDT related compounds (*)	115-32-2	204-082-0	2906 29 00	p(1)-p(2)	b-b	
Dimethenamid (*)	87674-68-8	n.a.	2934 99 90	p(1)	b	
Diniconazole-M (*)	83657-18-5	n.a.	2933 99 80	p(1)	b	
Dinitro-ortho-cresol (DNOC) and its salts (such as ammonium salt, potassium salt and sodium salt) (#)	534-52-1 2980-64-5 5787-96-2 2312-76-7	208-601-1 221-037-0 — 219-007-7	2908 99 90	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Dinobuton	973-21-7	213-546-1	2920 90 10	p(1)-p(2)	b-b	
Dinoseb and its salts and esters (#)	88-85-7 and others	201-861-7 and others	2908 91 00 2915 36 00	p(1)-p(2) i(2)	b-b b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Dinoterb (*)	1420-07-1	215-813-8	2908 99 90	p(1)-p(2)	b-b	
Diphenylamine	122-39-4	204-539-4	2921 44 00	p(1)	b	
Dustable powder formulations containing a combination of:  Benomyl at or above 7 %	  17804-35-2	  241-775-7	3808 99 90  2933 99 90	  p(1)	  b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Carbofuran at or above 10 % and Thiram at or above 15 % (#)	1563-66-2 137-26-8	216-353-0 205-286-2	2932 99 85 2930 30 00	p(2)	b	
Endosulfan (*)	115-29-7	204-079-4	2920 90 85	p(1)	b	
Ethalfuralin (*)	55283-68-6	259-564-3	2921 43 00	p(1)	b	
Ethion	563-12-2	209-242-3	2930 90 85	p(1)-p(2)	b-b	
Ethoxyquin (*)	91-53-2	202-075-7	2933 49 90	p(1)	b	
Ethylene oxide (Oxirane) (#)	75-21-8	200-849-9	2910 10 00	p(1)	b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Fenarimol (*)	60168-88-9	262-095-7	2933 59 95	p(1)	b	
Fenitrothion (*)	122-14-5	204-524-2	2920 19 00	p(1)	b	
Fenpropathrin	39515-41-8	254-485-0	2926 90 95	p(1)-p(2)	b-b	
Fenthion (*)	55-38-9	200-231-9	2930 90 85	p(1)	sr	
Fentin acetate (*)	900-95-8	212-984-0	2931 00 95	p(1)-p(2)	b-b	
Fentin hydroxide (*)	76-87-9	200-990-6	2931 00 95	p(1)-p(2)	b-b	
Fenvalerate	51630-58-1	257-326-3	2926 90 95	p(1)	b	
Ferbam	14484-64-1	238-484-2	2930 20 00	p(1)-p(2)	b-b	
Fluoroacetamide (#)	640-19-7	211-363-1	2924 12 00	p(1)	b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Flurenol	467-69-6	207-397-1	2918 19 85	p(1)-p(2)	b-b	
Flurprimidol (*)	56425-91-3	n.a.	2933 59 95	p(1)	b	
Furathiocarb	65907-30-4	265-974-3	2932 99 85	p(1)-p(2)	b-b	
Guazatine (*)	108173-90-6 115044-19-4	236-855-3	3808 99 90	p(1)-p(2)	b-b	
Hexachloroethane	67-72-1	200-666-4	2903 19 80	i(1)	sr	

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Hexazinone	51235-04-2	257-074-4	2933 69 80	p(1)-p(2)	b-b	
Iminoctadine	13516-27-3	236-855-3	2925 29 00	p(1)-p(2)	b-b	
Indolylacetic acid (*)	87-51-4	201-748-2	2933 99 80	p(1)	b	
Isoxathion	18854-01-8	242-624-8	2934 99 90	p(1)	b	
Malathion	121-75-5	204-497-7	2930 90 99	p(2)	b	
(a) Maleic hydrazide, and its salts, other than choline, potassium and sodium salts	123-33-1	204-619-9	2933 99 90	p(1)	b	
(b) Choline, potassium and sodium salts of maleic hydrazide containing more than 1 mg/kg of free hydrazine expressed on the basis of the acid equivalent	61167-10-0, 51542-52-0, 28330-26-9	257-261-0, 248-972-7	2933 99 90			
Mercury compounds, including inorganic mercury compounds, alkyl mercury compounds and alkyloxyalkyl and aryl mercury compounds except mercury compounds listed in Annex V (#)	62-38-4, 26545-49-3 and others	200-532-5, 247-783-7 and others	2852 00 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Metam	144-54-7 137-42-8	205-632-2 205-239-0	2930 20 00	p(1)	b	
Methamidophos <sup>(2)</sup> (*)	10265-92-6	233-606-0	2930 50 00	p(1)	b	
Methamidophos (Soluble liquid formulations of the substance that exceed 600 g active ingredient/l) (#)	10265-92-6	233-606-0	2930 50 00 3808 50 00	p(2)	b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Methidathion	950-37-8	213-449-4	2934 99 90	p(1)-p(2)	b-b	
Methomyl	16752-77-5	240-815-0	2930 90 99	p(2)	b	
Methyl bromide (*)	74-83-9	200-813-2	2903 39 11	p(1)-p(2)	b-b	
Methyl-parathion (*) (#)	298-00-0	206-050-1	2920 11 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Metoxuron	19937-59-8	243-433-2	2924 21 90	p(1)-p(2)	b-b	
Monocrotophos (#)	6923-22-4	230-042-7	2924 12 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Monolinuron	1746-81-2	217-129-5	2928 00 90	p(1)	b	
Monomethyl-dibromo-diphenyl methane Tradename: DBBT (*)	99688-47-8	402-210-1	2903 69 90	i(1)	b	
Monomethyl-Dichloro-Diphenyl methane; Tradename: Ugilec 121 or Ugilec 21 (*)	—	400-140-6	2903 69 90	i(1)-i(2)	b-b	
Monomethyl-Tetrachlorodiphenyl methane; Tradename: Ugilec 141 (*)	76253-60-6	278-404-3	2903 69 90	i(1)-i(2)	b-b	
Monuron	150-68-5	205-766-1	2924 21 90	p(1)	b	
Nicotine (*)	54-11-5	200-193-3	2939 99 00	p(1)	b	
Nitrofen (*)	1836-75-5	217-406-0	2909 30 90	p(1)-p(2)	b-b	
Nonylphenols C <sub>6</sub> H <sub>4</sub> (OH)C <sub>9</sub> H <sub>19</sub> (*)	25154-52-3 (phenol, nonyl-), 84852-15-3 (phenol, 4-nonyl-, branched) 11066-49-2 (isononylphenol), 90481-04-2, (phenol, nonyl-, branched), 104-40-5(p-nonylphenol) and others	246-672-0 284-325-5 234-284-4 291-844-0 203-199-4 and others	2907 13 00	i(1)	sr	
Nonylphenol ethoxylates (C <sub>2</sub> H <sub>4</sub> O) <sub>n</sub> C <sub>15</sub> H <sub>24</sub> O (*)	9016-45-9, 26027-38-3, 68412-54-4, 37205-87-1, 127087-87-0 and others		3402 13 00	i(1) p(1)-p(2)	sr b-b	
Octabromodiphenyl ether (*)	32536-52-0	251-087-9	2909 30 38	i(1)	sr	
Omethoate	1113-02-6	214-197-8	2930 90 85	p(1)-p(2)	b-b	
Oxydemeton-methyl (*)	301-12-2	206-110-7	2930 90 85	p(1)	b	
Paraquat (*)	4685-14-7 1910-42-5 2074-50-2	225-141-7 217-615-7 218-196-3	2933 39 99	p(1)	b	

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Parathion (#)	56-38-2	200-271-7	2920 11 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Pebulate	1114-71-2	214-215-4	2930 20 00	p(1)-p(2)	b-b	
Pentachlorophenol and its salts and esters (#)	87-86-5 and others	201-778-6 and others	2908 11 00 2908 19 00 and others	p(1)-p(2)	b-sr	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Perfluorooctane sulfonates (PFOS) $C_8F_{17}SO_2X$ (X = OH, Metal salt (O-M+), halide, amide, and other derivatives including polymers) (*)	1763-23-1  2795-39-3  and others	n.a.	2904 90 20  2904 90 20  and others	i(1)	sr	
Permethrin	52645-53-1	258-067-9	2916 20 00	p(1)	b	
Phosalone (*)	2310-17-0	218-996-2	2934 99 90	p(1)	b	
Phosphamidon (soluble liquid formulations of the substance that exceed 1 000 g active ingredient/l) (#)	13171-21-6 (mixture, (E) & (Z) isomers) 23783-98-4 ((Z)-isomer) 297-99-4 ((E)-isomer)	236-116-5	2924 12 00 3808 50 00	p(1)-p(2)	b-b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Polybrominated biphenyls (PBB) except hexabromo-biphenyl (#)	13654-09-6, 27858-07-7 and others	237-137-2, 248-696-7 and others	2903 69 90	i(1)	sr	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Polychlorinated terphenyls (PCT) (#)	61788-33-8	262-968-2	2903 69 90	i(1)	b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Procymidone (*)	32809-16-8	251-233-1	2925 19 95	p(1)	b	
Propachlor (*)	1918-16-7	217-638-2	2924 29 98	p(1)	b	
Propanil	709-98-8	211-914-6	2924 29 98	p(1)	b	
Propham	122-42-9	204-542-0	2924 29 95	p(1)	b	
Propisochlor (*)	86763-47-5	n.a.	2924 29 98	p(1)	b	

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Pyrazophos (*)	13457-18-6	236-656-1	2933 59 95	p(1)-p(2)	b-b	
Quintozene (*)	82-68-8	201-435-0	2904 90 85	p(1)-p(2)	b-b	
Scilliroside	507-60-8	208-077-4	2938 90 90	p(1)	b	
Simazine (*)	122-34-9	204-535-2	2933 69 10	p(1)-p(2)	b-b	
Strychnine	57-24-9	200-319-7	2939 99 00	p(1)	b	
Tecnazene (*)	117-18-0	204-178-2	2904 90 85	p(1)-p(2)	b-b	
Terbufos	13071-79-9	235-963-8	2930 90 85	p(1)-p(2)	b-b	
Tetraethyl lead (#)	78-00-2	201-075-4	2931 00 95	i(1)	sr	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Tetramethyl lead (#)	75-74-1	200-897-0	2931 00 95	i(1)	sr	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Thallium sulphate	7446-18-6	231-201-3	2833 29 90	p(1)	b	
Thiobencarb (*)	28249-77-6	248-924-5	2930 20 00	p(1)	b	
Thiocyclam	31895-22-4	250-859-2	2934 99 90	p(1)-p(2)	b-b	
Thiodicarb (*)	59669-26-0	261-848-7	2930 90 85	p(1)	b	
Tolylfluamid (*)	731-27-1	211-986-9	2930 90 85	p(1)	b	
Triazophos	24017-47-8	245-986-5	2933 99 90	p(1)-p(2)	b-b	
All tributyltin compounds, including:			2931 00 95	p(2)	b	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Tributyltin oxide	56-35-9	200-268-0	2931 00 95			
Tributyltin fluoride	1983-10-4	217-847-9	2931 00 95			
Tributyltin methacrylate	2155-70-6	218-452-4	2931 00 95			
Tributyltin benzoate	4342-36-3	224-399-8	2931 00 95			
Tributyltin chloride	1461-22-9	215-958-7	2931 00 95			
Tributyltin linoleate	24124-25-2	246-024-7	2931 00 95			
Tributyltin naphthenate (#)	85409-17-2	287-083-9	2931 00 95			

Chemical	CAS No	Einecs No	CN code	Subcategory (*)	Use limitation (**)	Countries for which no notification is required
Trichlorfon (*)	52-68-6	200-149-3	2931 00 95	p(1)-p(2)	b-b	
Tricyclazole (*)	41814-78-2	255-559-5	2934 99 90	p(1)	b	
Tridemorph	24602-86-6	246-347-3	2934 99 90	p(1)-p(2)	b-b	
Trifluralin (*)	1582-09-8	216-428-8	2921 43 00	p(1)	b	
Triorganostannic compounds other than tributyltin compounds (*)	—	—	2931 00 95 and others	p(2) i(2)	sr sr	
Tris (2,3-Dibromopropyl) phosphate (#)	126-72-7	204-799-9	2919 10 00	i(1)	sr	Please refer to PIC circular at <a href="http://www.pic.int/">www.pic.int/</a>
Tris-aziridinyl-phosphin oxide (1,1',1'-phosphoryl triaziridine) (*)	545-55-1	208-892-5	2933 99 90	i(1)	sr	
Vamidothion	2275-23-2	218-894-8	2930 90 85	p(1)-p(2)	b-b	
Vinclozolin (*)	50471-44-8	256-599-6	2934 99 90	p(1)	b	
Zineb	12122-67-7	235-180-1	2930 20 00 or 3824 90 97	p(1)	b	

(\*) Sub-category: p(1) — pesticide in the group of plant protection products, p(2) — other pesticide including biocides. i(1) — industrial chemical for professional use and i(2) — industrial chemical for public use.

(\*\*) Use limitation: sr — severe restriction, b — ban (for the sub-category or sub-categories concerned) according to Union legislation.

(1) This entry does not affect the existing entry for cis-1,3-dichloropropene (CAS No 10061-01-5).

(2) This entry does not affect the existing entry for soluble liquid formulations of methamidophos that exceed 600 g active ingredient/l.

(3) Except motor fuels subject to Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels (OJ L 350, 28.12.1998, p. 58).

CAS No = Chemical Abstracts Service Registry Number.

(#) Chemical subject or partially subject to the PIC procedure.

(\*) Chemical qualifying for PIC notification.

## PART 2

**List of chemicals qualifying for PIC notification***(referred to in Article 11)*

This list comprises chemicals qualifying for PIC notification. It does not include chemicals that are already subject to the PIC procedure, which are listed in Part 3 of this Annex.

Chemical	CAS No	Einecs No	CN code	Category (*)	Use limitation (**)
1,3-dichloropropene	542-75-6	208-826-5	2903 29 00	p	b
2-Naphthylamine (naphthalen-2-amine) and its salts	91-59-8, 553-00-4, 612-52-2 and others	202-080-4, 209-030-0, 210-313-6 and others	2921 45 00	i	b
4-Aminobiphenyl (biphenyl-4-amine) and its salts	92-67-1, 2113-61-3 and others	202-177-1 and others	2921 49 80	i	b
4-Nitrobiphenyl	92-92-3	202-204-7	2904 20 00	i	b
Acephate	30560-19-1	250-241-2	2930 90 85	p	b
Alachlor	15972-60-8	240-110-8	2924 29 95	p	b
Aldicarb	116-06-3	204-123-2	2930 90 85	p	sr
Amitraz	33089-61-1	251-375-4	2925 29 00	p	b
Anthraquinone	84-65-1	201-549-0	2914 61 00	p	b
Asbestos fibres: Chrysotile	12001-29-5 or 132207-32-0		2524 90 00	i	b
Atrazine	1912-24-9	217-617-8	2933 69 10	p	b
Azinphos-methyl	86-50-0	201-676-1	2933 99 80	p	b
Benfuracarb	82560-54-1	n.a.	2932 99 00	p	b
Benzidine and its salts	92-87-5, 36341-27-2 and others	202-199-1, 252-984-8 and others	2921 59 90	i	sr
Benzidine derivatives	—	—			

Chemical	CAS No	Einecs No	CN code	Category (*)	Use limitation (**)
Butralin	33629-47-9	251-607-4	2921 49 00	p	b
Cadusafos	95465-99-9	n.a.	2930 90 99	p	b
Carbaryl	63-25-2	200-555-0	2924 29 95	p	b
Carbofuran	1563-66-2	216-353-0	2932 99 00	p	b
Carbosulfan	55285-14-8	259-565-9	2932 99 00	p	b
Chlorate	7775-09-9 10137-74-3	231-887-4 233-378-2	2829 11 00 2829 19 00	p	b
Chlorfenapyr	122453-73-0		2933 99 90	p	sr
Chlorthal-dimethyl	1861-32-1	217-464-7	2917 39 95	p	b
Chlozolinate	84332-86-5	282-714-4	2934 99 90	p	b
Cyanamide	420-04-2	206-992-3	2853 00 90	p	sr
Diazinon	333-41-5	206-373-8	2933 59 10	p	sr
Dichlobenil	1194-65-6	214-787-5	2926 90 95	p	b
Dicloran	99-30-9	202-746-4	2921 42 00	p	b
Dichlorvos	62-73-7	200-547-7	2919 90 00	p	sr
Dicofol	115-32-2	204-082-0	2906 29 00	p	b
Dicofol containing < 78 % p, p'-Dicofol or 1 g/kg of DDT and DDT related compounds	115-32-3	204-082-0	2906 29 00	p	b
Dimethenamid	87674-68-8	n.a.	2934 99 90	p	b
Diniconazole-M	83657-18-5	n.a.	2933 99 80	p	b
Dinoterb	1420-07-1	215-813-8	2908 99 90	p	b
Endosulfan	115-29-7	204-079-4	2920 90 85	p	b
Ethalfuralin	55283-68-6	259-564-3	2921 43 00	p	b

Chemical	CAS No	Einecs No	CN code	Category (*)	Use limitation (**)
Ethoxyquin	91-53-2	202-075-7	2933 49 90	p	b
Fenarimol	60168-88-9	262-095-7	2933 59 95	p	b
Fenitrothion	122-14-5	204-524-2	2920 19 00	p	sr
Fenthion	55-38-9	200-231-9	2930 90 85	p	sr
Fentin acetate	900-95-8	212-984-0	2931 00 95	p	b
Fentin hydroxide	76-87-9	200-990-6	2931 00 95	p	b
Flurprimidol	56425-91-3	n.a.	2933 59 95	p	b
Guazatine	108173-90-6 115044-19-4	236-855-3	3808 99 90	p	b
Indolylacetic acid	87-51-4	201-748-2	2933 99 80	p	b
Methamidophos (l)	10265-92-6	233-606-0	2930 50 00	p	b
Methyl bromide	74-83-9	200-813-2	2903 39 11	p	b
Methyl parathion (#)	298-00-0	206-050-1	2920 11 00	p	b
Monomethyl-dibromo-diphenyl methane Tradenam: DBBT	99688-47-8	401-210-1	2903 69 90	i	b
Monomethyl-Dichloro-Diphenyl methane; Tradenam: Ugilec 121 or Ugilec 21	—	400-140-6	2903 69 90	i	b
Monomethyl-Tetrachlorodiphenyl methane; Tradenam: Ugilec 141	76253-60-6	278-404-3	2903 69 90	i	b
Nicotine	54-11-5	200-193-3	2939 99 00	p	b

Chemical	CAS No	Einecs No	CN code	Category (*)	Use limitation (**)
Nitrofen	1836-75-5	217-406-0	2909 30 90	p	b
Nonylphenols C <sub>6</sub> H <sub>4</sub> (OH)C <sub>9</sub> H <sub>19</sub>	25154-52-3 (phenol, nonyl-), 84852-15-3 (phenol, 4-nonyl- branched), 11066-49-2 (isononylphenol), 90481-04-2, (phenol, nonyl- branched), 104-40-5 (P-nonylphenol) and others	246-672-0 284-325-5 234-284-4 291-844-0 203-199-4 and others	2907 13 00	i	sr
Nonylphenol ethoxylates (C <sub>2</sub> H <sub>4</sub> O) <sub>n</sub> C <sub>15</sub> H <sub>24</sub> O	9016-45-9, 26027-38-3, 68412-54-4, 37205-87-1, 127087-87-0 and others		3402 13 00	i p	sr b
Octabromodiphenyl ether	32536-52-0	251-087-9	2909 30 38	i	sr
Oxydemeton-methyl	301-12-2	206-110-7	2930 90 85	p	b
Paraquat	4685-14-7 1910-42-5 2074-50-2	225-141-7 217-615-7 218-196-3	2933 39 99	p	b
Perfluorooctane sulfonates	1763-23-1	n.a.	2904 90 20	i	sr
(PFOS) C <sub>8</sub> F <sub>17</sub> SO <sub>2</sub> X (X = OH, Metal salt (O-M+), halide, amide, and other derivatives including polymers)	2795-39-3 and others		2904 90 20 and others		
Phosalone	2310-17-0	218-996-2	2934 99 90	p	b
Procymidone	32809-16-8	251-233-1	2925 19 95	p	b
Propachlor	1918-16-7	217-638-2	2924 29 98	p	b
Propisochlor	86763-47-5	n.a.	2924 29 98	p	b
Pyrazophos	13457-18-6	236-656-1	2933 59 95	p	b

Chemical	CAS No	Einecs No	CN code	Category (*)	Use limitation (**)
Quintozene	82-68-8	201-435-0	2904 90 85	p	b
Simazine	122-34-9	204-535-2	2933 69 10	p	b
Tecnazene	117-18-0	204-178-2	2904 90 85	p	b
Thiobencarb	28249-77-6	248-924-5	2930 20 00	p	b
Thiodicarb	59669-26-0	261-848-7	2930 90 85	p	b
Tolylfluand	731-27-1	211-986-9	2930 90 85	p	sr
Trichlorfon	52-68-6	200-149-3	2931 00 95	p	b
Tricyclazole	41814-78-2	255-559-5	2934 99 90	p	b
Trifluralin	1582-09-8	216-428-8	2921 43 00	p	b
Triorganostannic compounds other than tributyltin compounds	—	—	2931 00 95 and others	p	sr
Vinclozolin	50471-44-8	256-599-6	2934 99 90	p	b

(\*) Category: p — pesticides; i — industrial chemical.

(\*\*) Use limitation: sr — severe restriction, b — ban (for the category or categories concerned).CAS No = Chemical Abstracts Service Registry Number.

(1) This entry does not affect the entry in Annex I Part 3 for soluble liquid formulations of methamidophos that exceed 600 g active ingredient/l.

(#) Chemical subject or partially subject to the PIC procedure.

## PART 3

## List of chemicals subject to the PIC procedure

(referred to in Articles 13 and 14)

(The categories shown are those referred to in the Convention)

Chemical	Relevant CAS number(s)	HS code Pure substance	HS code Mixtures containing substance	Category
2,4,5-T and its salts and esters	93-76-5 (#)	2918.91	3808.50	Pesticide
Aldrin (*)	309-00-2	2903.52	3808.50	Pesticide
Binapacryl	485-31-4	2916.19	3808.50	Pesticide
Captafol	2425-06-1	2930.50	3808.50	Pesticide
Chlordane (*)	57-74-9	2903.52	3808.50	Pesticide
Chlordimeform	6164-98-3	2925.21	3808.50	Pesticide
Chlorobenzilate	510-15-6	2918.18	3808.50	Pesticide
DDT (*)	50-29-3	2903.62	3808.50	Pesticide
Dieldrin (*)	60-57-1	2910.40	3808.50	Pesticide
Dinitro-ortho-cresol (DNOC) and its salts (such as ammonium salt, potassium salt and sodium salt)	534-52-1, 2980-64-5, 5787-96-2, 2312-76-7	2908.99	3808.91 3808.92 3808.93	Pesticide
Dinoseb and its salts and esters	88-85-7 (#)	2908.91	3808.50	Pesticide
1,2-dibromoethane (EDB)	106-93-4	2903.31	3808.50	Pesticide
Ethylene dichloride (1,2-dichloroethane)	107-06-2	2903.15	3808.50	Pesticide
Ethylene oxide	75-21-8	2910.10	3808.50 3824.81	Pesticide
Fluoroacetamide	640-19-7	2924.12	3808.50	Pesticide
HCH (mixed isomers) (*)	608-73-1	2903.51	3808.50	Pesticide
Heptachlor (*)	76-44-8	2903.52	3808.50	Pesticide

Chemical	Relevant CAS number(s)	HS code Pure substance	HS code Mixtures containing substance	Category
Hexachlorobenzene (*)	118-74-1	2903.62	3808.50	Pesticide
Lindane (*)	58-89-9	2903.51	3808.50	Pesticide
Mercury compounds, including inorganic mercury compounds, alkyl mercury compounds and alkyloxyalkyl and aryl mercury compounds	10112-91-1, 21908-53-2 and others See also: <a href="http://www.pic.int/">www.pic.int/</a>	2852.00	3808.50	Pesticide
Monocrotophos	6923-22-4	2924.12	3808.50	Pesticide
Parathion	56-38-2	2920.11	3808.50	Pesticide
Pentachlorophenol and its salts and esters	87-86-5 (#)	2908.11 2908.19	3808.50 3808.91 3808.92 3808.93 3808.94 3808.99	Pesticide
Toxaphene (*)	8001-35-2	—	3808.50	Pesticide
Dustable powder formulations containing a combination of: Benomyl at or above 7 %, Carbofuran at or above 10 % and Thiram at or above 15 %	17804-35-2 1563-66-2 137-26-8	—	3808.92	Severely hazardous pesticide formulation
Methamidophos (soluble liquid formulations of the substance that exceed 600 g active ingredient/l)	10265-92-6	2930.50	3808.50	Severely hazardous pesticide formulation
Methyl-parathion (emulsifiable concentrates (EC) at or above 19,5 % active ingredient and dusts at or above 1,5 % active ingredient)	298-00-0	2920.11	3808.50	Severely hazardous pesticide formulation
Phosphamidon (soluble liquid formulations of the substance that exceed 1 000 g active ingredient/l)		2924.12	3808.50	Severely hazardous pesticide formulation
Mixture (E) & (Z) isomers	13171-21-6			
(Z)-isomer	23783-98-4			
(E)-isomer	297-99-4			
Asbestos fibres:		2524.10 2524.90	6811.40 6812.80 6812.91 6812.92 6812.93 6812.99 6813.20	Industrial

Chemical	Relevant CAS number(s)	HS code Pure substance	HS code Mixtures containing substance	Category
Crocidolite	12001-28-4	2524.10		
Actinolite	77536-66-4	2524.90		
Anthophyllite	77536-67-5	2524.90		
Amosite	12172-73-5	2524.90		
Tremolite	77536-68-6	2524.90		
Polybrominated biphenyls (PBB)				
— (hexa-) (*)	36355-01-8	—	3824.82	Industrial
— (octa-)	27858-07-7			
— (deca-)	13654-09-6			
Polychlorinated biphenyls (PCB) (*)	1336-36-3	—	3824.82	Industrial
Polychlorinated terphenyls (PCT)	61788-33-8	—	3824.82	Industrial
Tetraethyl lead	78-00-2	2931.00	3811.11	Industrial
Tetramethyl lead	75-74-1	2931.00	3811.11	Industrial
All tributyltin compounds, including:		2931.00	3808.99	Pesticide
Tributyltin oxide	56-35-9	2931.00	3808.99	
Tributyltin fluoride	1983-10-4	2931.00	3808.99	
Tributyltin methacrylate	2155-70-6	2931.00	3808.99	
Tributyltin benzoate	4342-36-3	2931.00	3808.99	
Tributyltin chloride	1461-22-9	2931.00	3808.99	
Tributyltin linoleate	24124-25-2	2931.00	3808.99	
Tributyltin naphthenate	85409-17-2	2931.00	3808.99	
Tris (2,3-dibromopropyl) phosphate	126-72-7	2919.10	3824.83	Industrial

(\*) These substances are subject to an export ban in accordance with Article 15(2) of and Annex V to this Regulation.

(#) Only the CAS numbers of parent compounds are listed.

## ANNEX II

**EXPORT NOTIFICATION**

The following information is required pursuant to Article 8:

1. Identity of the substance to be exported:
  - (a) name in nomenclature of the International Union of Pure and Applied Chemistry;
  - (b) other names (e.g. ISO name, usual names, trade names, and abbreviations);
  - (c) European Inventory of Existing Chemical Substances (Einecs) number and Chemical Abstracts Services (CAS) number;
  - (d) CUS number (European Customs Inventory of Chemical Substances) and Combined Nomenclature code;
  - (e) main impurities of the substance, when particularly relevant.
2. Identity of the mixture to be exported:
  - (a) trade name and/or designation of the mixture;
  - (b) for each substance listed in Annex I, percentage and details as specified under point 1;
  - (c) CUS number (European Customs Inventory of Chemical Substances) and Combined Nomenclature code.
3. Identity of the article to be exported:
  - (a) trade name and/or designation of the article;
  - (b) for each substance listed in Annex I, percentage and details as specified under point 1.
4. Information on the export:
  - (a) country of destination;
  - (b) country of origin;
  - (c) expected date of first export this year;
  - (d) estimated amount of the chemical to be exported to the country concerned this year;
  - (e) intended use in the country of destination, if known, including information on the category(ies) under the Convention under which the use falls;
  - (f) name, address and other relevant particulars of the natural or legal importing person;
  - (g) name, address and other relevant particulars of the exporter.
5. Designated national authorities:
  - (a) the name, address, telephone and telex, fax number or e-mail of the designated authority in the Union from which further information may be obtained;
  - (b) the name, address, telephone and telex, fax number or e-mail of the designated authority in the importing country.
6. Information on precautions to be taken, including category of danger and risk and safety advice.
7. A summary on physicochemical, toxicological and ecotoxicological properties.

8. Use of the chemical in the Union:
    - (a) uses, category(ies) under the Convention and Union subcategory(ies) subject to control measure (ban or severe restriction);
    - (b) uses for which the chemical is not severely restricted or banned (use categories and subcategories as defined in Annex I of the Regulation);
    - (c) estimation, where available, of quantities of the chemical produced, imported, exported and used.
  9. Information on precautionary measures to reduce exposure to, and emission of, the chemical.
  10. Summary of regulatory restrictions and reasons for them.
  11. Summary of information specified in points 2(a), (c) and (d) of Annex IV.
  12. Additional information provided by the exporting Party because considered of concern or further information specified in Annex IV when requested by the importing Party.
-

## ANNEX III

**Information to be supplied to the Commission by the designated national authorities of the Member States in accordance with Article 10**

1. Summary of quantities of chemicals (in the form of substances, mixtures and articles) subject to Annex I exported during the previous year.

(a) Year in which exports took place.

(b) Table summarising quantities of exported chemicals (in the form of substances, mixtures and articles) as outlined below.

Chemical	Importing country	Quantity of substance

2. List of natural or legal persons importing chemicals into a Party or other country

Chemical	Importing country	Importing person	Address and other relevant particulars of the importing person

## ANNEX IV

**Notification to the Secretariat of the Convention of a banned or severely restricted chemical**

## INFORMATION REQUIREMENTS FOR NOTIFICATIONS PURSUANT TO ARTICLE 11

Notifications shall include:

1. properties, identification and uses

- (a) common name;
- (b) chemical name according to an internationally recognised nomenclature (for example International Union of Pure and Applied Chemistry (IUPAC)), where such nomenclature exists;
- (c) trade names and names of mixtures;
- (d) code numbers: Chemical Abstracts Service (CAS) number, Harmonised System Customs Code and other numbers;
- (e) information on hazard classification, where the chemical is subject to classification requirements;
- (f) use or uses of the chemical:
  - in the Union,
  - elsewhere (if known);
- (g) the physicochemical, toxicological and ecotoxicological properties;

2. final regulatory action

- (a) information specific to the final regulatory action:
  - (i) summary of the final regulatory action;
  - (ii) reference to the regulatory document;
  - (iii) date of entry into force of the final regulatory action;
  - (iv) indication of whether the final regulatory action was taken on the basis of a risk or hazard evaluation and, if so, information on such an evaluation, covering a reference to the relevant documentation;
  - (v) reasons for the final regulatory action relevant to human health, including the health of consumers and workers, or the environment;
  - (vi) summary of the hazards and risks presented by the chemical to human health, including the health of consumers and workers, or the environment and the expected effect of the final regulatory action;
- (b) category or categories where the final regulatory action has been taken, and for each category:
  - (i) use or uses prohibited by the final regulatory action;
  - (ii) use or uses that remain allowed;
  - (iii) estimation, where available, of quantities of the chemical produced, imported, exported and used;

- 
- (c) an indication, to the extent possible, of the likely relevance of the final regulatory action to other States and regions;
  - (d) other relevant information that may cover:
    - (i) assessment of socioeconomic effects of the final regulatory action;
    - (ii) information on alternatives and their relative risks, where available, such as:
      - integrated pest management strategies,
      - industrial practices and processes, including cleaner technology.
-

## ANNEX V

**Chemicals and articles subject to export ban***(referred to in Article 15)*

## PART 1

Persistent organic pollutants as listed in Annexes A and B to the Stockholm Convention on Persistent Organic Pollutants <sup>(1)</sup> according to the provisions thereof.

Description of chemicals/article(s) subject to export ban	Additional details, where relevant (e.g. name of chemical, EC No, CAS No, etc.)	
	Aldrin	EC No 206-215-8, CAS No 309-00-2, CN code 2903 52 00
	Chlordane	EC No 200-349-0, CAS No 57-74-9, CN code 2903 52 00
	Chlordecone	EC No 205-601-3 CAS No 143-50-0 CN code 2914 70 00
	Dieldrin	EC No 200-484-5, CAS No 60-57-1, CN code 2910 40 00
	DDT (1,1,1-trichloro-2,2-bis (p-chlorophenyl) ethane	EC No 200-024-3, CAS No 50-29-3, CN code 2903 62 00
	Endrin	EC No 200-775-7, CAS No 72-20-8, CN code 2910 90 00
	Heptabromodiphenyl ether C <sub>12</sub> H <sub>3</sub> Br <sub>7</sub> O	EC No 273-031-2 CAS No 68928-80-3 and others CN code 2909 30 38
	Heptachlor	EC No 200-962-3, CAS No 76-44-8, CN code 2903 52 00
	Hexabromobiphenyl	EC No 252-994-2 CAS No 36355-01-8 CN code 2903 69 90
	Hexabromodiphenyl ether C <sub>12</sub> H <sub>4</sub> Br <sub>6</sub> O	EC No 253-058-6 CAS No 36483-60-0 and others CN code 2909 30 38
	Hexachlorobenzene	EC No 200-273-9, CAS No 118-74-1, CN code 2903 62 00
	Hexachlorocyclohexanes, including lindane	EC No 200-401-2, 206-270-8, 206- 271-3, 210-168-9 CAS No 58-89-9, 319-84-6, 319-85- 7, 608-73-1 CN code 2903 51 00
	Mirex	EC No 219-196-6, CAS No 2385-85-5, CN code 2903 59 80

<sup>(1)</sup> OJ L 209, 31.7.2006, p. 3.

Description of chemicals/article(s) subject to export ban	Additional details, where relevant (e.g. name of chemical, EC No, CAS No, etc.)	
	Pentabromodiphenyl ether C <sub>12</sub> H <sub>5</sub> Br <sub>5</sub> O	EC No 251-084-2 and others CAS No 32534-81-9 and others CN code 2909 30 31
	Pentachlorobenzene	EC No 210-172-5 CAS No 608-93-5 CN code 2903 69 90
	Polychlorinated biphenyls (PCBs)	EC No 215-648-1 and others, CAS No 1336-36-3 and others, CN code 2903 69 90
	Tetrabromodiphenyl ether C <sub>12</sub> H <sub>6</sub> Br <sub>4</sub> O	EC No 254-787-2 and others CAS No 40088-47-9 and others CN code 2909 30 38
	Toxaphene (camphechlor)	EC No 232-283-3, CAS No 8001-35-2, CN code 3808 50 00

## PART 2

Chemicals other than persistent organic pollutants as listed in Annexes A and B to the Stockholm Convention on Persistent Organic Pollutants according to the provisions thereof.

Description of chemicals/article(s) subject to export ban	Additional details, where relevant (e.g. name of chemical, EC No, CAS No, etc.)
Cosmetic soaps containing mercury	CN codes 3401 11 00, 3401 19 00, 3401 20 10, 3401 20 90, 3401 30 00
Mercury compounds except compounds exported for research and development, medical or analysis purposes	Cinnabar ore, mercury (I) chloride (Hg <sub>2</sub> Cl <sub>2</sub> , CAS No 10112-91-1), mercury (II) oxide (HgO, CAS No 21908-53-2); CN code 2852 00 00
Metallic mercury and mixtures of metallic mercury with other substances, including alloys of mercury, with a mercury concentration of at least 95 % weight by weight	CAS No 7439-97-6 CN code 2805 40

## ANNEX VI

**List of Parties to the Convention requiring information concerning transit movements of chemicals subject to the PIC procedure***(referred to in Article 16)*

Country	Required information

## ANNEX VII

## Correlation table

Regulation (EC) No 689/2008	This Regulation
—	Article 1
Article 1(1)	1(1)
Article 1(2)	1(2)
—	Article 2
Article 2(1)	2(1)
Article 2(2)	2(2)
—	2(3)
Article 3	Article 3
Article 4	Article 4
—	Article 5
Article 5(1)	5(1)
Article 5(2)	5(2)
Article 5(3)	5(3)
—	Article 6
—	6(1)
—	6(2)
—	Article 7
Article 6(1)	7(1)
Article 6(2)	7(2)
Article 6(3)	7(3)
—	Article 8
Article 7(1)	8(1)
Article 7(2)	8(2)
Article 7(3)	8(3)
Article 7(4)	8(4)
Article 7(5)	8(5)
Article 7(6)	8(6)
Article 7(7)	8(7)
Article 7(8)	8(8)
—	Article 9
Article 8(1)	9(1)
Article 8(2)	9(2)
—	Article 10
Article 9(1)	10(1)
Article 9(2)	10(2)
Article 9(3)	10(3)

Regulation (EC) No 689/2008	This Regulation
—	Article 11
Article 10(1)	11(1)
Article 10(2)	11(2)
Article 10(3)	11(3)
Article 10(4)	11(4)
Article 10(5)	11(5)
Article 10(6)	11(6)
Article 10(7)	11(7)
Article 10(8)	11(8)
Article 11	Article 12
—	Article 13
Article 12(1)	13(1)
Article 12(2)	13(2)
Article 12(3)	13(3)
Article 12(4)	13(4)
Article 12(5)	13(5)
Article 12(6)	13(6)
—	Article 14
Article 13(1)	14(1)
Article 13(2)	14(2)
Article 13(3)	14(3)
Article 13(4)	14(4)
Article 13(5)	14(5)
Article 13(6)	14(6)
Article 13(7)	14(7)
Article 13(8)	14(8)
Article 13(9)	14(9)
Article 13(10)	14(10)
Article 13(11)	14(11)
—	Article 15
Article 14(1)	15(1)
Article 14(2)	15(2)
—	Article 16
Article 15(1)	16(1)
Article 15(2)	16(2)
Article 15(3)	16(3)
Article 15(4)	16(4)
—	Article 17
Article 16(1)	17(1)
Article 16(2)	17(2)

Regulation (EC) No 689/2008	This Regulation
Article 16(3)	17(3)
Article 16(4)	17(4)
—	Article 18
Article 17(1)	18(1)
—	18(2)
Article 17(1)	18(3)
—	Article 19
Article 17(2)	19(1)
—	19(2)
—	19(3)
—	Article 20
Article 19(1)	20(1)
Article 19(2)	20(2)
Article 19(3)	20(3)
Article 19(3)	20(4)
Article 20	Article 21
—	Article 22
Article 21(1)	22(1)
Article 21(2)	22(2)
Article 21(3)	22(3)
—	Article 23
Article 22(1)	23(1)
Article 22(2)	23(2)
Article 22(3)	23(3)
Article 22(4)	23(4)
—	Article 24
—	24(1)
—	24(2)
—	24(3)
—	Article 25
—	Article 26
—	26(1)
—	26(2)
—	26(3)
—	26(4)
—	26(5)
—	Article 27
Article 24(1)	27(1)
Article 24(2)	27(2)
Article 18	Article 28

Regulation (EC) No 689/2008	This Regulation
—	Article 29
Article 25	Article 30
Article 26	Article 31
Annex I	Annex I
Annex II	Annex II
Annex III	Annex III
Annex IV	Annex IV
Annex V	Annex V
Annex VI	Annex VI

**REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 4 July 2012**

**on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession**

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 81(2) thereof,

Having regard to the proposal from the European Commission,

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) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(2) In accordance with point (c) of Article 81(2) of the Treaty on the Functioning of the European Union, such measures may include measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) A programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters <sup>(3)</sup>, common to the Commission and

to the Council, was adopted on 30 November 2000. That programme identifies measures relating to the harmonisation of conflict-of-laws rules as measures facilitating the mutual recognition of decisions, and provides for the drawing-up of an instrument relating to wills and succession.

(5) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme called 'The Hague Programme: strengthening freedom, security and justice in the European Union' <sup>(4)</sup>. That programme underlines the need to adopt an instrument in matters of succession dealing, in particular, with the questions of conflict of laws, jurisdiction, mutual recognition and enforcement of decisions in the area of succession and a European Certificate of Succession.

(6) At its meeting in Brussels on 10 and 11 December 2009 the European Council adopted a new multiannual programme called 'The Stockholm Programme – An open and secure Europe serving and protecting citizens' <sup>(5)</sup>. In that programme the European Council considered that mutual recognition should be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, while taking into consideration Member States' legal systems, including public policy (*ordre public*), and national traditions in this area.

(7) The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.

(8) In order to achieve those objectives, this Regulation should bring together provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession.

<sup>(1)</sup> OJ C 44, 11.2.2011, p. 148.

<sup>(2)</sup> Position of the European Parliament of 13 March 2012 (not yet published in the Official Journal) and decision of the Council of 7 June 2012.

<sup>(3)</sup> OJ C 12, 15.1.2001, p. 1.

<sup>(4)</sup> OJ C 53, 3.3.2005, p. 1.

<sup>(5)</sup> OJ C 115, 4.5.2010, p. 1.

- (9) The scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.
- (10) This Regulation should not apply to revenue matters or to administrative matters of a public-law nature. It should therefore be for national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes.
- (11) This Regulation should not apply to areas of civil law other than succession. For reasons of clarity, a number of questions which could be seen as having a link with matters of succession should be explicitly excluded from the scope of this Regulation.
- (12) Accordingly, this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage. The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries.
- (13) Questions relating to the creation, administration and dissolution of trusts should also be excluded from the scope of this Regulation. This should not be understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.
- (14) Property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, should also be excluded from the scope of this Regulation. However, it should be the law specified by this Regulation as the law applicable to the succession which determines whether gifts or other forms of dispositions *inter vivos* giving rise to a right *in rem* prior to death should be restored or accounted for for the purposes of determining the shares of the beneficiaries in accordance with the law applicable to the succession.
- (15) This Regulation should allow for the creation or the transfer by succession of a right in immovable or movable property as provided for in the law applicable to the succession. It should, however, not affect the limited number (*numerus clausus*) of rights *in rem* known in the national law of some Member States. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.
- (16) However, in order to allow the beneficiaries to enjoy in another Member State the rights which have been created or transferred to them by succession, this Regulation should provide for the adaptation of an unknown right *in rem* to the closest equivalent right *in rem* under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it. For the purposes of determining the closest equivalent national right *in rem*, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.
- (17) The adaptation of unknown rights *in rem* as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation.
- (18) The requirements for the recording in a register of a right in immovable or movable property should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept (for immovable property, the *lex rei sitae*) which determines under what legal conditions and how the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. In particular, the authorities may check that the right of the deceased to the succession property mentioned in the document presented for registration is a right which is recorded as such in the register or which is otherwise demonstrated in accordance with the law of the Member State in which the register is kept. In order to avoid duplication of documents, the registration authorities should accept such documents drawn up in another Member State by the competent authorities whose circulation is provided for by this Regulation. In particular, the European Certificate of Succession issued under this

- Regulation should constitute a valid document for the recording of succession property in a register of a Member State. This should not preclude the authorities involved in the registration from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept, for instance information or documents relating to the payment of revenue. The competent authority may indicate to the person applying for registration how the missing information or documents can be provided.
- (19) The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept which determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immovable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.
- (20) This Regulation should respect the different systems for dealing with matters of succession applied in the Member States. For the purposes of this Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.
- (21) This Regulation should allow all notaries who have competence in matters of succession in the Member States to exercise such competence. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in this Regulation should depend on whether or not they are covered by the term 'court' for the purposes of this Regulation.
- (22) Acts issued by notaries in matters of succession in the Member States should circulate under this Regulation. When notaries exercise judicial functions they are bound by the rules of jurisdiction, and the decisions they give should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments.
- (23) In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.
- (24) In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.
- (25) With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.

- (26) Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law.
- (27) The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national.
- (28) One such mechanism should be to allow the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law. It would have to be determined on a case-by-case basis, depending in particular on the issue covered by the choice-of-court agreement, whether the agreement would have to be concluded between all parties concerned by the succession or whether some of them could agree to bring a specific issue before the chosen court in a situation where the decision by that court on that issue would not affect the rights of the other parties to the succession.
- (29) If succession proceedings are opened by a court of its own motion, as is the case in certain Member States, that court should close the proceedings if the parties agree to settle the succession amicably out of court in the Member State of the chosen law. Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State.
- (30) In order to ensure that the courts of all Member States may, on the same grounds, exercise jurisdiction in relation to the succession of persons not habitually resident in a Member State at the time of death, this Regulation should list exhaustively, in a hierarchical order, the grounds on which such subsidiary jurisdiction may be exercised.
- (31) In order to remedy, in particular, situations of denial of justice, this Regulation should provide a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a succession which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seized.
- (32) In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.
- (33) It should not be possible for a person who wishes to limit his liability for the debts under the succession to do so by a mere declaration to that effect before the courts or other competent authorities of the Member State of his habitual residence where the law applicable to the succession requires him to initiate specific legal proceedings, for instance inventory proceedings, before the competent court. A declaration made in such circumstances by a person in the Member State of his habitual residence in the form provided for by the law of that Member State should therefore not be formally valid for the purposes of this Regulation. Nor should the documents instituting the legal proceedings be regarded as declarations for the purposes of this Regulation.
- (34) In the interests of the harmonious functioning of justice, the giving of irreconcilable decisions in different Member States should be avoided. To that end, this Regulation should provide for general procedural rules similar to those of other Union instruments in the area of judicial cooperation in civil matters.
- (35) One such procedural rule is a *lis pendens* rule which will come into play if the same succession case is brought before different courts in different Member States. That rule will then determine which court should proceed to deal with the succession case.

- (36) Given that succession matters in some Member States may be dealt with by non-judicial authorities, such as notaries, who are not bound by the rules of jurisdiction under this Regulation, it cannot be excluded that an amicable out-of-court settlement and court proceedings relating to the same succession, or two amicable out-of-court settlements relating to the same succession, may be initiated in parallel in different Member States. In such a situation, it should be for the parties involved, once they become aware of the parallel proceedings, to agree among themselves how to proceed. If they cannot agree, the succession would have to be dealt with and decided upon by the courts having jurisdiction under this Regulation.
- (37) In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results. The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.
- (38) This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.
- (39) A choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. A choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.
- (40) A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law.
- (41) For the purposes of the application of this Regulation, the determination of the nationality or the multiple nationalities of a person should be resolved as a preliminary question. The issue of considering a person as a national of a State falls outside the scope of this Regulation and is subject to national law, including, where applicable, international Conventions, in full observance of the general principles of the European Union.
- (42) The law determined as the law applicable to the succession should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law. It should include questions relating to the administration of the estate and to liability for the debts under the succession. The payment of the debts under the succession may, depending, in particular, on the law applicable to the succession, include the taking into account of a specific ranking of the creditors.
- (43) The rules of jurisdiction laid down by this Regulation may, in certain cases, lead to a situation where the court having jurisdiction to rule on the succession will not be applying its own law. When that situation occurs in a Member State whose law provides for the mandatory appointment of an administrator of the estate, this Regulation should allow the courts of that Member State, when seised, to appoint one or more such administrators under their own law. This should be without prejudice to any choice made by the parties to settle the succession amicably out of court in another Member State where this is possible under the law of that Member State. In order to ensure a smooth coordination between the law applicable to the succession and the law of the Member State of the appointing court, the court should appoint the person(s) who would be entitled to administer the estate under the law applicable to the succession, such as for instance the executor of the will of the deceased or the heirs themselves or, if the law applicable to the succession so requires, a third-party administrator. The courts may, however, in specific cases where their law so requires, appoint a third party as administrator even if this is not provided for in the law applicable to the succession. If the deceased had appointed an executor of the will, that person may not be deprived of his powers unless the law applicable to the succession allows for the termination of his mandate.
- (44) The powers exercised by the administrators appointed in the Member State of the court seised should be the powers of administration which they may exercise under the law applicable to the succession. Thus, if, for instance, the heir is appointed as administrator he should have the powers to administer the estate which an heir

would have under that law. Where the powers of administration which may be exercised under the law applicable to the succession are not sufficient to preserve the assets of the estate or to protect the rights of the creditors or of other persons having guaranteed the debts of the deceased, the administrator(s) appointed in the Member State of the court seised may, on a residual basis, exercise powers of administration to that end provided for by the law of that Member State. Such residual powers could include, for instance, establishing a list of the assets of the estate and the debts under the succession, informing creditors of the opening of the succession and inviting them to make their claims known, and taking any provisional, including protective, measures intended to preserve the assets of the estate. The acts performed by an administrator in exercise of the residual powers should respect the law applicable to the succession as regards the transfer of ownership of succession property, including any transaction entered into by the beneficiaries prior to the appointment of the administrator, liability for the debts under the succession and the rights of the beneficiaries, including, where applicable, the right to accept or to waive the succession. Such acts could, for instance, only entail the alienation of assets or the payment of debts where this would be allowed under the law applicable to the succession. Where under the law applicable to the succession the appointment of a third-party administrator changes the liability of the heirs, such a change of liability should be respected.

- (45) This Regulation should not preclude creditors, for instance through a representative, from taking such further steps as may be available under national law, where applicable, in accordance with the relevant Union instruments, in order to safeguard their rights.
- (46) This Regulation should allow for potential creditors in other Member States where assets are located to be informed of the opening of the succession. In the context of the application of this Regulation, consideration should therefore be given to the possibility of establishing a mechanism, if appropriate by way of the e-Justice portal, to enable potential creditors in other Member States to access the relevant information so that they can make their claims known.
- (47) The law applicable to the succession should determine who the beneficiaries are in any given succession. Under most laws, the term 'beneficiaries' would cover heirs and legatees and persons entitled to a reserved share although, for instance, the legal position of legatees is not the same under all laws. Under some laws, the legatee may receive a direct share in the estate whereas under other laws the legatee may acquire only a claim against the heirs.
- (48) In order to ensure legal certainty for persons wishing to plan their succession in advance, this Regulation should lay down a specific conflict-of-laws rule concerning the admissibility and substantive validity of dispositions of property upon death. To ensure the uniform application of that rule, this Regulation should list which elements should be considered as elements pertaining to substantive validity. The examination of the substantive validity of a disposition of property upon death may lead to the conclusion that that disposition is without legal existence.
- (49) An agreement as to succession is a type of disposition of property upon death the admissibility and acceptance of which vary among the Member States. In order to make it easier for succession rights acquired as a result of an agreement as to succession to be accepted in the Member States, this Regulation should determine which law is to govern the admissibility of such agreements, their substantive validity and their binding effects between the parties, including the conditions for their dissolution.
- (50) The law which, under this Regulation, will govern the admissibility and substantive validity of a disposition of property upon death and, as regards agreements as to succession, the binding effects of such an agreement as between the parties, should be without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved.
- (51) Where reference is made in this Regulation to the law which would have been applicable to the succession of the person making a disposition of property upon death if he had died on the day on which the disposition was, as the case may be, made, modified or revoked, such reference should be understood as a reference to either the law of the State of the habitual residence of the person concerned on that day or, if he had made a choice of law under this Regulation, the law of the State of his nationality on that day.
- (52) This Regulation should regulate the validity as to form of all dispositions of property upon death made in writing by way of rules which are consistent with those of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. When determining whether a given disposition of property upon death is formally valid under this Regulation, the competent authority should disregard the fraudulent creation of an international element to circumvent the rules on formal validity.

- (53) For the purposes of this Regulation, any provision of law limiting the permitted forms of dispositions of property upon death by reference to certain personal qualifications of the person making the disposition, such as, for instance, his age, should be deemed to pertain to matters of form. This should not be interpreted as meaning that the law applicable to the formal validity of a disposition of property upon death under this Regulation should determine whether or not a minor has the capacity to make a disposition of property upon death. That law should only determine whether a personal qualification such as, for instance, minority should bar a person from making a disposition of property upon death in a certain form.
- (54) For economic, family or social considerations, certain immovable property, certain enterprises and other special categories of assets are subject to special rules in the Member State in which they are located imposing restrictions concerning or affecting the succession in respect of those assets. This Regulation should ensure the application of such special rules. However, this exception to the application of the law applicable to the succession requires a strict interpretation in order to remain compatible with the general objective of this Regulation. Therefore, neither conflict-of-laws rules subjecting immovable property to a law different from that applicable to movable property nor provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession under this Regulation may be regarded as constituting special rules imposing restrictions concerning or affecting the succession in respect of certain assets.
- (55) To ensure uniform handling of a situation in which it is uncertain in what order two or more persons whose succession would be governed by different laws died, this Regulation should lay down a rule providing that none of the deceased persons is to have any rights in the succession of the other or others.
- (56) In some situations an estate may be left without a claimant. Different laws provide differently for such situations. Under some laws, the State will be able to claim the vacant estate as an heir irrespective of where the assets are located. Under some other laws, the State will be able to appropriate only the assets located on its territory. This Regulation should therefore lay down a rule providing that the application of the law applicable to the succession should not preclude a Member State from appropriating under its own law the assets located on its territory. However, to ensure that this rule is not detrimental to the creditors of the estate, a proviso should be added enabling the creditors to seek satisfaction of their claims out of all the assets of the estate, irrespective of their location.
- (57) The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases regard should be had to the private international law rules of that State. If those rules provide for *renvoi* either to the law of a Member State or to the law of a third State which would apply its own law to the succession, such *renvoi* should be accepted in order to ensure international consistency. *Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State.
- (58) Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.
- (59) In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings, this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial cooperation in civil matters.
- (60) In order to take into account the different systems for dealing with matters of succession in the Member States, this Regulation should guarantee the acceptance and enforceability in all Member States of authentic instruments in matters of succession.
- (61) Authentic instruments should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects. When determining the evidentiary effects of a given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin.

- (62) The 'authenticity' of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.
- (63) The term 'the legal acts or legal relationships recorded in an authentic instrument' should be interpreted as referring to the contents as to substance recorded in the authentic instrument. The legal acts recorded in an authentic instrument could be, for instance, the agreement between the parties on the sharing-out or the distribution of the estate, or a will or an agreement as to succession, or another declaration of intent. The legal relationships could be, for instance, the determination of the heirs and other beneficiaries as established under the law applicable to the succession, their respective shares and the existence of a reserved share, or any other element established under the law applicable to the succession. A party wishing to challenge the legal acts or legal relationships recorded in an authentic instrument should do so before the courts having jurisdiction under this Regulation, which should decide on the challenge in accordance with the law applicable to the succession.
- (64) If a question relating to the legal acts or legal relationships recorded in an authentic instrument is raised as an incidental question in proceedings before a court of a Member State, that court should have jurisdiction over that question.
- (65) An authentic instrument which is being challenged should not produce any evidentiary effects in a Member State other than the Member State of origin as long as the challenge is pending. If the challenge concerns only a specific matter relating to the legal acts or legal relationships recorded in the authentic instrument, the authentic instrument in question should not produce any evidentiary effects in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending. An authentic instrument which has been declared invalid as a result of a challenge should cease to produce any evidentiary effects.
- (66) Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.
- (67) In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State, for instance in a Member State in which succession property is located. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Succession (hereinafter referred to as 'the Certificate'), to be issued for use in another Member State. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States.
- (68) The authority which issues the Certificate should have regard to the formalities required for the registration of immovable property in the Member State in which the register is kept. For that purpose, this Regulation should provide for an exchange of information on such formalities between the Member States.
- (69) The use of the Certificate should not be mandatory. This means that persons entitled to apply for a Certificate should be under no obligation to do so but should be free to use the other instruments available under this Regulation (decisions, authentic instruments and court settlements). However, no authority or person presented with a Certificate issued in another Member State should be entitled to request that a decision, authentic instrument or court settlement be presented instead of the Certificate.
- (70) The Certificate should be issued in the Member State whose courts have jurisdiction under this Regulation. It should be for each Member State to determine in its internal legislation which authorities are to have competence to issue the Certificate, whether they be courts as defined for the purposes of this Regulation or other authorities with competence in matters of succession, such as, for instance, notaries. It should also be for each Member State to determine in its internal legislation whether the issuing authority may involve other competent bodies in the issuing process, for instance bodies competent to receive statutory declarations in lieu of an oath. The Member States should

communicate to the Commission the relevant information concerning their issuing authorities in order for that information to be made publicly available.

over conventions concluded exclusively between two or more Member States in so far as such conventions concern matters governed by this Regulation.

- (71) The Certificate should produce the same effects in all Member States. It should not be an enforceable title in its own right but should have an evidentiary effect and should be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death. The evidentiary effect of the Certificate should not extend to elements which are not governed by this Regulation, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased. Any person who makes payments or passes on succession property to a person indicated in the Certificate as being entitled to accept such payment or property as an heir or legatee should be afforded appropriate protection if he acted in good faith relying on the accuracy of the information certified in the Certificate. The same protection should be afforded to any person who, relying on the accuracy of the information certified in the Certificate, buys or receives succession property from a person indicated in the Certificate as being entitled to dispose of such property. The protection should be ensured if certified copies which are still valid are presented. Whether or not such an acquisition of property by a third person is effective should not be determined by this Regulation.
- (72) The competent authority should issue the Certificate upon request. The original of the Certificate should remain with the issuing authority, which should issue one or more certified copies of the Certificate to the applicant and to any other person demonstrating a legitimate interest. This should not preclude a Member State, in accordance with its national rules on public access to documents, from allowing copies of the Certificate to be disclosed to members of the public. This Regulation should provide for redress against decisions of the issuing authority, including decisions to refuse the issue of a Certificate. Where the Certificate is rectified, modified or withdrawn, the issuing authority should inform the persons to whom certified copies have been issued so as to avoid wrongful use of such copies.
- (73) Respect for international commitments entered into by the Member States means that this Regulation should not affect the application of international conventions to which one or more Member States are party at the time when this Regulation is adopted. In particular, the Member States which are Contracting Parties to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions should be able to continue to apply the provisions of that Convention instead of the provisions of this Regulation with regard to the formal validity of wills and joint wills. Consistency with the general objectives of this Regulation requires, however, that this Regulation take precedence, as between Member States,
- (74) This Regulation should not preclude Member States which are parties to the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration from continuing to apply certain provisions of that Convention, as revised by the intergovernmental agreement between the States parties thereto.
- (75) In order to facilitate the application of this Regulation, provision should be made for an obligation requiring the Member States to communicate certain information regarding their legislation and procedures relating to succession within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC <sup>(1)</sup>. In order to allow for the timely publication in the *Official Journal of the European Union* of all information of relevance for the practical application of this Regulation, the Member States should also communicate such information to the Commission before this Regulation starts to apply.
- (76) Equally, to facilitate the application of this Regulation and to allow for the use of modern communication technologies, standard forms should be prescribed for the attestations to be provided in connection with the application for a declaration of enforceability of a decision, authentic instrument or court settlement and for the application for a European Certificate of Succession, as well as for the Certificate itself.
- (77) In calculating the periods and time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits <sup>(2)</sup> should apply.
- (78) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission with regard to the establishment and subsequent amendment of the attestations and forms pertaining to the declaration of enforceability of decisions, court settlements and authentic instruments and to the European Certificate of Succession. Those powers should be exercised in accordance with 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

<sup>(1)</sup> OJ L 174, 27.6.2001, p. 25.

<sup>(2)</sup> OJ L 124, 8.6.1971, p. 1.

for control by Member States of the Commission's exercise of implementing powers <sup>(1)</sup>.

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### SCOPE AND DEFINITIONS

#### Article 1

##### Scope

- (79) The advisory procedure should be used for the adoption of implementing acts establishing and subsequently amending the attestations and forms provided for in this Regulation in accordance with the procedure laid down in Article 4 of Regulation (EU) No 182/2011.
- (80) Since the objectives of this Regulation, namely the free movement of persons, the organisation in advance by citizens of their succession in a Union context and the protection of the rights of heirs and legatees and of persons close to the deceased, as well as of the creditors of the succession, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, 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 those objectives.
- (81) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. This Regulation must be applied by the courts and other competent authorities of the Member States in observance of those rights and principles.
- (82) In accordance with Articles 1 and 2 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 Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom and Ireland of notifying their intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol.
- (83) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,
1. This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.
2. The following shall be excluded from the scope of this Regulation:
- (a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;
  - (b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;
  - (c) questions relating to the disappearance, absence or presumed death of a natural person;
  - (d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;
  - (e) maintenance obligations other than those arising by reason of death;
  - (f) the formal validity of dispositions of property upon death made orally;
  - (g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);
  - (h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;

<sup>(1)</sup> OJ L 55, 28.2.2011, p. 13.

- (i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;
  - (j) the creation, administration and dissolution of trusts;
  - (k) the nature of rights *in rem*; and
  - (l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.
- (f) 'Member State of enforcement' means the Member State in which the declaration of enforceability or the enforcement of the decision, court settlement or authentic instrument is sought;
  - (g) 'decision' means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;
  - (h) 'court settlement' means a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings;

#### Article 2

### Competence in matters of succession within the Member States

This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession.

#### Article 3

### Definitions

1. For the purposes of this Regulation:

- (a) 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession;
- (b) 'agreement as to succession' means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;
- (c) 'joint will' means a will drawn up in one instrument by two or more persons;
- (d) 'disposition of property upon death' means a will, a joint will or an agreement as to succession;
- (e) 'Member State of origin' means the Member State in which the decision has been given, the court settlement approved or concluded, the authentic instrument established or the European Certificate of Succession issued;

- (i) 'authentic instrument' means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

- (i) relates to the signature and the content of the authentic instrument; and

- (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate:

- (a) may be made the subject of an appeal to or review by a judicial authority; and
- (b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 79.

## CHAPTER II

**JURISDICTION***Article 4***General jurisdiction**

The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

*Article 5***Choice-of-court agreement**

1. Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.

2. Such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties concerned. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

*Article 6***Declining of jurisdiction in the event of a choice of law**

Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised pursuant to Article 4 or Article 10:

- (a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; or
- (b) shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law.

*Article 7***Jurisdiction in the event of a choice of law**

The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if:

- (a) a court previously seised has declined jurisdiction in the same case pursuant to Article 6;
- (b) the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State; or
- (c) the parties to the proceedings have expressly accepted the jurisdiction of the court seised.

*Article 8***Closing of own-motion proceedings in the event of a choice of law**

A court which has opened succession proceedings of its own motion under Article 4 or Article 10 shall close the proceedings if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22.

*Article 9***Jurisdiction based on appearance**

1. Where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court.

2. If the jurisdiction of the court referred to in paragraph 1 is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction.

In that event, jurisdiction to rule on the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10.

*Article 10***Subsidiary jurisdiction**

1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as:

- (a) the deceased had the nationality of that Member State at the time of death; or, failing that,

(b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.

2. Where no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

#### Article 11

##### **Forum necessitatis**

Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

#### Article 12

##### **Limitation of proceedings**

1. Where the estate of the deceased comprises assets located in a third State, the court seised to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.

2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

#### Article 13

##### **Acceptance or waiver of the succession, of a legacy or of a reserved share**

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

#### Article 14

##### **Seising of a court**

For the purposes of this Chapter, a court shall be deemed to be seised:

- (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;
- (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or
- (c) if the proceedings are opened of the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.

#### Article 15

##### **Examination as to jurisdiction**

Where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

#### Article 16

##### **Examination as to admissibility**

1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to that end.

2. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters (service of documents)<sup>(1)</sup> shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

<sup>(1)</sup> OJ L 324, 10.12.2007, p. 79.

3. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

#### Article 17

##### **Lis pendens**

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

#### Article 18

##### **Related actions**

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where those actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

#### Article 19

##### **Provisional, including protective, measures**

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

#### CHAPTER III

##### **APPLICABLE LAW**

#### Article 20

##### **Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

#### Article 21

##### **General rule**

1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

#### Article 22

##### **Choice of law**

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

#### Article 23

##### **The scope of the applicable law**

1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.

2. That law shall govern in particular:
- (a) the causes, time and place of the opening of the succession;
  - (b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;
  - (c) the capacity to inherit;
  - (d) disinheritance and disqualification by conduct;
  - (e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;
  - (f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);
  - (g) liability for the debts under the succession;
  - (h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;
  - (i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and
  - (j) the sharing-out of the estate.

#### Article 24

### Dispositions of property upon death other than agreements as to succession

1. A disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made.

2. Notwithstanding paragraph 1, a person may choose as the law to govern his disposition of property upon death, as regards its admissibility and substantive validity, the law which that

person could have chosen in accordance with Article 22 on the conditions set out therein.

3. Paragraph 1 shall apply, as appropriate, to the modification or revocation of a disposition of property upon death other than an agreement as to succession. In the event of a choice of law in accordance with paragraph 2, the modification or revocation shall be governed by the chosen law.

#### Article 25

### Agreements as to succession

1. An agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

2. An agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.

An agreement as to succession which is admissible pursuant to the first subparagraph shall be governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, with which it has the closest connection.

3. Notwithstanding paragraphs 1 and 2, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.

#### Article 26

### Substantive validity of dispositions of property upon death

1. For the purposes of Articles 24 and 25 the following elements shall pertain to substantive validity:

- (a) the capacity of the person making the disposition of property upon death to make such a disposition;

- (b) the particular causes which bar the person making the disposition from disposing in favour of certain persons or which bar a person from receiving succession property from the person making the disposition;
- (c) the admissibility of representation for the purposes of making a disposition of property upon death;
- (d) the interpretation of the disposition;
- (e) fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.

2. Where a person has the capacity to make a disposition of property upon death under the law applicable pursuant to Article 24 or Article 25, a subsequent change of the law applicable shall not affect his capacity to modify or revoke such a disposition.

#### Article 27

#### **Formal validity of dispositions of property upon death made in writing**

1. A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:

- (a) of the State in which the disposition was made or the agreement as to succession concluded;
- (b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;
- (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;
- (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or
- (e) in so far as immovable property is concerned, of the State in which that property is located.

The determination of the question whether or not the testator or any person whose succession is concerned by the agreement

as to succession had his domicile in a particular State shall be governed by the law of that State.

2. Paragraph 1 shall also apply to dispositions of property upon death modifying or revoking an earlier disposition. The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under paragraph 1, the disposition of property upon death which has been modified or revoked was valid.

3. For the purposes of this Article, any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications to be possessed by any witnesses required for the validity of a disposition of property upon death.

#### Article 28

#### **Validity as to form of a declaration concerning acceptance or waiver**

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of:

- (a) the law applicable to the succession pursuant to Article 21 or Article 22; or
- (b) the law of the State in which the person making the declaration has his habitual residence.

#### Article 29

#### **Special rules on the appointment and powers of an administrator of the estate in certain situations**

1. Where the appointment of an administrator is mandatory or mandatory upon request under the law of the Member State whose courts have jurisdiction to rule on the succession pursuant to this Regulation and the law applicable to the succession is a foreign law, the courts of that Member State may, when seised, appoint one or more administrators of the estate under their own law, subject to the conditions laid down in this Article.

The administrator(s) appointed pursuant to this paragraph shall be the person(s) entitled to execute the will of the deceased and/or to administer the estate under the law applicable to the succession. Where that law does not provide for the administration of the estate by a person who is not a beneficiary, the courts of the Member State in which the administrator is to be appointed may appoint a third-party administrator under their own law if that law so requires and there is a serious conflict of interests between the beneficiaries or between the beneficiaries and the creditors or other persons having guaranteed the debts of the deceased, a disagreement amongst the beneficiaries on the administration of the estate or a complex estate to administer due to the nature of the assets.

The administrator(s) appointed pursuant to this paragraph shall be the only person(s) entitled to exercise the powers referred to in paragraph 2 or 3.

2. The person(s) appointed as administrator(s) pursuant to paragraph 1 shall exercise the powers to administer the estate which he or they may exercise under the law applicable to the succession. The appointing court may, in its decision, lay down specific conditions for the exercise of such powers in accordance with the law applicable to the succession.

Where the law applicable to the succession does not provide for sufficient powers to preserve the assets of the estate or to protect the rights of the creditors or of other persons having guaranteed the debts of the deceased, the appointing court may decide to allow the administrator(s) to exercise, on a residual basis, the powers provided for to that end by its own law and may, in its decision, lay down specific conditions for the exercise of such powers in accordance with that law.

When exercising such residual powers, however, the administrator(s) shall respect the law applicable to the succession as regards the transfer of ownership of succession property, liability for the debts under the succession, the rights of the beneficiaries, including, where applicable, the right to accept or to waive the succession, and, where applicable, the powers of the executor of the will of the deceased.

3. Notwithstanding paragraph 2, the court appointing one or more administrators pursuant to paragraph 1 may, by way of exception, where the law applicable to the succession is the law of a third State, decide to vest in those administrators all the powers of administration provided for by the law of the Member State in which they are appointed.

When exercising such powers, however, the administrators shall respect, in particular, the determination of the beneficiaries and

their succession rights, including their rights to a reserved share or claim against the estate or the heirs under the law applicable to the succession.

#### Article 30

##### **Special rules imposing restrictions concerning or affecting the succession in respect of certain assets**

Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.

#### Article 31

##### **Adaptation of rights *in rem***

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

#### Article 32

##### **Commorientes**

Where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for that situation or make no provision for it at all, none of the deceased persons shall have any rights to the succession of the other or others.

#### Article 33

##### **Estate without a claimant**

To the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole.

## Article 34

**Renvoi**

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

- (a) to the law of a Member State; or
- (b) to the law of another third State which would apply its own law.

2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.

## Article 35

**Public policy (*ordre public*)**

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

## Article 36

**States with more than one legal system – territorial conflicts of laws**

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

- (a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the deceased, be construed as referring to the law of the territorial unit in which the deceased had his habitual residence at the time of death;
- (b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the deceased, be construed as referring to the law of the territorial unit with which the deceased had the closest connection;
- (c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the

law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

3. Notwithstanding paragraph 2, any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the relevant law pursuant to Article 27, in the absence of internal conflict-of-laws rules in that State, be construed as referring to the law of the territorial unit with which the testator or the persons whose succession is concerned by the agreement as to succession had the closest connection.

## Article 37

**States with more than one legal system – inter-personal conflicts of laws**

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of succession, any reference to the law of that State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the deceased had the closest connection shall apply.

## Article 38

**Non-application of this Regulation to internal conflicts of laws**

A Member State which comprises several territorial units each of which has its own rules of law in respect of succession shall not be required to apply this Regulation to conflicts of laws arising between such units only.

## CHAPTER IV

**RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS**

## Article 39

**Recognition**

1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedure provided for in Articles 45 to 58, apply for that decision to be recognised.

3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

#### Article 40

##### Grounds of non-recognition

A decision shall not be recognised:

- (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;
- (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;
- (c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;
- (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

#### Article 41

##### No review as to the substance

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

#### Article 42

##### Staying of recognition proceedings

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.

#### Article 43

##### Enforceability

Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 45 to 58.

#### Article 44

##### Determination of domicile

To determine whether, for the purposes of the procedure provided for in Articles 45 to 58, a party is domiciled in the Member State of enforcement, the court seised shall apply the internal law of that Member State.

#### Article 45

##### Jurisdiction of local courts

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 78.
2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

#### Article 46

##### Procedure

1. The application procedure shall be governed by the law of the Member State of enforcement.
2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.
3. The application shall be accompanied by the following documents:

- (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
- (b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 81(2), without prejudice to Article 47.

*Article 47***Non-production of the attestation**

1. If the attestation referred to in point (b) of Article 46(3) is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.
2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.

*Article 48***Declaration of enforceability**

The decision shall be declared enforceable immediately on completion of the formalities in Article 46 without any review under Article 40. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

*Article 49***Notice of the decision on the application for a declaration of enforceability**

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.
2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.

*Article 50***Appeal against the decision on the application for a declaration of enforceability**

1. The decision on the application for a declaration of enforceability may be appealed against by either party.
2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 78.
3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an

appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

*Article 51***Procedure to contest the decision given on appeal**

The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 78.

*Article 52***Refusal or revocation of a declaration of enforceability**

The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 40. It shall give its decision without delay.

*Article 53***Staying of proceedings**

The court with which an appeal is lodged under Article 50 or Article 51 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

*Article 54***Provisional, including protective, measures**

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 48 being required.
2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 50(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

#### Article 55

##### Partial enforceability

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

#### Article 56

##### Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

#### Article 57

##### No security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

#### Article 58

##### No charge, duty or fee

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

### CHAPTER V

## AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

#### Article 59

##### Acceptance of authentic instruments

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member

State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State as long as the challenge is pending before the competent court.

3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of succession, that court shall have jurisdiction over that question.

#### Article 60

##### Enforceability of authentic instruments

1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.

2. For the purposes of point (b) of Article 46(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).

3. The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

### Article 61

#### Enforceability of court settlements

1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.

2. For the purposes of point (b) of Article 46(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).

3. The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only if enforcement of the court settlement is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

## CHAPTER VI

### EUROPEAN CERTIFICATE OF SUCCESSION

#### Article 62

##### Creation of a European Certificate of Succession

1. This Regulation creates a European Certificate of Succession (hereinafter referred to as 'the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

2. The use of the Certificate shall not be mandatory.

3. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter.

#### Article 63

##### Purpose of the Certificate

1. The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

2. The Certificate may be used, in particular, to demonstrate one or more of the following:

- (a) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate;
- (b) the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate;
- (c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.

#### Article 64

##### Competence to issue the Certificate

The Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11. The issuing authority shall be:

- (a) a court as defined in Article 3(2); or
- (b) another authority which, under national law, has competence to deal with matters of succession.

#### Article 65

##### Application for a Certificate

1. The Certificate shall be issued upon application by any person referred to in Article 63(1) (hereinafter referred to as 'the applicant').

2. For the purposes of submitting an application, the applicant may use the form established in accordance with the advisory procedure referred to in Article 81(2).

3. The application shall contain the information listed below, to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity, without prejudice to Article 66(2):

- (a) details concerning the deceased: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;
- (b) details concerning the applicant: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any;

- (c) details concerning the representative of the applicant, if any: surname (if applicable, surname at birth), given name(s), address and representative capacity;
- (d) details of the spouse or partner of the deceased and, if applicable, ex-spouse(s) or ex-partner(s): surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable) and address;
- (e) details of other possible beneficiaries under a disposition of property upon death and/or by operation of law: surname and given name(s) or organisation name, identification number (if applicable) and address;
- (f) the intended purpose of the Certificate in accordance with Article 63;
- (g) the contact details of the court or other competent authority which is dealing with or has dealt with the succession as such, if applicable;
- (h) the elements on which the applicant founds, as appropriate, his claimed right to succession property as a beneficiary and/or his right to execute the will of the deceased and/or to administer the estate of the deceased;
- (i) an indication of whether the deceased had made a disposition of property upon death; if neither the original nor a copy is appended, an indication regarding the location of the original;
- (j) an indication of whether the deceased had entered into a marriage contract or into a contract regarding a relationship which may have comparable effects to marriage; if neither the original nor a copy of the contract is appended, an indication regarding the location of the original;
- (k) an indication of whether any of the beneficiaries has made a declaration concerning acceptance or waiver of the succession;
- (l) a declaration stating that, to the applicant's best knowledge, no dispute is pending relating to the elements to be certified;
- (m) any other information which the applicant deems useful for the purposes of the issue of the Certificate.

#### Article 66

##### Examination of the application

1. Upon receipt of the application the issuing authority shall verify the information and declarations and the documents and other evidence provided by the applicant. It shall carry out the enquiries necessary for that verification of its own motion where this is provided for or authorised by its own law, or shall invite the applicant to provide any further evidence which it deems necessary.

2. Where the applicant has been unable to produce copies of the relevant documents which satisfy the conditions necessary to establish their authenticity, the issuing authority may decide to accept other forms of evidence.

3. Where this is provided for by its own law and subject to the conditions laid down therein, the issuing authority may require that declarations be made on oath or by a statutory declaration in lieu of an oath.

4. The issuing authority shall take all necessary steps to inform the beneficiaries of the application for a Certificate. It shall, if necessary for the establishment of the elements to be certified, hear any person involved and any executor or administrator and make public announcements aimed at giving other possible beneficiaries the opportunity to invoke their rights.

5. For the purposes of this Article, the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the land registers, the civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime or an equivalent property regime of the deceased, where that competent authority would be authorised, under national law, to provide another national authority with such information.

#### Article 67

##### Issue of the Certificate

1. The issuing authority shall issue the Certificate without delay in accordance with the procedure laid down in this Chapter when the elements to be certified have been established under the law applicable to the succession or under any other law applicable to specific elements. It shall use the form established in accordance with the advisory procedure referred to in Article 81(2).

The issuing authority shall not issue the Certificate in particular if:

- (a) the elements to be certified are being challenged; or
- (b) the Certificate would not be in conformity with a decision covering the same elements.

2. The issuing authority shall take all necessary steps to inform the beneficiaries of the issue of the Certificate.

#### Article 68

##### Contents of the Certificate

The Certificate shall contain the following information, to the extent required for the purpose for which it is issued:

- (a) the name and address of the issuing authority;
- (b) the reference number of the file;
- (c) the elements on the basis of which the issuing authority considers itself competent to issue the Certificate;
- (d) the date of issue;
- (e) details concerning the applicant: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any;
- (f) details concerning the deceased: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;
- (g) details concerning the beneficiaries: surname (if applicable, surname at birth), given name(s) and identification number (if applicable);
- (h) information concerning a marriage contract entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage, and information concerning the matrimonial property regime or equivalent property regime;
- (i) the law applicable to the succession and the elements on the basis of which that law has been determined;

- (j) information as to whether the succession is testate or intestate, including information concerning the elements giving rise to the rights and/or powers of the heirs, legatees, executors of wills or administrators of the estate;
- (k) if applicable, information in respect of each beneficiary concerning the nature of the acceptance or waiver of the succession;
- (l) the share for each heir and, if applicable, the list of rights and/or assets for any given heir;
- (m) the list of rights and/or assets for any given legatee;
- (n) the restrictions on the rights of the heir(s) and, as appropriate, legatee(s) under the law applicable to the succession and/or under the disposition of property upon death;
- (o) the powers of the executor of the will and/or the administrator of the estate and the restrictions on those powers under the law applicable to the succession and/or under the disposition of property upon death.

#### Article 69

##### Effects of the Certificate

1. The Certificate shall produce its effects in all Member States, without any special procedure being required.
2. The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate.
3. Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

4. Where a person mentioned in the Certificate as authorised to dispose of succession property disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

5. The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2).

#### Article 70

##### **Certified copies of the Certificate**

1. The issuing authority shall keep the original of the Certificate and shall issue one or more certified copies to the applicant and to any person demonstrating a legitimate interest.

2. The issuing authority shall, for the purposes of Articles 71(3) and 73(2), keep a list of persons to whom certified copies have been issued pursuant to paragraph 1.

3. The certified copies issued shall be valid for a limited period of six months, to be indicated in the certified copy by way of an expiry date. In exceptional, duly justified cases, the issuing authority may, by way of derogation, decide that the period of validity is to be longer. Once this period has elapsed, any person in possession of a certified copy must, in order to be able to use the Certificate for the purposes indicated in Article 63, apply for an extension of the period of validity of the certified copy or request a new certified copy from the issuing authority.

#### Article 71

##### **Rectification, modification or withdrawal of the Certificate**

1. The issuing authority shall, at the request of any person demonstrating a legitimate interest or of its own motion, rectify the Certificate in the event of a clerical error.

2. The issuing authority shall, at the request of any person demonstrating a legitimate interest or, where this is possible under national law, of its own motion, modify or withdraw the Certificate where it has been established that the Certificate or individual elements thereof are not accurate.

3. The issuing authority shall without delay inform all persons to whom certified copies of the Certificate have been

issued pursuant to Article 70(1) of any rectification, modification or withdrawal thereof.

#### Article 72

##### **Redress procedures**

1. Decisions taken by the issuing authority pursuant to Article 67 may be challenged by any person entitled to apply for a Certificate.

Decisions taken by the issuing authority pursuant to Article 71 and point (a) of Article 73(1) may be challenged by any person demonstrating a legitimate interest.

The challenge shall be lodged before a judicial authority in the Member State of the issuing authority in accordance with the law of that State.

2. If, as a result of a challenge as referred to in paragraph 1, it is established that the Certificate issued is not accurate, the competent judicial authority shall rectify, modify or withdraw the Certificate or ensure that it is rectified, modified or withdrawn by the issuing authority.

If, as a result of a challenge as referred to in paragraph 1, it is established that the refusal to issue the Certificate was unjustified, the competent judicial authority shall issue the Certificate or ensure that the issuing authority re-assesses the case and makes a fresh decision.

#### Article 73

##### **Suspension of the effects of the Certificate**

1. The effects of the Certificate may be suspended by:

(a) the issuing authority, at the request of any person demonstrating a legitimate interest, pending a modification or withdrawal of the Certificate pursuant to Article 71; or

(b) the judicial authority, at the request of any person entitled to challenge a decision taken by the issuing authority pursuant to Article 72, pending such a challenge.

2. The issuing authority or, as the case may be, the judicial authority shall without delay inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 70(1) of any suspension of the effects of the Certificate.

During the suspension of the effects of the Certificate no further certified copies of the Certificate may be issued.

## CHAPTER VII

## GENERAL AND FINAL PROVISIONS

## Article 74

**Legalisation and other similar formalities**

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

## Article 75

**Relationship with existing international conventions**

1. This Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation.

In particular, Member States which are Contracting Parties to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions shall continue to apply the provisions of that Convention instead of Article 27 of this Regulation with regard to the formal validity of wills and joint wills.

2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

3. This Regulation shall not preclude the application of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised by the intergovernmental agreement between those States of 1 June 2012, by the Member States which are parties thereto, in so far as it provides for:

- (a) rules on the procedural aspects of estate administration as defined by the Convention and assistance in that regard by the authorities of the States Contracting Parties to the Convention; and
- (b) simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of succession.

## Article 76

**Relationship with Council Regulation (EC) No 1346/2000**

This Regulation shall not affect the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings <sup>(1)</sup>.

## Article 77

**Information made available to the public**

The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to succession, including information on the type of authority which has competence in matters of succession and information on the type of authority competent to receive declarations of acceptance or waiver of the succession, of a legacy or of a reserved share.

The Member States shall also provide fact sheets listing all the documents and/or information usually required for the purposes of registration of immovable property located on their territory.

The Member States shall keep the information permanently updated.

## Article 78

**Information on contact details and procedures**

1. By 16 January 2014, the Member States shall communicate to the Commission:

- (a) the names and contact details of the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 45(1) and with appeals against decisions on such applications in accordance with Article 50(2);
- (b) the procedures to contest the decision given on appeal referred to in Article 51;
- (c) the relevant information regarding the authorities competent to issue the Certificate pursuant to Article 64; and
- (d) the redress procedures referred to in Article 72.

The Member States shall apprise the Commission of any subsequent changes to that information.

<sup>(1)</sup> OJ L 160, 30.6.2000, p. 1.

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the *Official Journal of the European Union*, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.

3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

#### Article 79

##### **Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)**

1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).

2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.

3. The Commission shall publish the list and any subsequent amendments in the *Official Journal of the European Union*.

4. The Commission shall make all information notified in accordance with paragraphs 1 and 2 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

#### Article 80

##### **Establishment and subsequent amendment of the attestations and forms referred to in Articles 46, 59, 60, 61, 65 and 67**

The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in Articles 46, 59, 60, 61, 65 and 67. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 81(2).

#### Article 81

##### **Committee procedure**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

#### Article 82

##### **Review**

By 18 August 2025 the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of any practical problems encountered in relation to parallel out-of-court settlements of succession cases in different Member States or an out-of-court settlement in one Member State effected in parallel with a settlement before a court in another Member State. The report shall be accompanied, where appropriate, by proposals for amendments.

#### Article 83

##### **Transitional provisions**

1. This Regulation shall apply to the succession of persons who die on or after 17 August 2015.

2. Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.

3. A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.

4. If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

*Article 84***Entry into force**

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

It shall apply from 17 August 2015, except for Articles 77 and 78, which shall apply from 16 January 2014, and Articles 79, 80 and 81, which shall apply from 5 July 2012.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 4 July 2012.

*For the European Parliament*  
*The President*  
M. SCHULZ

*For the Council*  
*The President*  
A. D. MAVROYIANNIS

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**REGULATION (EU) No 651/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 4 July 2012**  
**on the issuance of euro coins**

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 133 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>,

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

Whereas:

- (1) The Council conclusions of 23 November 1998 and of 5 November 2002 on euro coins intended for collection, the Commission Recommendation 2009/23/EC of 19 December 2008 on common guidelines for the national sides and the issuance of euro coins intended for circulation <sup>(3)</sup>, endorsed by Council conclusions of 10 February 2009, and the Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins <sup>(4)</sup>, recommend practices regarding the issuance of euro coins intended for circulation, including commemorative euro coins, consultation prior to the destruction of fit euro circulation coins and the use of euro collector coins.
- (2) The lack of mandatory provisions for the issuance of euro coins may result in different practices among Member States and does not achieve a sufficiently integrated framework for the single currency. In the interests of transparency and legal certainty, it is therefore necessary to introduce binding rules for the issuance of euro coins.

(3) In accordance with Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro <sup>(5)</sup>, coins denominated in euro and cent and complying with the denominations and technical specifications laid down by the Council have the status of legal tender in all Member States whose currency is the euro. Denominations and technical specifications of euro coins are laid down in Council Regulation (EC) No 975/98 of 3 May 1998 on denominations and technical specifications of euro coins intended for circulation <sup>(6)</sup>.

(4) Member States whose currency is the euro should also be able to issue 2-euro commemorative coins to celebrate specific subjects, subject to limits set per year and per issuing Member State for the number of issues of such coins. It is necessary to establish certain volume limits for commemorative euro coins in order to ensure that such coins remain a minor percentage of the total number of the 2-euro coins in circulation. Such volume limits should, however, allow for the issuance of a sufficient volume of coins to ensure that commemorative euro coins can circulate effectively.

(5) Member States whose currency is the euro should also be able to issue euro collector coins, which are not intended for circulation and which should be readily distinguishable from circulation coins. Euro collector coins should have the status of legal tender only in the Member State of issuance and should not be issued with a view to their entry into circulation.

(6) It is appropriate that issuances of euro collector coins are accounted for in the volume of coins to be approved by the European Central Bank, but on an aggregate basis rather than for each individual issue.

(7) The use of different denominations of euro coins and euro banknotes, as currently devised, should be periodically and carefully examined by the competent institutions against the criteria of cost and public acceptability. In particular, the Commission should conduct an impact assessment on the continued issuance of 1- and 2-cent coins.

(8) In order to avoid that fit euro circulation coins are destroyed by one Member State while there may be a need of such coins in another, Member States should consult each other prior to the destruction of such coins,

<sup>(1)</sup> OJ C 273, 16.9.2011, p. 2.

<sup>(2)</sup> Position of the European Parliament of 22 May 2012 (not yet published in the Official Journal) and decision of the Council of 26 June 2012.

<sup>(3)</sup> OJ L 9, 14.1.2009, p. 52.

<sup>(4)</sup> OJ L 83, 30.3.2010, p. 70.

<sup>(5)</sup> OJ L 139, 11.5.1998, p. 1.

<sup>(6)</sup> OJ L 139, 11.5.1998, p. 6.

HAVE ADOPTED THIS REGULATION:

#### Article 1

##### Definitions

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

- (1) 'circulation coins' means euro coins intended for circulation, the denominations and technical specifications of which are laid down in Regulation (EC) No 975/98;
- (2) 'commemorative coins' means circulation coins, which are intended to commemorate a specific subject as specified in Article 1h of Regulation (EC) No 975/98;
- (3) 'collector coins' means euro coins intended for collection that are not issued with a view to their entry into circulation.

#### Article 2

##### Types of euro coin

1. Member States may issue two types of euro coin: circulation coins and collector coins.
2. The Commission shall conduct an impact assessment on the continued issuance of 1- and 2-cent coins. That impact assessment shall include a cost-benefit analysis which takes into account the real production costs of those coins set against their value and benefits.

#### Article 3

##### Issuance of circulation coins

1. Circulation coins shall be issued and put into circulation at face value.
2. A minor proportion, not exceeding 5 % of the cumulated total net value and volume of circulation coins issued by a Member State, taking into account only years with positive net issuance, may be put on the market above face value if justified by the special quality of the coin, a special packaging or any additional services provided.

#### Article 4

##### Issuance of commemorative coins

1. Each Member State whose currency is the euro may only issue two commemorative coins per year, save where:
  - (a) commemorative coins are collectively issued by all Member States whose currency is the euro; or

- (b) a commemorative coin is issued on the occasion of a temporary vacancy or a provisional occupation of the function of Head of State.

2. The total number of commemorative coins put into circulation for each individual issue shall not exceed the higher of the following two ceilings:

- (a) 0,1 % of the cumulated total net number of 2-euro coins put into circulation by all Member States whose currency is the euro up to the beginning of the year preceding the year of issuance of the commemorative coin; this ceiling may be raised to 2,0 % of the cumulated total net number of 2-euro coins of all Member States whose currency is the euro if a widely recognised and highly symbolic subject is commemorated, in which case the issuing Member State shall refrain from launching another commemorative coin issue using the raised ceiling during the subsequent four years and shall set out the reasons for choosing the raised ceiling; or
  - (b) 5,0 % of the cumulated total net number of 2-euro coins put into circulation by the Member State concerned up to the beginning of the year preceding the year of issuance of the commemorative coin.

3. The decision whether to issue commemorative coins with a common design collectively issued by all Member States whose currency is the euro shall be taken by the Council. The voting rights of the Member States whose currency is not the euro shall be suspended for the adoption of that decision.

#### Article 5

##### Issuance of collector coins

1. Collector coins shall have the status of legal tender only in the issuing Member State.

The identity of the issuing Member State shall be clearly and easily recognisable on the coin.

2. In order to be easily differentiated from circulation coins, collector coins shall meet all of the following criteria:

- (a) their face value must be different from the face values of circulation coins;
  - (b) their images must not be similar to the common sides of circulation coins, and if their images are similar to any national side of circulation coins, their overall appearance can still be easily differentiated;

(c) their colour, diameter and weight must differ significantly from circulation coins for at least two of these three characteristics; the difference shall be regarded as significant if the values including tolerances are outside the tolerance ranges fixed for circulation coins; and

(d) they must not have a shaped edge with fine scallops or a 'Spanish flower' shape.

3. Collector coins may be put on the market at or above face value.

4. The issuances of collector coins shall be accounted for on an aggregated basis in the volume of coin issuance to be approved by the European Central Bank.

5. Member States shall take all appropriate measures to discourage the use of collector coins as a means of payment.

#### Article 6

##### **Consultation prior to the destruction of circulation coins**

Prior to the destruction of circulation coins which are not euro coins unfit for circulation within the meaning of point (b) of Article 2 of Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation<sup>(1)</sup>, Member States shall consult each other via the relevant subcommittee of the Economic and Financial Committee and inform the mint directors of the Member States whose currency is the euro.

#### Article 7

##### **Entry into force**

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

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 4 July 2012.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

A. D. MAVROYIANNIS

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<sup>(1)</sup> OJ L 339, 22.12.2010, p. 1.

## CORRIGENDA

**Corrigendum to Regulation (EU) No 1235/2010 of the European Parliament and of the Council of 15 December 2010 amending, as regards pharmacovigilance of medicinal products for human use, Regulation (EC) No 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, and Regulation (EC) No 1394/2007 on advanced therapy medicinal products**

(Official Journal of the European Union L 348 of 31 December 2010)

On page 6, Article 1(7):

for: '7. Article 16 is replaced by the following:

“Article 16

(...)

3. The marketing authorisation holder shall ensure that the product information is kept up to date with the current scientific knowledge including the conclusions of the assessment and recommendations made public by means of the European medicines web-portal established in accordance with Article 26.

4. In order to be able to continuously assess the risk-benefit balance, the Agency may at any time ask the marketing authorisation holder to forward data demonstrating that the risk-benefit balance remains favourable. The marketing authorisation holder shall answer fully and promptly any such request.

The Agency may at any time ask the marketing authorisation holder to submit a copy of the pharmacovigilance system master file. The marketing authorisation holder shall submit the copy at the latest 7 days after receipt of the request.”;

read: '7. In Article 16, paragraphs 1, 2 and 3 are replaced by the following:

“Article 16

(...)

3. The marketing authorisation holder shall ensure that the product information is kept up to date with the current scientific knowledge including the conclusions of the assessment and recommendations made public by means of the European medicines web-portal established in accordance with Article 26.

3a. In order to be able to continuously assess the risk-benefit balance, the Agency may at any time ask the marketing authorisation holder to forward data demonstrating that the risk-benefit balance remains favourable. The marketing authorisation holder shall answer fully and promptly any such request.

The Agency may at any time ask the marketing authorisation holder to submit a copy of the pharmacovigilance system master file. The marketing authorisation holder shall submit the copy at the latest seven days after receipt of the request.”;

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