

## I

*(Legislative acts)*

## REGULATIONS

**REGULATION (EU) 2015/2365 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**of 25 November 2015**  
**on transparency of securities financing transactions and of reuse and amending Regulation (EU)**  
**No 648/2012**  
**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank <sup>(1)</sup>,

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

Having regard to the opinion of the Committee of Regions <sup>(3)</sup>

Acting in accordance with the ordinary legislative procedure <sup>(4)</sup>,

Whereas:

- (1) The global financial crisis that emerged in 2007-2008 has revealed excessive speculative activities, important regulatory gaps, ineffective supervision, opaque markets and overly complex products in the financial system. The Union has adopted a range of measures in order to render the banking system more solid and more stable, including strengthening capital requirements, rules on improved governance and supervision and resolution regimes, and to ensure that the financial system fulfils its role in directing capital towards the financing of the real economy. Progress made on the establishment of the banking union is also decisive in this context. However, the crisis has also highlighted the need to improve transparency and monitoring not only in the traditional banking sector but also in areas where bank-like credit intermediation known as 'shadow banking', takes place, the scale of which is alarming, having already been estimated to amount to close to half of the regulated banking system. Any shortcomings with regard to those activities, which are similar to those carried out by credit institutions, have the potential to affect the rest of the financial sector.

<sup>(1)</sup> OJ C 336, 26.9.2014, p. 5.

<sup>(2)</sup> OJ C 451, 16.12.2014, p. 59.

<sup>(3)</sup> OJ C 271, 19.8.2014, p. 87.

<sup>(4)</sup> Position of the European Parliament of 29 October 2015 (not yet published in the Official Journal) and decision of the Council of 16 November 2015.

- (2) In the context of its work to curb shadow banking, the Financial Stability Board (FSB) and the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council<sup>(1)</sup> have identified the risks posed by securities financing transactions (SFTs). SFTs allow the build-up of leverage, pro-cyclicality and interconnectedness in the financial markets. In particular, a lack of transparency in the use of SFTs has prevented regulators and supervisors as well as investors from correctly assessing and monitoring the respective bank-like risks and level of interconnectedness in the financial system in the period preceding and during the financial crisis. Against this background, on 29 August 2013, the FSB adopted the policy framework entitled 'Strengthening Oversight and Regulation of Shadow Banking' (FSB Policy Framework) for addressing shadow banking risks in securities lending and repos, which was endorsed in September 2013 by the G20 Leaders.
- (3) On 14 October 2014, the FSB published a regulatory framework for haircuts on non-centrally cleared SFTs. In the absence of clearing, such operations raise major risks if they are not properly collateralised. While enhancing transparency in the reuse of client assets would be a first step towards facilitating counterparties' capacity to analyse and prevent risks, the FSB is due to complete its work, by 2016, on a set of recommendations on haircuts on non-centrally cleared SFTs to prevent excessive leveraging and mitigate concentration risk and default risk.
- (4) On 19 March 2012, the Commission published a Green Paper on Shadow Banking. Based on the extensive feedback received and taking into account international developments, the Commission issued, on 4 September 2013, a communication to the Council and the European Parliament entitled 'Shadow Banking — Addressing New Sources of Risk in the Financial sector'. The Communication stressed that the complex and opaque nature of SFTs makes it difficult to identify counterparties and monitor risk concentration and also leads to the build-up of excessive leverage in the financial system.
- (5) A high-level expert group chaired by Erkki Liikanen adopted a report on reforming the structure of the Union banking sector in October 2012. It considered, among other things, the interaction between the traditional and the shadow banking systems. The report recognised the risks of shadow banking activities such as high leverage and pro-cyclicality, and it called for a reduction of the interconnectedness between banks and the shadow banking system, which had been a source of contagion in a system-wide banking crisis. The report also suggested certain structural measures to deal with remaining weaknesses in the Union banking sector.
- (6) Structural reforms of the Union banking system are dealt with in a proposal for a regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions. However, imposing structural measures on banks could result in certain activities being shifted to less-regulated areas such as the shadow banking sector. That proposal should therefore be accompanied by the binding transparency and reporting requirements for SFTs laid down in this Regulation. Thus, the transparency rules laid down in this Regulation complement that proposal.
- (7) This Regulation responds to the need to enhance the transparency of securities financing markets and thus of the financial system. In order to ensure equivalent conditions of competition and international convergence, this Regulation follows the FSB Policy Framework. It creates a Union framework under which details of SFTs can be efficiently reported to trade repositories and information on SFTs and total return swaps is disclosed to investors in collective investment undertakings. The definition of SFT in this Regulation does not include derivative contracts as defined in Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>(2)</sup>. However, it includes transactions that are commonly referred to as liquidity swaps and collateral swaps, which do not fall under the definition of derivative contracts in Regulation (EU) No 648/2012. The need for international convergence is reinforced by the probability that, following structural reform of the Union banking sector, activities that are currently exercised by traditional banks might migrate to the shadow banking sector and encompass financial and non-financial entities. Therefore, even less transparency may arise for regulators and supervisors in respect of those activities, preventing them from obtaining a proper overview of the risks linked to SFTs. This would only aggravate already well established links between the regulated and the shadow banking sectors in particular markets.

(1) Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).

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

- (8) The evolution of market practices and technological developments enable market participants to use transactions other than SFTs as a source of funding, for liquidity and collateral management, as a yield-enhancement strategy, to cover short sales or for dividend tax arbitrage. Such transactions could have an equivalent economic effect and pose risks similar to SFTs, including pro-cyclicality brought about by fluctuating asset values and volatility; maturity or liquidity transformation stemming from financing long-term or illiquid assets through short-term or liquid assets; and financial contagion arising from interconnectedness of chains of transactions involving collateral reuse.
- (9) In order to respond to the issues raised by the FSB Policy Framework and the developments envisaged following structural reform of the Union banking sector, Member States are likely to 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. In addition, the lack of harmonised transparency rules makes it difficult for national authorities to compare the micro-level data stemming from different Member States and thus to understand the real risks individual market participants pose to the system. It is therefore necessary to prevent such distortions and obstacles from arising in the Union. Consequently, the appropriate legal basis for this Regulation is Article 114 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in accordance with the consistent case-law of the Court of Justice of the European Union.
- (10) The new rules on transparency should therefore provide for the reporting of details regarding SFTs concluded by all market participants, whether they are financial or non-financial entities, including the composition of the collateral, whether the collateral is available for reuse or has been reused, the substitution of collateral at the end of the day and the haircuts applied. In order to minimise additional operational costs for market participants, the new rules and standards should build on pre-existing infrastructures, operational processes and formats which have been introduced with regard to reporting derivative contracts to trade repositories. In that context, the European Supervisory Authority (European Securities and Markets Authority) ('ESMA') established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>(1)</sup> should, to the extent feasible and relevant, minimise overlaps and avoid inconsistencies between the technical standards adopted pursuant to this Regulation and those adopted pursuant to Article 9 of Regulation (EU) No 648/2012. The legal framework laid down by this Regulation should, to the extent possible, be the same as that of Regulation (EU) No 648/2012 in respect of the reporting of derivative contracts to trade repositories registered for that purpose. This should also enable trade repositories registered or recognised in accordance with that Regulation to fulfil the repository function assigned by this Regulation, if they comply with certain additional criteria, subject to completion of a simplified registration process.
- (11) In order to ensure consistency and effectiveness of ESMA's powers to impose penalties, the market participants that fall within the scope of this Regulation should, by reference to Regulation (EU) No 648/2012, be subject to the provisions regarding ESMA's powers as laid down in that Regulation as specified, in respect of the rules of procedure, by the delegated acts adopted pursuant to Article 64(7) of that Regulation.
- (12) Transactions with members of the European System of Central Banks (ESCB) should be exempted from the obligation to report SFTs to trade repositories. However, in order to ensure that regulators and supervisors obtain a proper overview of the risks linked to SFTs concluded by the entities they regulate or supervise, the relevant authorities and the members of the ESCB should cooperate closely. Such cooperation should enable regulators and supervisors to fulfil their respective responsibilities and mandates. Such cooperation should be confidential, and conditional on a justified request from the relevant competent authorities, and should only be provided with a view to enabling those authorities to fulfil their respective responsibilities having due regard to the principles and requirements of the independence of central banks and the performance by them of their functions as monetary authorities, including the performance of monetary, foreign exchange and financial stability policy operations which members of the ESCB are legally empowered to pursue. The members of the ESCB should be able to refuse to provide information where the transactions are entered into by them in the performance of their functions as monetary authorities. They should notify the requesting authority of any such refusal together with the justification therefor.
- (13) Information on the risks inherent in securities financing markets should be centrally stored, and easily and directly accessible by, inter alia, ESMA, the European Supervisory Authority (European Banking Authority)

<sup>(1)</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(‘EBA’) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council <sup>(1)</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>(2)</sup>, the relevant competent authorities, the ESRB and the relevant central banks of the ESCB, including the European Central Bank (ECB) in carrying out its tasks within a single supervisory mechanism under Council Regulation (EU) No 1024/2013 <sup>(3)</sup>, for the purpose of identification and monitoring of financial stability risks entailed by shadow banking activities of regulated and non-regulated entities. ESMA should take into consideration the technical standards adopted pursuant to Article 81 of Regulation (EU) No 648/2012 regulating trade repositories for derivative contracts and the future development of those technical standards when drawing up or proposing to revise the regulatory technical standards provided for in this Regulation. ESMA should also aim to ensure that the relevant competent authorities, the ESRB and the relevant central banks of the ESCB, including the ECB, have direct and immediate access to the information necessary to perform their duties, including to define and implement monetary policy and to perform oversight of financial market infrastructures. In order to ensure this, ESMA should set out the terms and conditions for access to such information in draft regulatory technical standards.

- (14) It is necessary to introduce provisions on the exchange of information between competent authorities and to strengthen the duties of assistance and cooperation which they owe each other. Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions in order 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. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights. Without prejudice to national 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.
- (15) SFTs are used extensively by managers of collective investment undertakings for efficient portfolio management. Such use can have a significant impact on the performance of those collective investment undertakings. SFTs can be used either to fulfil investment objectives or to enhance returns. Managers also make use of total return swaps which have effects equivalent to SFTs. SFTs and total return swaps are extensively used by managers of collective investment undertakings to get exposure to certain strategies or to enhance their returns. The use of SFTs and total return swaps could increase the general risk profile of the collective investment undertaking whereas their use is not properly disclosed to investors. It is crucial to ensure that investors in such collective investment undertakings are able to make informed choices and to assess the overall risk and reward profile of collective investment undertakings. When assessing SFTs and total return swaps, the collective investment undertaking should consider the substance of the transaction in addition to its legal form.
- (16) Investments made on the basis of incomplete or inaccurate information as regards a collective investment undertaking’s investment strategy can result in significant investor losses. It is therefore essential that collective investment undertakings disclose all relevant detailed information linked to their use of SFTs and total return swaps. In addition, full transparency is especially relevant in the area of collective investment undertakings as the entirety of assets that are subject to SFTs and total return swaps are not owned by the managers of collective investment undertakings but by their investors. Full disclosure as regards SFTs and total return swaps is therefore an essential tool to safeguard against possible conflicts of interest.

<sup>(1)</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

<sup>(2)</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

<sup>(3)</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

- (17) The new rules on transparency of SFTs and total return swaps are closely linked to Directives 2009/65/EC <sup>(1)</sup> and 2011/61/EU <sup>(2)</sup> of the European Parliament and of the Council since those Directives form the legal framework governing the establishment, management and marketing of collective investment undertakings.
- (18) Collective investment undertakings may operate as undertakings for collective investment in transferable securities (UCITS) managed by UCITS management companies or by UCITS investment companies authorised under Directive 2009/65/EC or as alternative investment funds (AIFs) managed by alternative investment fund managers (AIFMs) authorised or registered under Directive 2011/61/EU. The new rules on transparency of SFTs and total return swaps introduced by this Regulation supplement, and should apply in addition to, the provisions of those Directives.
- (19) In order to enable investors to become aware of the risks associated with the use of SFTs and total return swaps, managers of collective investment undertakings should include detailed information on any recourse they have to those techniques in periodical reports. The existing periodical reports that UCITS management companies or UCITS investment companies and AIFMs have to produce should be supplemented by the additional information on the use of SFTs and total return swaps. In further specifying the content of those periodical reports, ESMA should take into account the administrative burden and the specificities of different types of SFTs and total return swaps.
- (20) A collective investment undertaking's investment policy with respect to SFTs and total return swaps should be clearly disclosed in the pre-contractual documents, such as the prospectus for UCITS and the pre-contractual disclosure to investors for AIFs. This should ensure that investors understand and appreciate the inherent risks before they decide to invest in a particular UCITS or AIF.
- (21) Reuse of collateral provides liquidity and enables counterparties to reduce funding costs. However, it tends to create complex collateral chains between traditional banking and shadow banking, giving rise to financial stability risks. The lack of transparency on the extent to which financial instruments provided as collateral have been reused and the respective risks in the case of bankruptcy can undermine confidence in counterparties and magnify risks to financial stability.
- (22) In order to increase transparency of reuse, minimum information requirements should be imposed. Reuse should take place only with the express knowledge and consent of the providing counterparty. The exercise of a right to reuse should therefore be reflected in the securities account of the providing counterparty unless that account is governed by the law of a third country which provides for other appropriate means to reflect the reuse.
- (23) Although the scope of the rules concerning reuse in this Regulation is wider than that of Directive 2002/47/EC of the European Parliament and of the Council <sup>(3)</sup>, this Regulation does not amend the scope of that Directive but should, rather, be read in addition to that Directive. The conditions subject to which counterparties have a right to reuse and to exercise that right should not in any way diminish the protection afforded to a title transfer financial collateral arrangement under Directive 2002/47/EC. Against that background, any infringement of the transparency requirements of reuse should not affect national law concerning the validity or effect of a transaction.
- (24) This Regulation establishes strict information rules for counterparties on reuse which should not prejudice the application of sectorial rules adapted to specific actors, structures and situations. Therefore, the rules on reuse provided for in this Regulation should apply, for example, to collective investment undertakings and depositories or clients of investment firms only insofar as no more stringent rules on reuse are provided for in the legal framework for collective investment undertakings or for safeguarding of client assets constituting a *lex specialis* and taking precedence over the rules contained in this Regulation. In particular, this Regulation should be without prejudice to any rule under Union law or national law restricting the ability of counterparties to engage in reuse of financial instruments that are provided as collateral by counterparties or persons other than counterparties. The application of the reuse requirements should be deferred to six months after the date of entry into force of this Regulation in order to provide counterparties with sufficient time to adapt their outstanding collateral arrangements, including master agreements, and to ensure that new collateral arrangements comply with this Regulation.

<sup>(1)</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

<sup>(2)</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

<sup>(3)</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43).



- (25) In order to promote international consistency of terminology, the use of the term 'reuse' in this Regulation is in line with the FSB Policy Framework. This should not, however, lead to inconsistency within the Union *acquis* and, in particular, should be without prejudice to the meaning of the term 'reuse' employed in Directives 2009/65/EC and 2011/61/EU.
- (26) In order to ensure compliance by counterparties with the obligations deriving from this Regulation and that they are subject to similar treatment across the Union, Member States should ensure that competent authorities have the power to impose administrative sanctions and other administrative measures which are effective, proportionate and dissuasive. Therefore, administrative sanctions and other administrative measures laid down in this Regulation should satisfy certain essential requirements in relation to addressees, criteria to be taken into account when applying a sanction or measure, publication of sanctions or measures, key powers to impose sanctions and levels of administrative pecuniary sanctions. It is appropriate that sanctions and other measures established under Directives 2009/65/EC and 2011/61/EU apply to infringements of the transparency obligations relating to the collective investment undertakings under this Regulation.
- (27) The powers to impose sanctions conferred on competent authorities should be without prejudice to the exclusive competence of the ECB, pursuant to Article 4(1)(a) of Regulation (EU) No 1024/2013, to withdraw authorisations of credit institutions for prudential supervisory purposes.
- (28) Provisions in this Regulation regarding the application for registration of trade repositories and the withdrawal of registration do not affect the remedies provided for in Chapter V of Regulation (EU) No 1095/2010.
- (29) Technical standards in the financial services sector should ensure consistent harmonisation and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust ESMA with the development of draft regulatory technical and implementing standards which do not involve policy choices. ESMA should ensure efficient administrative and reporting processes when drafting technical standards. The Commission should be empowered to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010 in the following areas: the details to be reported for different types of SFTs; the details of the application for registration or extension of the registration of a trade repository; the details of the procedures to be applied by trade repositories in order to verify the details of SFTs reported to them; the frequency and the details of publication of, the requirements for, and the access to, trade repositories' data; and, if necessary, the further specification of the content of the Annex.
- (30) The Commission should be empowered to adopt implementing technical standards developed by ESMA by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010 with regard to the format and frequency of the reports, the format of the application for registration or extension of the registration of a trade repository, as well as the procedures and forms for exchange of information on sanctions and other measures with ESMA.
- (31) The power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of amending the list of entities that are excluded from the scope of this Regulation and 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 by trade repositories. 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.
- (32) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission to take decisions on the assessment of the rules of third countries for the purposes of recognising third-country trade repositories, and in order to avoid potentially duplicate or conflicting requirements. The assessment which forms the basis of decisions on equivalence of reporting requirements in a third country should not prejudice the right of a trade repository established in that third country and recognised by ESMA to provide reporting services to entities established in the Union, as a recognition decision should be independent of such an assessment for the purposes of an equivalence decision.
- (33) Where an implementing act on equivalence is withdrawn, counterparties should automatically be subject again to all of the requirements laid down in this Regulation.
- (34) Where appropriate, 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 those third countries and thus avoid any possible duplication in this respect.

- (35) Since the objectives of this Regulation, namely enhancing the transparency of certain activities in financial markets such as the use of SFTs and reuse of collateral in order to enable the monitoring and identification of the corresponding risks, cannot be sufficiently achieved by the Member States but can rather, 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.
- (36) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the right to respect for private and family life, the rights of the defence and the principle of *ne bis in idem*, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial. This Regulation must be applied according to those rights and principles.
- (37) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council <sup>(1)</sup> and delivered an opinion on 11 July 2014 <sup>(2)</sup>.
- (38) Any exchange or transmission of personal data by competent authorities of the Member States or by trade repositories should be undertaken in accordance with the rules on the transfer of personal data as laid down in Directive 95/46/EC of the European Parliament and of the Council <sup>(3)</sup>. Any exchange or transmission of personal data by ESMA, EBA or EIOPA should be carried out in accordance with the rules on the transfer of personal data as laid down in Regulation (EC) No 45/2001.
- (39) With the assistance of ESMA, the Commission should monitor and prepare reports to the European Parliament and to the Council on the international application of the reporting obligation laid down in this Regulation. The time provided for submission of the Commission reports should allow for the prior effective application of this Regulation.
- (40) Following the outcome of the work carried out by relevant international fora, and with the assistance of ESMA, EBA and the ESRB, the Commission should submit a report to the European Parliament and to the Council on progress in international efforts to mitigate the risks associated with SFTs, including the FSB recommendations for haircuts on non-centrally cleared SFTs, and on the appropriateness of those recommendations for Union markets.
- (41) The application of the transparency requirements laid down in this Regulation should be deferred in order to provide trade repositories with sufficient time to apply for the authorisation and recognition of their activities provided for in this Regulation, and counterparties and collective investment undertakings with sufficient time to comply with those requirements. In particular, it is appropriate to defer the application of additional transparency requirements for collective investment undertakings, taking into account the Guidelines for competent authorities and UCITS management companies issued by ESMA on 18 December 2012 which lay down an optional framework for UCITS management companies regarding disclosure obligations and the need to reduce the administrative burden of managers of collective investment undertakings. In order to ensure the effective implementation of the reporting of SFTs, a phase-in of the application of the requirements by type of counterparty is necessary. Such an approach should take into account the effective ability of the counterparty to comply with the reporting obligations laid down in this Regulation.
- (42) The new uniform rules on the transparency of SFTs and certain over-the-counter (OTC) derivatives, namely total return swaps, laid down in this Regulation are closely linked to the rules laid down in Regulation (EU) No 648/2012, as those OTC derivatives fall within the scope of the reporting requirements laid down in that Regulation. In order to ensure a coherent scope of both sets of transparency and reporting requirements, a clear delineation between OTC derivatives and exchange-traded derivatives is needed irrespective of whether those contracts are traded in the Union or in third-country markets. The definition of OTC derivatives in

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

<sup>(2)</sup> OJ C 328, 20.9.2014, p. 3.

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

Regulation (EU) No 648/2012 should therefore be amended in order to ensure that the same type of derivatives contracts are identified as either OTC derivatives or exchange-traded derivatives irrespective of whether those contracts are traded in the Union or in third-country markets.

(43) Regulation (EU) No 648/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

#### CHAPTER I

### SUBJECT MATTER, SCOPE AND DEFINITIONS

#### Article 1

##### **Subject matter**

This Regulation lays down rules on the transparency of securities financing transactions (SFTs) and of reuse.

#### Article 2

##### **Scope**

1. This Regulation applies to:

(a) a counterparty to an SFT that is established:

(i) in the Union, including all its branches irrespective of where they are located;

(ii) in a third country, if the SFT is concluded in the course of the operations of a branch in the Union of that counterparty;

(b) management companies of undertakings for collective investment in transferable securities (UCITS) and UCITS investment companies in accordance with Directive 2009/65/EC;

(c) managers of alternative investment funds (AIFMs) authorised in accordance with Directive 2011/61/EU;

(d) a counterparty engaging in reuse that is established:

(i) in the Union, including all its branches irrespective of where they are located;

(ii) in a third country, where either:

— the reuse is effected in the course of the operations of a branch in the Union of that counterparty, or

— the reuse concerns financial instruments provided under a collateral arrangement by a counterparty established in the Union or a branch in the Union of a counterparty established in a third country.

2. Articles 4 and 15 do not apply to:

(a) members of the European System of Central Banks (ESCB), other Member States' bodies performing similar functions, and other Union public bodies charged with, or intervening in, the management of the public debt;

(b) the Bank for International Settlements.



3. Article 4 does not apply to transactions to which a member of the ESCB is a counterparty.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 30 to amend the list set out in paragraph 2 of this Article.

To that end and before adopting such delegated acts, the Commission shall present to the European Parliament and to the Council a report assessing the international treatment of central banks and of public bodies charged with or intervening in the management of the public debt.

That report shall include a comparative analysis of the treatment of central banks and of those bodies within the legal framework of a number of third countries. Provided that the report concludes, in particular with regard to the comparative analysis and potential effects, that the exemption of the monetary responsibilities of those third-country central banks and bodies from Article 15 is necessary, the Commission shall adopt a delegated act adding them to the list set out in paragraph 2 of this Article.

### Article 3

#### Definitions

For purposes of this Regulation, the following definitions apply:

- (1) 'trade repository' means a legal person that centrally collects and maintains the records of SFTs;
- (2) 'counterparties' means financial counterparties and non-financial counterparties;
- (3) 'financial counterparty' means:
  - (a) an investment firm authorised in accordance with Directive 2014/65/EU of the European Parliament and of the Council <sup>(1)</sup>;
  - (b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council <sup>(2)</sup> or with Regulation (EU) No 1024/2013;
  - (c) an insurance undertaking or a reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council <sup>(3)</sup>;
  - (d) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC;
  - (e) an AIF managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU;
  - (f) an institution for occupational retirement provision authorised or registered in accordance with Directive 2003/41/EC of the European Parliament and of the Council <sup>(4)</sup>;
  - (g) a central counterparty authorised in accordance with Regulation (EU) No 648/2012;

<sup>(1)</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

<sup>(2)</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

<sup>(3)</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

<sup>(4)</sup> Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

- (h) a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council <sup>(1)</sup>;
- (i) a third-country entity which would require authorisation or registration in accordance with the legislative acts referred to in points (a) to (h) if it were established in the Union;
- (4) 'non-financial counterparty' means an undertaking established in the Union or in a third country other than the entities referred to in point (3);
- (5) 'established' means:
- (a) if the counterparty is a natural person, where it has its head office;
  - (b) if the counterparty is a legal person, where it has its registered office;
  - (c) if the counterparty has, under its national law, no registered office, where it has its head office;
- (6) 'branch' means a place of business other than the head office which is part of a counterparty and which has no legal personality;
- (7) 'securities or commodities lending' or 'securities or commodities borrowing' means a transaction by which a counterparty transfers securities or commodities subject to a commitment that the borrower will return equivalent securities or commodities on a future date or when requested to do so by the transferor, that transaction being considered as securities or commodities lending for the counterparty transferring the securities or commodities and being considered as securities or commodities borrowing for the counterparty to which they are transferred;
- (8) 'buy-sell back transaction' or 'sell-buy back transaction' means a transaction by which a counterparty buys or sells securities, commodities, or guaranteed rights relating to title to securities or commodities, agreeing, respectively, to sell or to buy back securities, commodities or such guaranteed rights of the same description at a specified price on a future date, that transaction being a buy-sell back transaction for the counterparty buying the securities, commodities or guaranteed rights, and a sell-buy back transaction for the counterparty selling them, such buy-sell back transaction or sell-buy back transaction not being governed by a repurchase agreement or by a reverse-repurchase agreement within the meaning of point (9);
- (9) 'repurchase transaction' means a transaction governed by an agreement by which a counterparty transfers securities, commodities, or guaranteed rights relating to title to securities or commodities where that guarantee is issued by a recognised exchange which holds the rights to the securities or commodities and the agreement does not allow a counterparty to transfer or pledge a particular security or commodity to more than one counterparty at a time, subject to a commitment to repurchase them, or substituted securities or commodities of the same description at a specified price on a future date specified, or to be specified, by the transferor, being a repurchase agreement for the counterparty selling the securities or commodities and a reverse repurchase agreement for the counterparty buying them;
- (10) 'margin lending transaction' means a transaction in which a counterparty extends credit in connection with the purchase, sale, carrying or trading of securities, but not including other loans that are secured by collateral in the form of securities;
- (11) 'securities financing transaction' or 'SFT' means:
- (a) a repurchase transaction;

<sup>(1)</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

- (b) securities or commodities lending and securities or commodities borrowing;
  - (c) a buy-sell back transaction or sell-buy back transaction;
  - (d) a margin lending transaction;
- (12) 'reuse' means the use by a receiving counterparty, in its own name and on its own account or on the account of another counterparty, including any natural person, of financial instruments received under a collateral arrangement, such use comprising transfer of title or exercise of a right of use in accordance with Article 5 of Directive 2002/47/EC but not including the liquidation of a financial instrument in the event of default of the providing counterparty;
- (13) 'title transfer collateral arrangement' means a title transfer financial collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC concluded between counterparties to secure any obligation;
- (14) 'security collateral arrangement' means a security financial collateral arrangement as defined in point (c) of Article 2(1) of Directive 2002/47/EC concluded between counterparties to secure any obligation;
- (15) 'collateral arrangement' means a title transfer collateral arrangement and security collateral arrangement;
- (16) 'financial instrument' means a financial instrument as defined in point (15) of Article 4(1) of Directive 2014/65/EU;
- (17) 'commodity' means a commodity as defined in point (1) of Article 2 of Commission Regulation (EC) No 1287/2006<sup>(1)</sup>;
- (18) 'total return swap' means a derivative contract as defined in point (7) of Article 2 of Regulation (EU) No 648/2012 in which one counterparty transfers the total economic performance, including income from interest and fees, gains and losses from price movements, and credit losses, of a reference obligation to another counterparty.

## CHAPTER II

### TRANSPARENCY OF SFTS

#### Article 4

#### **Reporting obligation and safeguarding in respect of SFTs**

1. Counterparties to SFTs shall report the details of any SFT they have concluded, as well as any modification or termination thereof, to a trade repository registered in accordance with Article 5 or recognised in accordance with Article 19. Those details shall be reported no later than the working day following the conclusion, modification or termination of the transaction.

The reporting obligation laid down in the first subparagraph shall apply to SFTs which:

- (a) were concluded before the relevant date of application referred to in point (a) of Article 33(2) and remain outstanding on that date, if:
  - (i) the remaining maturity of those SFTs on that date exceeds 180 days; or
  - (ii) those SFTs have an open maturity and remain outstanding 180 days after that date;

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

(b) are concluded on or after the relevant date of application referred to in point (a) of Article 33(2).

The SFTs referred to in point (a) of the second subparagraph shall be reported within 190 days of the relevant date of application referred to in point (a) of Article 33(2).

2. A counterparty which is subject to the reporting obligation may delegate the reporting of the details of SFTs.

3. Where a financial counterparty concludes an SFT with a non-financial counterparty which on its balance sheet dates does not exceed the limits of at least two of the three criteria laid down in Article 3(3) of Directive 2013/34/EU of the European Parliament and of the Council <sup>(1)</sup>, the financial counterparty shall be responsible for reporting on behalf of both counterparties.

Where a UCITS managed by a management company is the counterparty to SFTs, the management company shall be responsible for reporting on behalf of that UCITS.

Where an AIF is the counterparty to SFTs, its AIFM shall be responsible for reporting on behalf of that AIF.

4. Counterparties shall keep a record of any SFT that they have concluded, modified or terminated for at least five years following the termination of the transaction.

5. Where a trade repository is not available to record the details of SFTs, counterparties shall ensure that those details are reported to the European Supervisory Authority (European Securities and Markets Authority) ('ESMA').

In those cases, ESMA shall ensure that all of the relevant entities referred to in Article 12(2) have access to all of the details of SFTs they need to fulfil their respective responsibilities and mandates.

6. In respect of information received under this Article, trade repositories and ESMA shall respect the relevant provisions on confidentiality, integrity and protection of information and shall comply with the obligations set out in particular in Article 80 of Regulation (EU) No 648/2012. For the purposes of this Article, references in Article 80 of Regulation (EU) No 648/2012 to Article 9 thereof and to 'derivative contracts' shall be construed as references to this Article and to 'SFTs' respectively.

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

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

9. In order to ensure consistent application of this Article and in order to ensure consistency with the reporting made under Article 9 of Regulation (EU) No 648/2012 and internationally agreed standards, ESMA shall, in close cooperation with, and taking into account the needs of, the ESCB, develop draft regulatory technical standards specifying the details of the reports referred to in paragraphs 1 and 5 of this Article for the different types of SFTs that shall include at least:

(a) the parties to the SFT and, where different, the beneficiary of the rights and obligations arising therefrom;

(b) the principal amount; the currency; the assets used as collateral and their type, quality, and value; the method used to provide collateral; whether collateral is available for reuse; in cases where the collateral is distinguishable from other assets, whether it has been reused; any substitution of the collateral; the repurchase rate, lending fee or margin lending rate; any haircut; the value date; the maturity date; the first callable date; and the market segment;

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

(c) depending on the SFT, details of the following:

- (i) cash collateral reinvestment;
- (ii) securities or commodities being lent or borrowed.

In developing those draft technical standards, ESMA shall take into account the technical specificities of pools of assets and shall provide for the possibility of reporting position level collateral data where appropriate.

ESMA shall submit those draft regulatory technical standards to the Commission by 13 January 2017.

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

10. In order to ensure uniform conditions of application of paragraph 1 of this Article and, to the extent feasible, consistency with the reporting pursuant to Article 9 of Regulation (EU) No 648/2012 and harmonisation of formats between trade repositories, ESMA shall, in close cooperation with, and taking into account the needs of, the ESCB, develop draft implementing technical standards specifying the format and frequency of the reports referred to in paragraphs 1 and 5 of this Article for the different types of SFTs.

The format shall include, in particular:

- (a) global legal entity identifiers (LEIs), or pre-LEIs until the global legal entity identifier system is fully implemented;
- (b) international securities identification numbers (ISINs); and
- (c) unique trade identifiers.

In developing those draft technical standards, ESMA shall take into account international developments and standards agreed at Union or global level.

ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.

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.

### CHAPTER III

#### REGISTRATION AND SUPERVISION OF A TRADE REPOSITORY

##### *Article 5*

##### **Registration of a trade repository**

1. A trade repository shall register with ESMA for the purposes of Article 4 under the conditions and the procedure set out in this Article.
2. To be eligible to be registered under this Article, a trade repository shall be a legal person established in the Union, apply procedures to verify the completeness and correctness of the details reported to it under Article 4(1), and meet the requirements laid down in Articles 78, 79 and 80 of Regulation (EU) No 648/2012. For the purposes of this Article, references in Articles 78 and 80 of Regulation (EU) No 648/2012 to Article 9 thereof shall be construed as references to Article 4 of this Regulation.
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.

5. A trade repository shall submit to ESMA either of the following:

(a) an application for registration;

(b) an application for an extension of registration for the purposes of Article 4 of this Regulation in the case of a trade repository already registered under Title VI, Chapter 1 of Regulation (EU) No 648/2012.

6. 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.

7. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the details of all of the following:

(a) the procedures referred to in paragraph 2 of this Article and which are to be applied by trade repositories in order to verify the completeness and correctness of the details reported to them under Article 4(1);

(b) the application for registration referred to in point (a) of paragraph 5;

(c) a simplified application for an extension of registration referred to in point (b) of paragraph 5 in order to avoid duplicate requirements.

ESMA shall submit those draft regulatory technical standards to the Commission by 13 January 2017.

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

8. In order to ensure uniform conditions of application of paragraphs 1 and 2, ESMA shall develop draft implementing technical standards specifying the format of both of the following:

(a) the application for registration referred to in point (a) of paragraph 5;

(b) the application for an extension of registration referred to in point (b) of paragraph 5.

With regard to point (b) of the first subparagraph, ESMA shall develop a simplified format to avoid duplicate procedures.

ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.

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 6***Notification of and consultation with competent authorities prior to registration or extension of registration**

1. Where a trade repository applies for registration or for an extension of registration and is an entity 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, or the extension of 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 7***Examination of the application**

1. ESMA shall, within 40 working days of the notification referred to in Article 5(6), examine the application for registration, or for an extension of registration, based on the compliance of the trade repository with this Chapter and shall adopt a fully reasoned decision accepting or refusing registration or an extension of registration.
2. A decision issued by ESMA pursuant to paragraph 1 shall take effect on the fifth working day following its adoption.

*Article 8***Notification of ESMA decisions relating to registration or extension of registration**

1. Where ESMA adopts a decision as referred to in Article 7(1) or withdraws the registration as referred to in Article 10(1), it shall notify the trade repository within five working days with a fully reasoned explanation for its decision.

ESMA shall, without undue delay, notify the competent authority as referred to in Article 6(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 of the adoption of a decision under paragraph 1.

*Article 9***Powers of ESMA**

1. The powers conferred on ESMA in accordance with Articles 61 to 68, 73 and 74 of Regulation (EU) No 648/2012, in conjunction with Annexes I and II thereto, shall also be exercised with respect to this Regulation. References to Article 81(1) and (2) of Regulation (EU) No 648/2012 in Annex I to that Regulation shall be construed as references to Article 12(1) and (2) of this Regulation respectively.
2. The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 61, 62 and 63 of Regulation (EU) No 648/2012 shall not be used to require the disclosure of information or documents which are subject to legal privilege.

*Article 10***Withdrawal of registration**

1. Without prejudice to Article 73 of Regulation (EU) No 648/2012, 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 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 6(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 for its decision.

4. The competent authority referred to in paragraph 3 of this Article shall be the authority designated under points (a) and (b) of Article 16(1) of this Regulation.

#### Article 11

##### **Supervisory fees**

1. ESMA shall charge the trade repositories fees in accordance with this Regulation and in accordance with the delegated acts adopted pursuant to paragraph 2 of this Article. Those fees shall be proportionate to the turnover of the trade repository concerned and fully cover ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories as well as the reimbursement of any costs that the competent authorities may incur as a result of any delegation of tasks pursuant to Article 9(1) of this Regulation. In so far as Article 9(1) of this Regulation refers to Article 74 of Regulation (EU) No 648/2012, references to Article 72(3) of that Regulation shall be construed as references to paragraph 2 of this Article.

Where a trade repository has already been registered under Title VI, Chapter 1, of Regulation (EU) No 648/2012, the fees referred to in the first subparagraph of this paragraph shall only be adjusted to reflect additional necessary expenditure and costs relating to the registration, recognition and supervision of trade repositories pursuant to this Regulation.

2. The Commission shall be empowered to adopt a delegated act in accordance with Article 30 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 12

##### **Transparency and availability of data held in a trade repository**

1. A trade repository shall regularly, and in an easily accessible way, publish aggregate positions by type of SFTs reported to it.

2. A trade repository shall collect and maintain the details of SFTs and shall ensure that the following entities have direct and immediate access to these details to enable them to fulfil their respective responsibilities and mandates:

(a) ESMA;

(b) the European Supervisory Authority (European Banking Authority) ('EBA');

(c) the European Supervisory Authority (European Insurance and Occupational Pensions Authority) ('EIOPA');

(d) the ESRB;

(e) the competent authority supervising the trading venues of the reported transactions;

(f) the relevant members of the ESCB, including the European Central Bank (ECB) in carrying out its tasks within a single supervisory mechanism under Regulation (EU) No 1024/2013;

- (g) the relevant authorities of a third country in respect of which an implementing act pursuant to Article 19(1) has been adopted;
- (h) supervisory authorities designated under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council <sup>(1)</sup>;
- (i) the relevant Union securities and market authorities whose respective supervisory responsibilities and mandates cover transactions, markets, participants and assets which fall within the scope of this Regulation;
- (j) the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council <sup>(2)</sup>;
- (k) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council <sup>(3)</sup>;
- (l) the Single Resolution Board established by Regulation (EU) No 806/2014 of the European Parliament and of the Council <sup>(4)</sup>;
- (m) the authorities referred to in Article 16(1).

3. In order to ensure consistent application of this Article, ESMA shall, in close cooperation with the ESCB and taking into account the needs of the entities referred to in paragraph 2, develop draft regulatory technical standards specifying:

- (a) the frequency and the details of the aggregate positions referred to in paragraph 1 and the details of SFTs referred to in paragraph 2;
- (b) the operational standards required, to allow the timely, structured and comprehensive:
  - (i) collection of data by trade repositories;
  - (ii) aggregation and comparison of data across repositories;
- (c) the details of the information to which the entities referred to in paragraph 2 are to have access, taking into account their mandate and their specific needs;
- (d) the terms and conditions under which the entities referred to in paragraph 2 are to have direct and immediate access to data held in trade repositories.

Those draft regulatory technical standards shall ensure that the information published under paragraph 1 does not enable the identification of a party to any SFT.

<sup>(1)</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

<sup>(2)</sup> Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1).

<sup>(3)</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

<sup>(4)</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1).

ESMA shall submit those draft regulatory technical standards to the Commission by 13 January 2017.

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

#### CHAPTER IV

### TRANSPARENCY TOWARDS INVESTORS

#### Article 13

#### **Transparency of collective investment undertakings in periodical reports**

1. UCITS management companies, UCITS investment companies, and AIFMs shall inform investors on the use they make of SFTs and total return swaps in the following manner:

(a) for UCITS management companies or UCITS investment companies in the half-yearly and annual reports referred to in Article 68 of Directive 2009/65/EC;

(b) for AIFMs in the annual report referred to in Article 22 of Directive 2011/61/EU.

2. The information on SFTs and total return swaps shall include the data provided for in Section A of the Annex.

3. In order to ensure uniform disclosure of data but also to take account of the specificities of different types of SFTs and total return swaps, ESMA may, taking into account the requirements laid down in Directives 2009/65/EC and 2011/61/EU as well as evolving market practices, develop draft regulatory technical standards further specifying the content of Section A of the Annex.

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 14

#### **Transparency of collective investment undertakings in pre-contractual documents**

1. The UCITS prospectus referred to in Article 69 of Directive 2009/65/EC, and the disclosure by AIFMs to investors referred to in Article 23(1) and (3) of Directive 2011/61/EU shall specify the SFT and total return swaps which UCITS management companies or UCITS investment companies, and AIFMs respectively, are authorised to use and include a clear statement that those transactions and instruments are used.

2. The prospectus and the disclosure to investors referred to in paragraph 1 shall include the data provided for in Section B of the Annex.

3. In order to reflect evolving market practices or to ensure uniform disclosure of data, ESMA may, taking into account the requirements laid down in Directives 2009/65/EC and 2011/61/EU, develop draft regulatory technical standards further specifying the content of Section B of the Annex.

In preparing the draft regulatory technical standards referred to in the first subparagraph, ESMA shall take into account the need to allow for a sufficient time before their application.

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



## CHAPTER V

## TRANSPARENCY OF REUSE

## Article 15

**Reuse of financial instruments received under a collateral arrangement**

1. Any right of counterparties to reuse financial instruments received as collateral shall be subject to at least both of the following conditions:

(a) the providing counterparty has been duly informed in writing by the receiving counterparty of the risks and consequences that may be involved in one of the following:

(i) granting consent to a right of use of collateral provided under a security collateral arrangement in accordance with Article 5 of Directive 2002/47/EC;

(ii) concluding a title transfer collateral arrangement;

(b) the providing counterparty has granted its prior express consent, as evidenced by a signature, in writing or in a legally equivalent manner, of the providing counterparty to a security collateral arrangement, the terms of which provide a right of use in accordance with Article 5 of Directive 2002/47/EC, or has expressly agreed to provide collateral by way of a title transfer collateral arrangement.

With regard to point (a) of the first subparagraph, the providing counterparty shall at least be informed in writing of the risks and consequences that may arise in the event of the default of the receiving counterparty.

2. Any exercise by counterparties of their right to reuse shall be subject to at least both of the following conditions:

(a) reuse is undertaken in accordance with the terms specified in the collateral arrangement referred to in point (b) of paragraph 1;

(b) the financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty.

By way of derogation from point (b) of the first subparagraph, where a counterparty to a collateral arrangement is established in a third country and the account of the counterparty providing the collateral is maintained in and subject to the law of a third country, the reuse shall be evidenced either by a transfer from the account of the providing counterparty or by other appropriate means.

3. This Article is without prejudice to stricter sectoral legislation, in particular to Directives 2009/65/EC and 2014/65/EU, and to national law that aims to ensure a higher level of protection for providing counterparties.

4. This Article shall not affect national law concerning the validity or effect of a transaction.

## CHAPTER VI

## SUPERVISION AND COMPETENT AUTHORITIES

## Article 16

**Designation and powers of competent authorities**

1. For the purpose of this Regulation, competent authorities shall comprise the following:

- (a) for financial counterparties, competent authorities or national competent authorities within the meaning of Regulations (EU) No 648/2012, (EU) No 1024/2013 and (EU) No 909/2014 and of Directives 2003/41/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU and 2014/65/EU, and the supervisory authorities within the meaning of Directive 2009/138/EC;
  - (b) for non-financial counterparties, the competent authorities designated in accordance with Article 10(5) of Regulation (EU) No 648/2012;
  - (c) for the purpose of Articles 13 and 14 of this Regulation, concerning UCITS management companies and UCITS investment companies, the competent authorities designated in accordance with Article 97 of Directive 2009/65/EC;
  - (d) for the purpose of Articles 13 and 14 of this Regulation, concerning AIFMs, the competent authorities designated in accordance with Article 44 of Directive 2011/61/EU.
2. The competent authorities shall exercise the powers conferred on them by the provisions referred to in paragraph 1 and shall supervise compliance with the obligations laid down in this Regulation.
3. The competent authorities referred to in points (c) and (d) of paragraph 1 of this Article shall monitor UCITS management companies, UCITS investment companies and AIFMs established in their territories to verify that they do not use SFTs and total return swaps, unless they comply with Articles 13 and 14.

#### Article 17

##### Cooperation between competent authorities

1. The competent authorities referred to in Article 16 and ESMA shall cooperate closely with each other and exchange information for the purpose of carrying out their duties pursuant to this Regulation, in particular in order to identify and remedy infringements of this Regulation.
2. A competent authority may refuse to act on a request to cooperate and exchange information in accordance with paragraph 1 only in either of the following exceptional circumstances:
  - (a) where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State of the competent authority receiving the request; or
  - (b) where a final judgment has already been delivered in relation to such persons for the same actions in the Member State of the competent authority receiving the request.

In the case of such a refusal, the competent authority shall notify the requesting authority and ESMA accordingly, providing as detailed information as possible.

3. The entities referred to in Article 12(2) and the relevant members of ESCB shall cooperate closely in accordance with the conditions laid down in this paragraph.

Such cooperation shall be confidential and conditional upon a justified request from the relevant competent authorities, and only with a view to enabling those authorities to fulfil their respective responsibilities.

Notwithstanding the first and second subparagraphs the members of the ESCB may refuse to provide information where the transactions are entered into by them in the performance of their functions as monetary authorities.

In the case of a refusal as referred to in the third subparagraph, the relevant member of the ESCB shall notify the requesting authority of that refusal together with the justification therefor.

*Article 18***Professional secrecy**

1. Any confidential information received, exchanged or transmitted pursuant to this Regulation shall be subject to the conditions of professional secrecy laid down in paragraphs 2 and 3.
2. The obligation of professional secrecy shall apply to all persons who work or have worked for the entities referred to in Article 12(2) and the competent authorities referred to in Article 16, for ESMA, EBA and EIOPA, or for auditors and experts instructed by the competent authorities or ESMA, EBA and EIOPA. 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 counterparty, trade repository or any other person cannot be identified, without prejudice to national criminal or tax law or to this Regulation.
3. Without prejudice to national criminal or tax law, the competent authorities, ESMA, EBA, EIOPA, 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, EBA, EIOPA, 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. Paragraphs 2 and 3 shall not prevent ESMA, EBA, EIOPA, 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, 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 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.

## CHAPTER VII

**RELATIONSHIP WITH THIRD COUNTRIES***Article 19***Equivalence and recognition of trade repositories**

1. The Commission may adopt implementing acts 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 of trade repositories and effective enforcement of their obligations takes place in that third country on an ongoing basis;
  - (c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and those guarantees are at least equivalent to those laid down in this Regulation; and
  - (d) trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to give direct and immediate access to the data to the entities referred to in Article 12(2).

The implementing act referred to in the first subparagraph shall also specify the relevant third-country authorities that are entitled to access the data on SFTs held in trade repositories established in the Union.

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the examination procedure referred to in Article 31(2).

2. Where trade repositories authorised in a third country are not subject to a legally binding and enforceable obligation under the law of that third country to give direct and immediate access to the data to the entities referred to in Article 12(2), the Commission shall submit recommendations to the Council for the negotiation of international agreements with that third country regarding mutual access to, and exchange of, information on SFTs held in trade repositories which are established in that third country, in order to ensure that all of the entities referred to in Article 12(2) have direct and immediate access to all of the information needed for the exercise of their duties.

3. 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 4 only after its recognition by ESMA in accordance with the requirements laid down in paragraph 4 of this Article.

4. A trade repository referred to in paragraph 3 shall submit to ESMA either of the following:

(a) an application for recognition;

(b) an application for extension of the registration for the purposes of Article 4 of this Regulation in the case of a trade repository already recognised in accordance with Regulation (EU) No 648/2012.

5. An application as referred to in paragraph 4 shall be accompanied by 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 satisfies all of the following criteria:

(a) the Commission has determined, by means of an implementing act pursuant to paragraph 1, that the third country has an equivalent and enforceable regulatory and supervisory framework;

(b) the relevant authorities of the third country have entered into cooperation arrangements with ESMA specifying at least:

(i) a mechanism for the exchange of information between ESMA and any other Union authority that exercises responsibilities as a result of any delegation of tasks pursuant to Article 9(1) on the one hand and the relevant competent authorities of the third country concerned on the other; and

(ii) procedures concerning the coordination of supervisory activities.

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

6. Within 30 working days of receipt of the application, ESMA shall assess whether the application is complete. If ESMA determines that the application is not complete, it shall set a deadline by which the applicant trade repository is to provide additional information.

7. 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.

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

#### Article 20

##### **Indirect access to data between authorities**

ESMA may conclude cooperation arrangements with relevant authorities of third countries that need to fulfil their respective responsibilities and mandates regarding mutual exchange of information on SFTs made available to ESMA

by Union trade repositories in accordance with Article 12(2) and on SFT data collected and maintained by third-country authorities, provided that guarantees of professional secrecy exist, including with regard to the protection of business secrets shared by the authorities with third parties.

#### Article 21

##### **Equivalence of reporting**

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

- (a) are equivalent to the requirements laid down in Article 4;
- (b) ensure protection of professional secrecy equivalent to that laid down in this Regulation;
- (c) are being effectively applied and enforced in an equitable and non-distortive manner in order to ensure effective supervision and enforcement in that third country; and
- (d) ensure that the entities referred to in Article 12(2) have either direct access to the details on SFT data pursuant to Article 19(1) or indirect access to the details on SFTs pursuant to Article 20.

2. Where the Commission has adopted an implementing act on equivalence with regard to a third country, as referred to in paragraph 1 of this Article, counterparties entering into a transaction subject to this Regulation shall be deemed to have fulfilled the requirements laid down in Article 4 where at least one of the counterparties is established in that third country and the counterparties have complied with the relevant obligations of that third country in relation to that transaction.

That implementing act shall be adopted in accordance with the examination procedure referred to in Article 31(2).

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 Article 4 and report regularly to the European Parliament and to the Council. Where the report reveals an insufficient or inconsistent application of the equivalent requirements by third-country authorities, the Commission shall consider, within 30 calendar days of the presentation of the report, whether to withdraw the recognition as equivalent of the third-country legal framework in question.

#### CHAPTER VIII

##### **ADMINISTRATIVE SANCTIONS AND OTHER ADMINISTRATIVE MEASURES**

#### Article 22

##### **Administrative sanctions and other administrative measures**

1. Without prejudice to Article 28 and the right of Member States to provide for and impose criminal sanctions, Member States shall, in accordance with national law, provide for competent authorities to have the power to impose administrative sanctions and other administrative measures in relation to at least infringements of Articles 4 and 15.

Where the provisions referred to in the first subparagraph apply to legal persons, Member States shall empower competent authorities, in the case of an infringement, to apply sanctions, subject to the conditions laid down in national law, to members of the management body, and to other individuals who under national law are responsible for the infringement.

2. The administrative sanctions and other administrative measures taken for the purpose of paragraph 1 shall be effective, proportionate and dissuasive.



3. Where Member States have chosen, in accordance with paragraph 1 of this Article, to lay down criminal sanctions for the infringements of the provisions referred to in that paragraph they shall ensure that appropriate measures are in place so that competent authorities have all of the necessary powers to liaise with judicial, prosecuting, or criminal justice authorities within their jurisdiction to receive specific information related to criminal investigations or proceedings commenced for possible infringements of Articles 4 and 15, and to provide such information to other competent authorities and ESMA to fulfil their obligation to cooperate with each other and, where relevant, with ESMA for the purposes of this Regulation.

Competent authorities may cooperate with competent authorities of other Member States and relevant third-country authorities with respect to the exercise of their powers to impose sanctions.

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

4. Member States shall, in accordance with national law, confer on competent authorities the power to apply at least the following administrative sanctions and other administrative measures in the event of the infringements referred to in paragraph 1:

- (a) an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;
- (b) a public statement which indicates the person responsible and the nature of the infringement in accordance with Article 26;
- (c) withdrawal or suspension of the authorisation;
- (d) a temporary ban against any person discharging managerial responsibilities, or any natural person who is held responsible for such an infringement, from exercising management functions;
- (e) maximum administrative pecuniary sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement where those can be determined by the relevant authority, even if those sanctions exceed the amounts referred to in points (f) and (g);
- (f) in respect of a natural person, a maximum administrative pecuniary sanctions of at least EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 12 January 2016;
- (g) in respect of legal persons, maximum administrative pecuniary sanctions of at least:
  - (i) EUR 5 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 12 January 2016, or up to 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body for infringements of Article 4;
  - (ii) EUR 15 000 000 or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 12 January 2016, or up to 10 % of the total annual turnover of the legal person according to the last available accounts approved by the management body for infringements of Article 15.

For the purpose of point (g)(i) and (ii) of the first subparagraph, where the legal person is a parent undertaking or a subsidiary of the parent undertaking which has to prepare consolidated financial accounts in accordance with Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income according to the relevant accounting regime according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking.

Member States may provide that competent authorities have powers in addition to those referred to in this paragraph. Member States may also provide for a wider scope of sanctions and higher levels of sanctions than those provided for in this paragraph.

5. An infringement of Article 4 shall not affect the validity of the terms of an SFT or the possibility of the parties to enforce the terms of an SFT. An infringement of Article 4 shall not give rise to compensation rights from a party to an SFT.

6. Member States may decide not to lay down rules for administrative sanctions and other administrative measures as referred to in paragraph 1 where the infringements referred to in that paragraph are already subject to criminal sanctions in their national law before 13 January 2018. Where they decide not to lay down rules for administrative sanctions and other administrative measures, Member States shall notify, in detail, to the Commission and to ESMA, the relevant parts of their criminal law.

7. By 13 July 2017 Member States shall notify the rules regarding paragraphs 1, 3 and 4 to the Commission and to ESMA. They shall notify the Commission and ESMA without delay of any subsequent amendment thereto.

#### Article 23

##### **Determination of administrative sanctions and other administrative measures**

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

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

Competent authorities may take into account additional factors to those referred to in the first paragraph when determining the type and level of administrative sanctions and other administrative measures.

#### Article 24

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

1. The competent authorities shall establish effective mechanisms to enable reporting of actual or potential infringements of Articles 4 and 15 to other competent authorities.
2. The mechanisms referred to in paragraph 1 shall include at least:
  - (a) specific procedures for the receipt of reports of infringements of Article 4 or 15 and their follow-up, including the establishment of secure communication channels for such reports;

- (b) appropriate protection for persons working under a contract of employment who report infringements of Article 4 or 15 or who are accused of infringing those articles against retaliation, discrimination and other types of unfair treatment;
  - (c) protection of personal data both of the person who reports the infringement of Article 4 or 15 and of the person who allegedly committed the infringement, including protection in relation to preserving the confidentiality of their identity, at all stages of the procedure without prejudice to disclosure of information being required by national law in the context of investigations or subsequent judicial proceedings.
3. Counterparties shall have in place appropriate internal procedures for their employees to report infringements of Articles 4 and 15.

#### Article 25

##### Exchange of information with ESMA

1. Competent authorities shall provide ESMA annually with aggregated and granular information regarding all administrative sanctions and other administrative measures imposed by them in accordance with Article 22. ESMA shall publish aggregated information in an annual report.
2. Where Member States have chosen to lay down criminal sanctions for infringements of the provisions referred to in Article 22, their competent authorities shall provide ESMA annually with anonymised and aggregated data regarding all criminal investigations undertaken and criminal sanctions imposed. ESMA shall publish, in an annual report, data on criminal sanctions imposed.
3. Where the competent authority has disclosed an administrative sanction or other administrative measure, or criminal sanction to the public, it shall, at the same time, report that information to ESMA.
4. ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information as referred to in paragraphs 1 and 2.

ESMA shall submit those draft implementing technical standards to the Commission by 13 January 2017.

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

#### Article 26

##### Publication of decisions

1. Subject to paragraph 4 of this Article, Member States shall ensure that competent authorities publish any decision imposing an administrative sanction or other administrative measure in relation to infringements of Article 4 or 15 on their website immediately after the person subject to that decision has been informed of that decision.
2. The information published pursuant to paragraph 1 shall specify at least the type and nature of the infringement and the identity of the person subject to the decision.
3. Paragraphs 1 and 2 shall not apply to decisions imposing measures that are of an investigatory nature.

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

- (a) defer publication of the decision until the reasons for that deferral cease to exist;

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

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

5. Competent authorities shall inform ESMA of all administrative sanctions and other administrative measures imposed but not published, in accordance with point (c) of paragraph 3, including any appeal in relation thereto and the outcome thereof. Member States shall ensure that competent authorities receive information and the final judgement in relation to any criminal sanction imposed and submit it to ESMA. ESMA shall maintain a central database of administrative sanctions, other administrative measures and criminal sanctions communicated to it solely for the purposes of exchanging information between competent authorities. That database shall be accessible only to competent authorities and it shall be updated on the basis of the information provided by the competent authorities.

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

#### *Article 27*

### **Right of appeal**

Member States shall ensure that decisions and measures taken pursuant to this Regulation are properly reasoned and subject to a right of appeal before a tribunal. The right of appeal before a tribunal shall also apply where, in respect of an application for authorisation which provides all of the information required, no decision is taken within six months of its submission.

#### *Article 28*

### **Sanctions and other measures for the purpose of Articles 13 and 14**

Sanctions and other measures established in accordance with Directives 2009/65/EC and 2011/61/EU shall be applicable to infringements of Articles 13 and 14 of this Regulation.

## CHAPTER IX

### **REVIEW**

#### *Article 29*

### **Reports and review**

1. Within 36 months of the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9), the Commission shall, after consulting ESMA, submit a report on the effectiveness, efficiency and proportionality of the obligations laid down in this Regulation to the European Parliament and to the Council, together with any appropriate proposals. That report shall include, in particular, an overview of similar reporting obligations laid down in third countries taking into account work at international level. It shall also focus on the reporting of any relevant transactions not included in the scope of this Regulation, taking into account any significant developments in market practices, as well as on the possible impact on the level of transparency of securities financing operations.

For the purposes of the report referred to in the first subparagraph, ESMA shall, within 24 months of the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9), and every three years thereafter, or more frequently where significant developments in market practices arise, submit a report to the European Parliament, to the Council and to the Commission on the efficiency of the reporting, taking into account the appropriateness of single-side reporting, in particular in terms of reporting coverage and quality as well as reduction of reports to trade repositories, and on significant developments in market practices with a focus on transactions having an equivalent objective or effect to an SFT.

2. Following completion of, and taking into account, work at international level, the reports referred to in paragraph 1 shall also identify material risks related to the use of SFTs by credit institutions and listed companies and analyse the appropriateness of providing for additional disclosure by those entities in their periodical reports.

3. By 13 October 2017, the Commission shall submit a report to the European Parliament and to the Council on progress in international efforts to mitigate the risks associated with SFTs, including the FSB recommendations for haircuts on non-centrally cleared SFTs, and on the appropriateness of those recommendations for Union markets. The Commission shall submit that report together with any appropriate proposals.

To that end, ESMA shall, by 13 October 2016, in cooperation with EBA and the ESRB and taking due account of international efforts, submit a report to the Commission, to the European Parliament and to the Council, assessing:

- (a) whether the use of SFTs leads to the build-up of significant leverage that is not addressed by existing regulation;
- (b) where appropriate, the options available to tackle such a build-up;
- (c) whether further measures to reduce the pro-cyclicality of that leverage are required.

ESMA's report shall also consider the quantitative impact of the FSB recommendations.

4. Within 39 months of the entry into force of the delegated act adopted by the Commission pursuant to Article 4(9), and within six months of submission of each ESMA report as referred to in the second subparagraph of this paragraph, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on the application of Article 11 in particular on whether fees that have been charged to trade repositories are proportionate to the turnover of the trade repository concerned and limited to fully covering ESMA's necessary expenditure relating to the registration, recognition and supervision of trade repositories as well as 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 pursuant to Article 9(1).

For the purposes of the Commission's reports referred to in the first subparagraph, within 33 months of the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9), and every three years thereafter, or more frequently where material changes to fees are introduced, ESMA shall submit a report to the Commission on the fees charged to trade repositories in accordance with this Regulation. Those reports shall set out at least ESMA's necessary expenditures relating to the registration, recognition and supervision of trade repositories, the costs that the competent authorities incurred carrying out work pursuant to this Regulation, in particular, as a result of any delegation of tasks, as well as the fees charged to trade repositories and their proportionality to trade repositories' turnover.

5. After consulting the ESRB, ESMA shall publish an annual report on aggregate SFT volumes by type of counterparty and transaction based on data reported in accordance with Article 4.

## CHAPTER X

### FINAL PROVISIONS

#### Article 30

#### **Exercise of delegated powers**

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 2(4) and Article 11(2) shall be conferred on the Commission for an indeterminate period of time from 12 January 2016.

3. The delegation of power referred to in Article 2(4) and Article 11(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 the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

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

5. A delegated act adopted pursuant to Article 2(4) or Article 11(2) 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 31

##### 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 of the European Parliament and of the Council <sup>(2)</sup>.

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

#### Article 32

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

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

(1) In Article 2, point (7) is replaced by the following:

‘(7) “OTC derivative” or “OTC derivative contract” means a derivative contract the execution of which does not take place on a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39/EC or on a third-country market considered to be equivalent to a regulated market in accordance with Article 2a of this Regulation;’.

(2) The following Article is inserted:

‘Article 2a

##### Equivalence decisions for the purposes of the definition of OTC derivatives

1. For the purposes of Article 2(7) of this Regulation, a third-country market shall be considered to be equivalent to a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39/EC where it complies with legally binding requirements which are equivalent to the requirements laid down in Title III of that Directive and it is subject to effective supervision and enforcement in that third country on an ongoing basis, as determined by the Commission in accordance with the procedure referred to in paragraph 2 of this Article.

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

<sup>(2)</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

2. The Commission may adopt implementing acts determining that a third-country market complies with legally binding requirements which are equivalent to the requirements laid down in Title III of Directive 2004/39/EC and it is subject to effective supervision and enforcement in that third country on an ongoing basis for the purposes of paragraph 1.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 86(2) of this Regulation.

3. The Commission and ESMA shall publish on their websites a list of those markets that are to be considered to be equivalent in accordance with the implementing act referred to in paragraph 2. That list shall be updated periodically.

(3) In Article 81, paragraph 3 is replaced by the following:

'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) EBA;
- (c) EIOPA;
- (d) the ESRB;
- (e) the competent authority supervising CCPs accessing the trade repositories;
- (f) the competent authority supervising the trading venues of the reported contracts;
- (g) the relevant members of the ESCB, including the ECB in carrying out its tasks within a single supervisory mechanism under Council Regulation (EU) No 1024/2013 (\*);
- (h) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;
- (i) supervisory authorities designated under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council (\*\*);
- (j) the relevant Union securities and market authorities whose respective supervisory responsibilities and mandates cover contracts, markets, participants and underlyings which fall within the scope of this Regulation;
- (k) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA, as referred to in Article 76;
- (l) the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council (\*\*\*)



- (m) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council (\*\*\*\*);
- (n) the Single Resolution Board established by Regulation (EU) No 806/2014;
- (o) competent authorities or national competent authorities within the meaning of Regulations (EU) No 1024/2013 and (EU) No 909/2014 and of Directives 2003/41/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU and, 2014/65/EU, and supervisory authorities within the meaning of Directive 2009/138/EC;
- (p) the competent authorities designated in accordance with Article 10(5) of this Regulation.

(\*) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

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

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

(\*\*\*\*) Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

### Article 33

#### Entry into force and application

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

2. This Regulation shall apply from 12 January 2016, with the exception of:

(a) Article 4(1), which shall apply:

(i) 12 months after the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9) for financial counterparties referred to in points (3)(a) and (b) of Article 3 and third-country entities referred to in point (3)(i) of Article 3 which would require authorisation or registration in accordance with the legislation referred to in points (3)(a) and (b) of Article 3 if they were established in the Union;

(ii) 15 months after the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9) for financial counterparties referred to in points (3)(g) and (h) of Article 3 and third-country entities referred to in point (3)(i) of Article 3 which would require authorisation or registration in accordance with the legislation referred to in points (3)(g) and (h) of Article 3 if they were established in the Union;

(iii) 18 months after the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9) for financial counterparties referred to in points (3)(c) to (f) of Article 3 and third-country entities referred to point (3)(i) of Article 3 which would require authorisation or registration in accordance with the legislation referred to in points (3)(c) to (f) of Article 3 if they were established in the Union; and

(iv) 21 months after the date of entry into force of the delegated act adopted by the Commission pursuant to Article 4(9) for non-financial counterparties;

(b) Article 13, which shall apply from 13 January 2017;

- (c) Article 14, which shall apply from 13 July 2017 in the case of collective investment undertakings subject to Directive 2009/65/EC or Directive 2011/61/EU that are constituted before 12 January 2016;
- (d) Article 15, which shall apply from 13 July 2016, including for collateral arrangements existing on that date.

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

Done at Strasbourg, 25 November 2015.

*For the European Parliament*

*The President*

M. SCHULZ

*For the Council*

*The President*

N. SCHMIT

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## ANNEX

**Section A – Information to be provided in the UCITS half-yearly and annual reports and the AIF's annual report****Global data:**

- The amount of securities and commodities on loan as a proportion of total lendable assets defined as excluding cash and cash equivalents;
- The amount of assets engaged in each type of SFTs and total return swaps expressed as an absolute amount (in the collective investment undertaking's currency) and as a proportion of the collective investment undertaking's assets under management (AUM).

**Concentration data:**

- Ten largest collateral issuers across all SFTs and total return swaps (break down of volumes of the collateral securities and commodities received per issuer's name);
- Top 10 counterparties of each type of SFTs and total return swaps separately (Name of counterparty and gross volume of outstanding transactions).

**Aggregate transaction data for each type of SFTs and total return swaps separately to be broken down according to the below categories:**

- Type and quality of collateral;
- Maturity tenor of the collateral broken down in the following maturity buckets: less than one day, one day to one week, one week to one month, one to three months, three months to one year, above one year, open maturity;
- Currency of the collateral;
- Maturity tenor of the SFTs and total return swaps broken down in the following maturity buckets: less than one day, one day to one week, one week to one month, one to three months, three months to one year, above one year, open transactions;
- Country in which the counterparties are established;
- Settlement and clearing (e.g., tri-party, Central Counterparty, bilateral).

**Data on reuse of collateral:**

- Share of collateral received that is reused, compared to the maximum amount specified in the prospectus or in the disclosure to investors;
- Cash collateral reinvestment returns to the collective investment undertaking.

**Safekeeping of collateral received by the collective investment undertaking as part of SFTs and total return swaps:**

Number and names of custodians and the amount of collateral assets safe-kept by each of the custodians

**Safekeeping of collateral granted by the collective investment undertaking as part of SFTs and total return swaps:**

The proportion of collateral held in segregated accounts or in pooled accounts, or in any other accounts

**Data on return and cost for each type of SFTs and total return swaps** broken down between the collective investment undertaking, the manager of the collective investment undertaking and third parties (e.g. agent lender) in absolute terms and as a percentage of overall returns generated by that type of SFTs and total return swaps

**Section B – Information to be included in the UCITS Prospectus and AIF disclosure to investors:**

- General description of the SFTs and total return swaps used by the collective investment undertaking and the rationale for their use.
  - Overall data to be reported for each type of SFTs and total return swaps
    - Types of assets that can be subject to them
    - Maximum proportion of AUM that can be subject to them
    - Expected proportion of AUM that will be subject to each of them.
  - Criteria used to select counterparties (including legal status, country of origin, minimum credit rating).
  - Acceptable collateral: description of acceptable collateral with regard to asset types, issuer, maturity, liquidity as well as the collateral diversification and correlation policies.
  - Collateral valuation: description of the collateral valuation methodology used and its rationale, and whether daily mark-to-market and daily variation margins are used.
  - Risk management: description of the risks linked to SFTs and total return swaps as well as risks linked to collateral management, such as operational, liquidity, counterparty, custody and legal risks and, where applicable, the risks arising from its reuse.
  - Specification of how assets subject to SFTs and total return swaps and collateral received are safe-kept (e.g. with fund custodian).
  - Specification of any restrictions (regulatory or self-imposed) on reuse of collateral.
  - Policy on sharing of return generated by SFTs and total return swaps: description of the proportions of the revenue generated by SFTs and total return swaps that is returned to the collective investment undertaking, and of the costs and fees assigned to the manager or third parties (e.g. the agent lender). The prospectus or disclosure to investors shall also indicate if these are related parties to the manager.
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