

Regulation (EU) No 648/2012 of the European Parliament
and of the Council of 4 July 2012 on OTC derivatives, central
counterparties and trade repositories (Text with EEA relevance)

REGULATION (EU) No 648/2012 OF THE
EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 4 July 2012

on OTC derivatives, central counterparties and trade repositories

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Central Bank⁽¹⁾,

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

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

Whereas:

- (1) At the request of the Commission, a report was published on 25 February 2009 by a High-Level Group chaired by Jacques de Larosière and concluded that the supervisory framework of the financial sector of the Union needed to be strengthened to reduce the risk and severity of future financial crises and recommended far-reaching reforms to the structure of supervision of that sector, including the creation of a European System of Financial Supervisors, comprising three European supervisory authorities, one each for the banking, the insurance and occupational pensions and the securities and markets sectors, and the creation of a European Systemic Risk Council.
- (2) The Commission Communication of 4 March 2009, entitled ‘Driving European Recovery’, proposed to strengthen the Union’s regulatory framework for financial services. In its Communication of 3 July 2009 entitled ‘Ensuring efficient, safe and sound derivatives markets’, the Commission assessed the role of derivatives in the financial crisis, and in its Communication of 20 October 2009 entitled ‘Ensuring efficient, safe and sound derivative markets: Future policy actions’, the Commission outlined the actions it intends to take to reduce the risks associated with derivatives.
- (3) On 23 September 2009, the Commission adopted proposals for three regulations establishing the European System of Financial Supervision, including the creation of three European Supervisory Authorities (ESAs) to contribute to a consistent

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

application of Union legislation and to the establishment of high-quality common regulatory and supervisory standards and practices. The ESAs comprise the European Supervisory Authority (European Banking Authority) (EBA) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council⁽⁴⁾, 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⁽⁵⁾, and the European Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁽⁶⁾. The ESAs have a crucial role to play in safeguarding the stability of the financial sector. It is therefore essential to ensure continuously that the development of their work is a matter of high political priority and that they are adequately resourced.

- (4) Over-the-counter derivatives ('OTC derivative contracts') lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved. The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and, accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.
- (5) At the 26 September 2009 summit in Pittsburgh, G20 leaders agreed that all standardised OTC derivative contracts should be cleared through a central counterparty (CCP) by the end of 2012 and that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of OTC derivative contracts in an internationally consistent and non-discriminatory way.
- (6) The Commission will monitor and endeavour to ensure that those commitments are implemented in a similar way by the Union's international partners. The Commission should cooperate with third-country authorities in order to explore mutually supportive solutions to ensure consistency between this Regulation and the requirements established by third countries and thus avoid any possible overlapping in this respect. With the assistance of ESMA, the Commission should monitor and prepare reports to the European Parliament and the Council on the international application of principles laid down in this Regulation. In order to avoid potential duplicate or conflicting requirements, the Commission might adopt decisions on equivalence of the legal, supervisory and enforcement framework in third countries, if a number of conditions are met. The assessment which forms the basis of such decisions should not prejudice the right of a CCP established in a third country and recognised by ESMA to provide clearing services to clearing members or trading venues established in the Union, as the recognition decision should be independent of this assessment. Similarly, neither an equivalence decision nor the assessment should prejudice the right of a trade repository established in a third country and recognised by ESMA to provide services to entities established in the Union.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (7) With regard to the recognition of third-country CCPs, and in accordance with the Union's international obligations under the agreement establishing the World Trade Organisation, including the General Agreement on Trade in Services, decisions determining third-country legal regimes as equivalent to the legal regime of the Union should be adopted only if the legal regime of the third country provides for an effective equivalent system for the recognition of CCPs authorised under foreign legal regimes in accordance with the general regulatory goals and standards set out by the G20 in September 2009 of improving transparency in the derivatives markets, mitigating systemic risk, and protecting against market abuse. Such a system should be considered equivalent if it ensures that the substantial result of the applicable regulatory regime is similar to Union requirements and should be considered effective if those rules are being applied in a consistent manner.
- (8) It is appropriate and necessary in this context, taking account of the characteristics of derivative markets and the functioning of CCPs, to verify the effective equivalence of foreign regulatory systems in meeting G20 goals and standards in order to improve transparency in derivatives markets, mitigate systemic risk and protect against market abuse. The very special situation of CCPs requires that the provisions relating to third countries are organised and function in accordance with arrangements that are specific to these market structure entities. Therefore this approach does not constitute a precedent for other legislation.
- (9) The European Council, in its Conclusions of 2 December 2009, agreed that there was a need to substantially improve the mitigation of counterparty credit risk and that it was important to improve transparency, efficiency and integrity for derivative transactions. The European Parliament resolution of 15 June 2010 on 'Derivatives markets: future policy actions' called for mandatory clearing and reporting of OTC derivative contracts.
- (10) ESMA should act within the scope of this Regulation by safeguarding the stability of financial markets in emergency situations, ensuring the consistent application of Union rules by national supervisory authorities and settling disagreements between them. It is also entrusted with developing draft regulatory and implementing technical standards and has a central role in the authorisation and monitoring of CCPs and trade repositories.
- (11) One of the basic tasks to be carried out through the European System of Central Banks (ESCB) is to promote the smooth operation of payment systems. In this respect, the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems, including CCPs. The members of the ESCB are thus closely involved in the authorisation and monitoring of CCPs, recognition of third-country CCPs and the approval of interoperability arrangements. In addition, they are closely involved in respect of the setting of regulatory technical standards as well as guidelines and recommendations. This Regulation is without prejudice to the responsibilities of the European Central Bank (ECB) and the national central banks (NCBs) to ensure efficient and sound clearing and payment systems within the Union and with other countries. Consequently, and in order to prevent the possible creation of parallel sets of rules, ESMA and the ESCB should cooperate closely when preparing the relevant draft technical standards. Further, the access to information by the ECB and the NCBs

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

is crucial when fulfilling their tasks relating to the oversight of clearing and payment systems as well as to the functions of a central bank of issue.

- (12) Uniform rules are required for derivative contracts set out in Annex I, Section C, points (4) to (10) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments⁽⁷⁾.
- (13) Incentives to promote the use of CCPs have not proven to be sufficient to ensure that standardised OTC derivative contracts are in fact cleared centrally. Mandatory CCP clearing requirements for those OTC derivative contracts that can be cleared centrally are therefore necessary.
- (14) It is likely that Member States will adopt divergent national measures which could create obstacles to the smooth functioning of the internal market and be to the detriment of market participants and financial stability. A uniform application of the clearing obligation in the Union is also necessary to ensure a high level of investor protection and to create a level playing field between market participants.
- (15) Ensuring that the clearing obligation reduces systemic risk requires a process of identification of classes of derivatives that should be subject to that obligation. That process should take into account the fact that not all CCP-cleared OTC derivative contracts can be considered suitable for mandatory CCP clearing.
- (16) This Regulation sets out the criteria for determining whether or not different classes of OTC derivative contracts should be subject to a clearing obligation. On the basis of draft regulatory technical standards developed by ESMA, the Commission should decide whether a class of OTC derivative contract is to be subject to a clearing obligation, and from when the clearing obligation takes effect including, where appropriate, phased-in implementation and the minimum remaining maturity of contracts entered into or novated before the date on which the clearing obligation takes effect, in accordance with this Regulation. A phased-in implementation of the clearing obligation could be in terms of the types of market participants that must comply with the clearing obligation. In determining which classes of OTC derivative contracts are to be subject to the clearing obligation, ESMA should take into account the specific nature of OTC derivative contracts which are concluded with covered bond issuers or with cover pools for covered bonds.
- (17) When determining which classes of OTC derivative contracts are to be subject to the clearing obligation, ESMA should also pay due regard to other relevant considerations, most importantly the interconnectedness between counterparties using the relevant classes of OTC derivative contracts and the impact on the levels of counterparty credit risk as well as promote equal conditions of competition within the internal market as referred to in Article 1(5)(d) of Regulation (EU) No 1095/2010.
- (18) Where ESMA has identified that an OTC derivative product is standardised and suitable for clearing but no CCP is willing to clear that product, ESMA should investigate the reason for this.
- (19) In determining which classes of OTC derivative contracts are to be subject to the clearing obligation, due account should be taken of the specific nature of the relevant

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

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

- (20) In order to ensure a uniform and coherent application of this Regulation and a level playing field for market participants when a class of OTC derivative contract is declared subject to the clearing obligation, this obligation should also apply to all contracts pertaining to that class of OTC derivative contract entered into on or after the date of notification of a CCP authorisation for the purpose of the clearing obligation received by ESMA but before the date from which the clearing obligation takes effect, provided that those contracts have a remaining maturity above the minimum determined by the Commission.
- (21) In determining whether a class of OTC derivative contract is to be subject to clearing requirements, ESMA should aim for a reduction in systemic risk. This includes taking into account in the assessment factors such as the level of contractual and operational standardisation of contracts, the volume and the liquidity of the relevant class of OTC derivative contract as well as the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivative contract.
- (22) For an OTC derivative contract to be cleared, both parties to that contract must be subject to a clearing obligation or must consent. Exemptions to the clearing obligation should be narrowly tailored as they would reduce the effectiveness of the obligation and the benefits of CCP clearing and may lead to regulatory arbitrage between groups of market participants.
- (23) In order to foster financial stability within the Union, it might be necessary also to subject the transactions entered into by entities established in third countries to the clearing and risk-mitigation techniques obligations, provided that the transactions concerned have a direct, substantial and foreseeable effect within the Union or where such obligations are necessary or appropriate to prevent the evasion of any provisions of this Regulation.
- (24) OTC derivative contracts that are not considered suitable for CCP clearing entail counterparty credit and operational risk and therefore, rules should be established to manage that risk. To mitigate counterparty credit risk, market participants that are subject to the clearing obligation should have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral. When preparing draft regulatory technical standards specifying those risk-management procedures, ESMA should take into account the proposals of the international standard setting bodies on margining requirements for non-centrally cleared derivatives. When developing draft regulatory technical standards to specify the arrangements required for the accurate and appropriate exchange of collateral to manage risks associated with

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

uncleared trades, ESMA should take due account of impediments faced by covered bond issuers or cover pools in providing collateral in a number of Union jurisdictions. ESMA should also take into account the fact that preferential claims given to covered bond issuers counterparties on the covered bond issuer's assets provides equivalent protection against counterparty credit risk.

- (25) Rules on clearing OTC derivative contracts, reporting on derivative transactions and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP should apply to financial counterparties, namely investment firms as authorised in accordance with Directive 2004/39/EC, credit institutions as authorised in accordance with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions⁽⁸⁾, insurance undertakings as authorised in accordance with First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance⁽⁹⁾, assurance undertakings as authorised in accordance with Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance⁽¹⁰⁾, reinsurance undertakings as authorised in accordance with Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance⁽¹¹⁾, undertakings for collective investments in transferable securities (UCITS) and, where relevant, their management companies, as authorised in accordance with Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)⁽¹²⁾, institutions for occupational retirement provision as defined in Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision⁽¹³⁾ and alternative investment funds managed by alternative investment fund managers (AIFM) as authorised or registered in accordance with Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers⁽¹⁴⁾.
- (26) Entities operating pension scheme arrangements, the primary purpose of which is to provide benefits upon retirement, usually in the form of payments for life, but also as payments made for a temporary period or as a lump sum, typically minimise their allocation to cash in order to maximise the efficiency and the return for their policy holders. Hence, requiring such entities to clear OTC derivative contracts centrally would lead to divesting a significant proportion of their assets for cash in order for them to meet the ongoing margin requirements of CCPs. To avoid a likely negative impact of such a requirement on the retirement income of future pensioners, the clearing obligation should not apply to pension schemes until a suitable technical solution for the transfer of non-cash collateral as variation margins is developed by CCPs to address this problem. Such a technical solution should take into account the special role of pension scheme arrangements and avoid materially adverse effects on pensioners. During a transitional period, OTC derivative contracts entered into with a view to decreasing investment risks directly relating to the financial solvency of pension scheme

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

arrangements should be subject not only to the reporting obligation, but also to bilateral collateralisation requirements. The ultimate aim, however, is central clearing as soon as this is tenable.

- (27) It is important to ensure that only appropriate entities and arrangements receive special treatment as well as to take into account the diversity of pension systems across the Union, while also to provide for a level playing field for all pension scheme arrangements. Therefore, the temporary derogation should apply to institutions for occupational retirement provision registered in accordance with Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf as referred to in Article 2(1) of that Directive as well as any legal entity set up for the purpose of investment by such institutions, acting solely and exclusively in their interest, and to occupational retirement provision businesses of institutions referred to in Article 3 of Directive 2003/41/EC.
- (28) The temporary derogation should also apply to occupational retirement provision businesses of life insurance undertakings provided that all corresponding assets and liabilities are ring-fenced, managed and organised separately, without any possibility of transfer. It should also apply to any other authorised and supervised entities operating on a national basis only or arrangements that are provided mainly in the territory of one Member State, only if both of them are recognised by national law and their primary purpose is to provide benefits upon retirement. The entities and arrangements referred to in this recital should be subject to the decision of the relevant competent authority and in order to ensure consistency, remove possible misalignments and avoid any abuse, the opinion of ESMA, after consulting EIOPA. This could include entities and arrangements that are not necessarily linked to an employer pension programme but still have the primary purpose of providing income at retirement, either on a compulsory or on a voluntary basis. Examples could include legal entities operating pension schemes on a funded basis under national law, provided that they invest in accordance with the ‘prudent person’ principle, and pension arrangements taken up by individuals directly, which may also be provided by life insurers. The exemption in the case of pension arrangements taken up by individuals directly should not cover OTC derivative contracts relating to other life insurance products of the insurer which do not have the primary purpose of providing an income at retirement. Further examples might be retirement provision businesses of insurance undertakings covered by Directive 2002/83/EC, provided that all assets corresponding to the businesses are included in a special register in accordance with the Annex to Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings⁽¹⁵⁾ as well as occupational retirement provision arrangements of insurance undertakings based on collective bargaining agreements. Institutions established for the purpose of providing compensation to members of pension scheme arrangements in the case of a default should also be treated as a pension scheme for the purpose of this Regulation.
- (29) Where appropriate, rules applicable to financial counterparties, should also apply to non-financial counterparties. It is recognised that non-financial counterparties use OTC derivative contracts in order to cover themselves against commercial risks directly

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

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

- (30) In determining whether an OTC derivative contract reduces risks directly relating to the commercial activities and treasury activities of a non-financial counterparty, due account should be taken of that non-financial counterparty's overall hedging and risk-mitigation strategies. In particular, consideration should be given to whether an OTC derivative contract is economically appropriate for the reduction of risks in the conduct and management of a non-financial counterparty, where the risks relate to fluctuations in interest rates, foreign exchange rates, inflation rates or commodity prices.
- (31) The clearing threshold is a very important figure for all non-financial counterparties. When the clearing threshold is set, the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivative contract should be taken into account. In that connection, appropriate efforts should be made to recognise the methods of risk mitigation used by non-financial counterparties in the context of their normal business activity.
- (32) Members of the ESCB and other Member States' bodies performing similar functions, other Union public bodies charged with or intervening in the management of the public debt, and the Bank for International Settlements should be excluded from the scope of this Regulation in order to avoid limiting their power to perform their tasks of common interest.
- (33) As not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP, they should have the possibility to access CCPs as clients or indirect clients subject to certain conditions.
- (34) The introduction of a clearing obligation along with a process to establish which CCPs can be used for the purpose of this obligation may lead to unintended competitive distortions of the OTC derivatives market. For example, a CCP could refuse to clear transactions executed on certain trading venues because the CCP is owned by a competing trading venue. In order to avoid such discriminatory practices, CCPs should agree to clear transactions executed in different trading venues, to the extent that those trading venues comply with the operational and technical requirements established by the CCP, without reference to the contractual documents on the basis of which the parties concluded the relevant OTC derivative transaction, provided that those

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

documents are consistent with market standards. Trading venues should provide the CCPs with trade feeds on a transparent and non-discriminatory basis. The right of access of a CCP to a trading venue should allow for arrangements whereby multiple CCPs use trade feeds of the same trading venue. However, this should not lead to interoperability for derivatives clearing or create liquidity fragmentation.

- (35) This Regulation should not block fair and open access between trading venues and CCPs in the internal market, subject to the conditions laid down in this Regulation and in the regulatory technical standards developed by ESMA and adopted by the Commission. The Commission should continue to monitor closely the evolution of the OTC derivatives market and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market with the aim of ensuring a level playing field in the financial markets.
- (36) In certain areas within financial services and trading of derivative contracts, commercial and intellectual property rights may also exist. In instances where such property rights relate to products or services which have become, or impact upon, industry standards, licences should be available on proportionate, fair, reasonable and non-discriminatory terms.
- (37) In order to identify the relevant classes of OTC derivative contracts that should be subject to the clearing obligation, the thresholds and systemically relevant non-financial counterparties, reliable data is needed. Therefore, for regulatory purposes, it is important that a uniform derivatives data reporting requirement is established at Union level. Moreover, a retrospective reporting obligation is needed, to the largest possible extent, for both financial counterparties and non-financial counterparties, in order to provide comparative data, including to ESMA and the relevant competent authorities.
- (38) An intragroup transaction is a transaction between two undertakings which are included in the same consolidation on a full basis and are subject to appropriate centralised risk evaluation, measurement and control procedures. They are part of the same institutional protection scheme as referred to in Article 80(8) of Directive 2006/48/EC or, in the case of credit institutions affiliated to the same central body, as referred to in Article 3(1) of that Directive, both are credit institutions or one is a credit institution and the other is a central body. OTC derivative contracts may be recognised within non-financial or financial groups, as well as within groups composed of both financial and non-financial undertakings, and if such a contract is considered an intragroup transaction in respect of one counterparty, then it should also be considered an intragroup transaction in respect of the other counterparty to that contract. It is recognised that intragroup transactions may be necessary for aggregating risks within a group structure and that intragroup risks are therefore specific. Since the submission of those transactions to the clearing obligation may limit the efficiency of those intragroup risk-management processes, an exemption of intragroup transactions from the clearing obligation may be beneficial, provided that this exemption does not increase systemic risk. As a result, adequate exchange of collateral should be substituted to the CCP clearing those transactions, where that is appropriate to mitigate intragroup counterparty risks.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

- (39) However, some intragroup transactions could be exempted, in some cases on the basis of the decision of the competent authorities, from the collateralisation requirement provided that their risk-management procedures are adequately sound, robust and consistent with the level of complexity of the transaction and there is no impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties. Those criteria as well as the procedures for the counterparties and the relevant competent authorities to be followed while applying exemptions should be specified in regulatory technical standards adopted in accordance with the relevant regulations establishing the ESAs. Before developing such draft regulatory technical standards, the ESAs should prepare an impact assessment of their potential impact on the internal market as well as on financial market participants and in particular on the operations and the structure of groups concerned. All the technical standards applicable to the collateral exchanged in intragroup transactions, including criteria for the exemption, should take into account the prevailing specificities of those transactions and existing differences between non-financial and financial counterparties as well as their purpose and methods of using derivatives.
- (40) Counterparties should be considered to be included in the same consolidation at least where they are both included in a consolidation in accordance with Council Directive 83/349/EEC⁽¹⁶⁾ or International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 of the European Parliament and of the Council⁽¹⁷⁾ or, in relation to a group the parent undertaking of which has its head office in a third country, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with Commission Regulation (EC) No 1569/2007⁽¹⁸⁾ (or accounting standards of a third country the use of which is permitted in accordance with Article 4 of Regulation (EC) No 1569/2007), or where they are both covered by the same consolidated supervision in accordance with Directive 2006/48/EC or with Directive 2006/49/EC of the European Parliament and of the Council⁽¹⁹⁾ or, in relation to a group the parent undertaking of which has its head office in a third country, the same consolidated supervision by a third country competent authority verified as equivalent to that governed by the principles laid down in Article 143 of Directive 2006/48/EC or in Article 2 of Directive 2006/49/EC.
- (41) It is important that market participants report all details regarding derivative contracts they have entered into to trade repositories. As a result, information on the risks inherent in derivatives markets will be centrally stored and easily accessible, inter alia, to ESMA, the relevant competent authorities, the European Systemic Risk Board (ESRB) and the relevant central banks of the ESCB.
- (42) The provision of trade repository services is characterised by economies of scale, which may hamper competition in this particular field. At the same time, the imposition of a comprehensive reporting requirement on market participants may increase the value of the information maintained by trade repositories also for third parties providing ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression. It is appropriate to ensure that a level playing field in the post-trade sector more generally is not compromised by a

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

possible natural monopoly in the provision of trade repository services. Therefore, trade repositories should be required to provide access to the information held in the repository on fair, reasonable and non-discriminatory terms, subject to necessary precautions on data protection.

- (43) In order to allow for a comprehensive overview of the market and for assessing systemic risk, both CCP-cleared and non-CCP-cleared derivative contracts should be reported to trade repositories.
- (44) The ESAs should be provided with adequate resources in order to perform the tasks they are given in this Regulation effectively.
- (45) Counterparties and CCPs that conclude, modify, or terminate a derivative contract should ensure that the details of that contract are reported to a trade repository. They should be able to delegate the reporting of the contract to another entity. An entity or its employees that report the details of a derivative contract to a trade repository on behalf of a counterparty, in accordance with this Regulation, should not be in breach of any restriction on disclosure. When preparing the draft regulatory technical standards regarding reporting, ESMA should take into account the progress made in the development of a unique contract identifier and the list of required reporting data in Annex I, Table 1 of Commission Regulation (EC) No 1287/2006⁽²⁰⁾ implementing Directive 2004/39/EC and consult other relevant authorities such as the Agency for the Cooperation of Energy Regulators.
- (46) Taking into consideration the principles set out in the Commission's Communication on reinforcing sanctioning regimes in the financial services sector and legal acts of the Union adopted as a follow-up to that Communication, Member States should lay down rules on penalties applicable to infringements of this Regulation. Member States should enforce those penalties in a manner that does not reduce the effectiveness of those rules. Those penalties should be effective, proportionate and dissuasive. They should be based on guidelines adopted by ESMA to promote convergence and cross-sector consistency of penalty regimes in the financial sector. Member States should ensure that the penalties imposed are publicly disclosed, where appropriate, and that assessment reports on the effectiveness of existing rules are published at regular intervals.
- (47) A CCP might be established in accordance with this Regulation in any Member State. No Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for clearing services. Nothing in this Regulation should attempt to restrict or impede a CCP in one jurisdiction from clearing a product denominated in the currency of another Member State or in the currency of a third country.
- (48) Authorisation of a CCP should be conditional on a minimum amount of initial capital. Capital, including retained earnings and reserves of a CCP, should be proportionate to the risk stemming from the activities of the CCP at all times in order to ensure that it is adequately capitalised against credit, counterparty, market, operational, legal and business risks which are not already covered by specific financial resources and that it is able to conduct an orderly winding-up or restructuring of its operations if necessary.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (49) As this Regulation introduces a legal obligation to clear through specific CCPs for regulatory purposes, it is essential to ensure that those CCPs are safe and sound and comply at all times with the stringent organisational, business conduct, and prudential requirements established by this Regulation. In order to ensure uniform application of this Regulation, those requirements should apply to the clearing of all financial instruments in which the CCPs deal.
- (50) It is therefore necessary, for regulatory and harmonisation purposes, to ensure that counterparties only use CCPs which comply with the requirements laid down in this Regulation. Those requirements should not prevent Member States from adopting or continuing to apply additional requirements in respect of CCPs established in their territory including certain authorisation requirements under Directive 2006/48/EC. However, imposing such additional requirements should not influence the right of CCPs authorised in other Member States or recognised, in accordance with this Regulation, to provide clearing services to clearing members and their clients established in the Member State introducing additional requirements, since those CCPs are not subject to those additional requirements and do not need to comply with them. By 30 September 2014, ESMA should draft a report on the impact of the application of additional requirements by Member States.
- (51) Direct rules regarding the authorisation and supervision of CCPs are an essential corollary to the obligation to clear OTC derivative contracts. It is appropriate that competent authorities retain responsibility for all aspects of the authorisation and the supervision of CCPs, including the responsibility for verifying that the applicant CCP complies with this Regulation and with Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems⁽²¹⁾, in view of the fact that those national competent authorities remain best placed to examine how the CCPs operate on a daily basis, to carry out regular reviews and to take appropriate action, where necessary.
- (52) Where a CCP risks insolvency, fiscal responsibility may lie predominantly with the Member State in which that CCP is established. It follows that authorisation and supervision of that CCP should be exercised by the relevant competent authority of that Member State. However, since a CCP's clearing members may be established in different Member States and they will be the first to be impacted by the CCP's default, it is imperative that all relevant competent authorities and ESMA be involved in the authorisation and supervisory process. This will avoid divergent national measures or practices and obstacles to the proper functioning of the internal market. Furthermore, no proposal or policy of any member of a college of supervisors should, directly or indirectly, discriminate against any Member State or group of Member States as a venue for clearing services in any currency. ESMA should be a participant in every college in order to ensure the consistent and correct application of this Regulation. ESMA should involve other competent authorities in the Member States concerned in the work of preparing recommendations and decisions.
- (53) In light of the role assigned to colleges, it is important that all the relevant competent authorities as well as members of the ESCB are involved in performing their tasks.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

The college should consist not only of the competent authorities supervising the CCP but also of the supervisors of the entities on which the operations of that CCP might have an impact, namely selected clearing members, trading venues, interoperable CCPs and central securities depositories. Members of the ESCB that are responsible for the oversight of the CCP and interoperable CCPs as well as those responsible for the issue of the currencies of the financial instruments cleared by the CCP, should be able to participate in the college. As the supervised or overseen entities would be established in a limited range of Member States in which the CCP operates, a single competent authority or member of the ESCB could be responsible for supervision or oversight of a number of those entities. In order to ensure smooth cooperation between all the members of the college, appropriate procedures and mechanisms should be put in place.

- (54) Since the establishment and functioning of the college is assumed to be based on a written agreement between all of its members, it is appropriate to confer upon them the power to determine the college's decision-making procedures, given the sensitivity of the issue. Therefore, detailed rules on voting procedures should be laid down in a written agreement between the members of the college. However, in order to balance the interests of all the relevant market participants and Member States appropriately, the college should vote in accordance with the general principle whereby each member has one vote, irrespective of the number of functions it performs in accordance with this Regulation. For colleges with up to and including 12 members, a maximum of two college members belonging to the same Member State should have a vote and each voting member should have one vote. For colleges with more than 12 members, a maximum of three college members belonging to the same Member State should have a vote and each voting member should have one vote.
- (55) The very particular situation of CCPs requires that colleges are organised and function in accordance with arrangements that are specific to the supervision of CCPs.
- (56) The arrangements provided for in this Regulation do not constitute a precedent for other legislation on the supervision and oversight of financial market infrastructures, in particular with regard to the voting modalities for referrals to ESMA.
- (57) A CCP should not be authorised where all the members of the college, excluding the competent authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement that the CCP should not be authorised. If, however, a sufficient majority of the college has expressed a negative opinion and any of the competent authorities concerned, based on that majority of two-thirds of the college, has referred the matter to ESMA, the competent authority of the Member State where the CCP is established should defer its decision on the authorisation and await any decision that ESMA may take regarding conformity with Union law. The competent authority of the Member State where the CCP is established should take its decision in accordance with such a decision by ESMA. Where all the members of the college, excluding the authorities of the Member State where the CCP is established, reach a joint opinion to the effect that they consider that the requirements are not met and that the CCP should not receive authorisation, the competent authority of the Member State where the CCP

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

is established should be able to refer the matter to ESMA to decide on conformity with Union law.

- (58) It is necessary to reinforce provisions on exchange of information between competent authorities, ESMA and other relevant authorities and to strengthen the duties of assistance and cooperation between them. Due to increasing cross-border activity, those authorities should provide each other with the relevant information for the exercise of their functions so as to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions.
- (59) In view of the global nature of financial markets, ESMA should be directly responsible for recognising CCPs established in third countries and thus allowing them to provide clearing services within the Union, provided that the Commission has recognised the legal and supervisory framework of that third country as equivalent to the Union framework and that certain other conditions are met. Therefore, a CCP established in a third country, providing clearing services to clearing members or trading venues established in the Union should be recognised by ESMA. However, in order not to hamper the further development of cross-border investment management business in the Union, a third-country CCP providing services to clients established in the Union through a clearing member established in a third country should not have to be recognised by ESMA. In this context, agreements with the Union's major international partners will be of particular importance in order to ensure a global level playing field and financial stability.
- (60) On 16 September 2010, the European Council agreed on the need for the Union to promote its interest and values more assertively and, in a spirit of reciprocity and mutual benefit, in the context of the Union's external relations and to take steps, inter alia, to secure greater market access for European business and deepen regulatory cooperation with major trade partners.
- (61) A CCP should have robust governance arrangements, senior management of good repute and independent members on its board, irrespective of its ownership structure. At least one-third, and no less than two, members of its board should be independent. However, different governance arrangements and ownership structures may influence a CCP's willingness or ability to clear certain products. It is thus appropriate that the independent members of the board and the risk committee to be established by the CCP address any potential conflict of interests within a CCP. Clearing members and clients need to be adequately represented as decisions taken by the CCP may have an impact on them.
- (62) A CCP may outsource functions. The CCP's risk committee should advise on such outsourcing. Major activities linked to risk management should not be outsourced unless this is approved by the competent authority.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (63) The participation requirements for a CCP should be transparent, proportionate, and non-discriminatory and should allow for remote access to the extent that this does not expose the CCP to additional risks.
- (64) Clients of clearing members that clear their OTC derivative contracts with CCPs should be granted a high level of protection. The actual level of protection depends on the level of segregation that those clients choose. Intermediaries should segregate their assets from those of their clients. For this reason, CCPs should keep updated and easily identifiable records, in order to facilitate the transfer of the positions and assets of a defaulting clearing member's clients to a solvent clearing member or, as the case may be, the orderly liquidation of the clients' positions and the return of excess collateral to the clients. The requirements laid down in this Regulation on the segregation and portability of clients' positions and assets should therefore prevail over any conflicting laws, regulations and administrative provisions of the Member States that prevent the parties from fulfilling them.
- (65) A CCP should have a sound risk-management framework to manage credit risks, liquidity risks, operational and other risks, including the risks that it bears or poses to other entities as a result of interdependencies. A CCP should have adequate procedures and mechanisms in place to deal with the default of a clearing member. In order to minimise the contagion risk of such a default, the CCP should have in place stringent participation requirements, collect appropriate initial margins, maintain a default fund and other financial resources to cover potential losses. In order to ensure that it benefits from sufficient resources on an ongoing basis, the CCP should establish a minimum amount below which the size of the default fund is not generally to fall. This should not, however, limit the CCP's ability to use the entirety of the default fund to cover the losses caused by a clearing member's default.
- (66) When defining a sound risk-management framework, a CCP should take into account its potential risk and economic impact on the clearing members and their clients. Although the development of a highly robust risk management should remain its primary objective, a CCP may adapt its features to the specific activities and risk profiles of the clients of the clearing members, and if deemed appropriate on the basis of the criteria specified in the regulatory technical standards to be developed by ESMA, may include in the scope of the highly liquid assets accepted as collateral, at least cash, government bonds, covered bonds in accordance with Directive 2006/48/EC subject to adequate haircuts, guarantees callable on first demand granted by a member of the ESCB, commercial bank guarantees under strict conditions, in particular relating to the creditworthiness of the guarantor, and the guarantor's capital links with CCP's clearing members. Where appropriate, ESMA may also consider gold as an asset acceptable as collateral. CCPs should be able to accept, under strict risk-management conditions, commercial bank guarantees from non-financial counterparties acting as clearing members.
- (67) CCPs' risk-management strategies should be sufficiently sound so as to avoid risks for the taxpayer.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (68) Margin calls and haircuts on collateral may have procyclical effects. CCPs, competent authorities and ESMA should therefore adopt measures to prevent and control possible procyclical effects in risk-management practices adopted by CCPs, to the extent that a CCP's soundness and financial security is not negatively affected.
- (69) Exposure management is an essential part of the clearing process. Access to, and use of, the relevant pricing sources should be granted to provide clearing services in general. Such pricing sources should include those relating to indices that are used as references to derivatives or other financial instruments.
- (70) Margins are the primary line of defence for a CCP. Although CCPs should invest the margins received in a safe and prudent manner, they should make particular efforts to ensure adequate protection of margins to guarantee that they are returned in a timely manner to the non-defaulting clearing members or to an interoperable CCP where the CCP collecting these margins defaults.
- (71) Access to adequate liquidity resources is essential for a CCP. It is possible for such liquidity to derive from access to central bank liquidity, creditworthy and reliable commercial bank liquidity, or a combination of both. Access to liquidity could result from an authorisation granted in accordance with Article 6 of Directive 2006/48/EC or other appropriate arrangements. In assessing the adequacy of liquidity resources, especially in stress situations, a CCP should take into consideration the risks of obtaining the liquidity by only relying on commercial banks credit lines.
- (72) The 'European Code of Conduct for Clearing and Settlement' of 7 November 2006 established a voluntary framework for establishing links between CCPs. However, the post-trade sector remains fragmented along national lines, making cross-border trades more costly and hindering harmonisation. It is therefore necessary to lay down the conditions for the establishment of interoperability arrangements between CCPs to the extent these do not expose the relevant CCPs to risks that are not appropriately managed.
- (73) Interoperability arrangements are important for greater integration of the post-trading market within the Union and regulation should be provided for. However, as interoperability arrangements may expose CCPs to additional risks, CCPs should have been, for three years, authorised to clear or recognised in accordance with this Regulation, or authorised under a pre-existing national authorisation regime, before competent authorities grant approval of such interoperability arrangements. In addition, given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to restrict the scope of interoperability arrangements to transferable securities and money-market instruments. However, by 30 September 2014, ESMA should submit a report to the Commission on whether an extension of that scope to other financial instruments would be appropriate.
- (74) Trade repositories collect data for regulatory purposes that are relevant to authorities in all Member States. ESMA should assume responsibility for the registration, withdrawal of registration and supervision of trade repositories.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (75) Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict operational, record-keeping and data-management requirements.
- (76) Transparency of prices, fees and risk-management models associated with the services provided by CCPs, their members and trade repositories is necessary to enable market participants to make an informed choice.
- (77) In order to carry out its duties effectively, ESMA should be able to require, by simple request or by decision, all necessary information from trade repositories, related third parties and third parties to which the trade repositories have outsourced operational functions or activities. If ESMA requires such information by simple request, the addressee is not obliged to provide the information but, in the event that it does so voluntarily, the information provided should not be incorrect or misleading. Such information should be made available without delay.
- (78) Without prejudice to cases covered by criminal or tax law, the competent authorities, ESMA, bodies or natural or legal persons other than the competent authorities, which receive confidential information should use it only in the performance of their duties and for the exercise of their functions. However, this should not prevent the exercise, in accordance with national law, of the functions of national bodies responsible for the prevention, investigation or correction of cases of maladministration.
- (79) In order to exercise its supervisory powers effectively, ESMA should be able to conduct investigations and on-site inspections.
- (80) ESMA should be able to delegate specific supervisory tasks to the competent authority of a Member State, for instance where a supervisory task requires knowledge and experience with respect to local conditions, which are more easily available at national level. ESMA should be able to delegate the carrying out of specific investigatory tasks and on-site inspections. Prior to the delegation of tasks, ESMA should consult the relevant competent authority about the detailed conditions relating to such delegation of tasks, including the scope of the task to be delegated, the timetable for the performance of the task, and the transmission of necessary information by and to ESMA. ESMA should compensate the competent authorities for carrying out a delegated task in accordance with a regulation on fees to be adopted by the Commission by means of a delegated act. ESMA should not be able to delegate the power to adopt decisions on registration.
- (81) It is necessary to ensure that competent authorities are able to request that ESMA examine whether the conditions for the withdrawal of a trade repository's registration are met. ESMA should assess such requests and take any appropriate measures.
- (82) ESMA should be able to impose periodic penalty payments to compel trade repositories to put an end to an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or an on-site inspection.
- (83) ESMA should also be able to impose fines on trade repositories where it finds that they have committed, intentionally or negligently, an infringement of this Regulation.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

Fines should be imposed according to the level of seriousness of the infringement. Infringements should be divided into different groups for which specific fines should be allocated. In order to calculate the fine relating to a particular infringement, ESMA should use a two-step methodology consisting of setting a basic amount and adjusting that basic amount, if necessary, by certain coefficients. The basic amount should be established by taking into account the annual turnover of the trade repository concerned and the adjustments should be made by increasing or decreasing the basic amount through the application of the relevant coefficients in accordance with this Regulation.

- (84) This Regulation should establish coefficients linked to aggravating and mitigating circumstances in order to give the necessary tools to ESMA to decide on a fine which is proportionate to the seriousness of the infringement committed by a trade repository, taking into account the circumstances under which that infringement has been committed.
- (85) Before taking a decision to impose fines or periodic penalty payments, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence.
- (86) ESMA should refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical facts, or from facts which are substantially the same, has acquired the force of *res judicata* as a result of criminal proceedings under national law.
- (87) ESMA's decisions imposing fines and periodic penalty payments should be enforceable and their enforcement should be subject to the rules of civil procedure which are in force in the State in the territory of which it is carried out. Rules of civil procedure should not include criminal procedural rules but could include administrative procedural rules.
- (88) In the case of an infringement committed by a trade repository, ESMA should be empowered to take a range of supervisory measures, including requiring the trade repository to bring the infringement to an end, and, as a last resort, withdrawing the registration where the trade repository has seriously or repeatedly infringed this Regulation. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons subject to the proceedings an opportunity to be heard in order to comply with their rights of defence.
- (89) It is essential that Member States and ESMA protect the right to privacy of natural persons when processing personal data, in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽²²⁾ and with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and of the free movement of such data⁽²³⁾.

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (90) It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the existing recommendations developed by the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO) noting that the CPSS-IOSCO principles for financial market infrastructure, including CCPs, were established on 16 April 2012. It creates a Union framework in which CCPs can operate safely. ESMA should consider these existing standards and their future developments when drawing up or proposing to revise the regulatory technical standards as well as the guidelines and recommendations foreseen in this Regulation.
- (91) The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of amendments to the list of entities exempt from this Regulation, further rules of procedure relating to the imposition of fines or periodic penalty payments, including provisions on the rights of the defence, time limits, the collection of fines or periodic penalty payments and the limitation periods for the imposition and enforcement of penalty payments or fines; measures to amend Annex II in order to take account of developments in the financial markets; the further specification of the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (92) In order to ensure consistent harmonisation, power should be delegated to the Commission to adopt the ESAs' draft regulatory technical standards in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010 for the application, for the purposes of this Regulation, of points (4) to (10) of Section C of Annex I to Directive 2004/39/EC and in order to specify: the OTC derivative contracts that are considered to have a direct, substantial and foreseeable effect within the Union or the cases where it is necessary or appropriate to prevent the evasion of any provision of this Regulation; the types of indirect contractual arrangements that meet the conditions set out in this Regulation; the classes of OTC derivative contracts that should be subject to the clearing obligation, the date or dates from which the clearing obligation is to take effect, including any phase-in, the categories of counterparties to which the clearing obligation applies, and the minimum remaining maturity of the OTC derivative contracts entered into or novated before the date on which the clearing obligation takes effect; the details to be included in a competent authority's notification to ESMA of its authorisation of a CCP to clear a class of OTC derivative contract; particular classes of OTC derivative contracts, the degree of standardisation of the contractual terms and operational processes, the volume and the liquidity, and the availability of fair, reliable and generally accepted pricing information; the details to be included in ESMA's register of classes of OTC derivative contracts subject to the clearing obligation; the details and type of the reports for the different classes of derivatives; criteria to determine which OTC derivative contracts

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity and values of the clearing thresholds, the procedures and the arrangements in regard to risk-mitigation techniques for OTC derivative contracts not cleared by a CCP; the risk-management procedures, including the required levels and type of collateral and segregation arrangements and the required level of capital; the notion of liquidity fragmentation; requirements regarding the capital, retained earnings and reserves of CCPs; the minimum content of the rules and governance arrangements for CCPs; the details of the records and information to be retained by CCPs; the minimum content and requirements for CCPs' business continuity policies and disaster recovery plans; the appropriate percentage and time horizons for the liquidation period and the calculation of historical volatility to be considered for the different classes of financial instruments taking into account the objective to limit pro-cyclicality and the conditions under which portfolio margining practices can be implemented; the framework for defining extreme but plausible market conditions which should be used when defining the size of the default fund and the resources of CCPs; the methodology for calculating and maintaining the amount of CCPs' own resources; the type of collateral that could be considered highly liquid, such as cash, gold, government and high-quality corporate bonds, covered bonds and the haircuts and the conditions under which commercial bank guarantees can be accepted as collateral; the financial instruments that can be considered highly liquid, bearing minimal credit and market risk, highly secured arrangements and concentration limits; the type of stress tests to be undertaken by CCPs for different classes of financial instruments and portfolios, the involvement of clearing members or other parties in the tests, the frequency and timing of the tests and the key information that the CCP is to disclose on its risk-management model and assumptions adopted to perform the stress tests; the details of the application by trade repositories for registration with ESMA; the frequency and the detail in which trade repositories are to disclose information relating to aggregate positions by class of OTC derivative contract; and the operational standards required in order to aggregate and compare data across repositories.

- (93) Any obligation imposed by this Regulation which is to be further developed by means of delegated or implementing acts adopted under Article 290 or 291 TFEU should be understood as applying only from the date on which those acts take effect.
- (94) As a part of its development of technical guidelines and regulatory technical standards, and in particular when setting the clearing threshold for non-financial counterparties under this Regulation, ESMA should organise public hearings of market participants.
- (95) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers⁽²⁴⁾.
- (96) The Commission should monitor and assess the need for any appropriate measures to ensure the consistent and effective application and development of regulations,

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

standards and practices falling within the scope of this Regulation, taking into consideration the outcome of the work performed by relevant international forums.

- (97) In view of the rules regarding interoperable systems, it was deemed appropriate to amend Directive 98/26/EC to protect the rights of a system operator that provides collateral security to a receiving system operator in the event of insolvency proceedings against that receiving system operator.
- (98) In order to facilitate efficient clearing, recording, settlement and payment, CCPs and trade repositories should accommodate in their communication procedures with participants and with the market infrastructures they interface with, the relevant international communication procedures and standards for messaging and reference data.
- (99) Since the objectives of this Regulation, namely to lay down uniform requirements for OTC derivative contracts and for the performance of activities of CCPs and trade repositories, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAVE ADOPTED THIS REGULATION:

Modifications etc. (not altering text)

- C1** Regulation: power to modify conferred (11.7.2023) by [Financial Services and Markets Act 2023](#) (c. 29), ss. 3, 86(3), [Sch. 1 Pt. 1](#); S.I. 2023/779, reg. 2(d)

Changes to legislation: Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) [View outstanding changes](#)

- (1) [OJ C 57, 23.2.2011, p. 1.](#)
- (2) [OJ C 54, 19.2.2011, p. 44.](#)
- (3) Position of the European Parliament of 29 March 2012 (not yet published in the Official Journal) and decision of the Council of 4 July 2012.
- (4) [OJ L 331, 15.12.2010, p. 12.](#)
- (5) [OJ L 331, 15.12.2010, p. 48.](#)
- (6) [OJ L 331, 15.12.2010, p. 84.](#)
- (7) [OJ L 145, 30.4.2004, p. 1.](#)
- (8) [OJ L 177, 30.6.2006, p. 1.](#)
- (9) [OJ L 228, 16.8.1973, p. 3.](#)
- (10) [OJ L 345, 19.12.2002, p. 1.](#)
- (11) [OJ L 323, 9.12.2005, p. 1.](#)
- (12) [OJ L 302, 17.11.2009, p. 32.](#)
- (13) [OJ L 235, 23.9.2003, p. 10.](#)
- (14) [OJ L 174, 1.7.2011, p. 1.](#)
- (15) [OJ L 110, 20.4.2001, p. 28.](#)
- (16) Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts ([OJ L 193, 18.7.1983, p. 1.](#)).
- (17) Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards ([OJ L 243, 11.9.2002, p. 1.](#)).
- (18) Commission Regulation (EC) No 1569/2007 of 21 December 2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities pursuant to Directives 2003/71/EC and 2004/109/EC of the European Parliament and of the Council ([OJ L 340, 22.12.2007, p. 66.](#)).
- (19) Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions ([OJ L 177, 30.6.2006, p. 201.](#)).
- (20) [OJ L 241, 2.9.2006, p. 1.](#)
- (21) [OJ L 166, 11.6.1998, p. 45.](#)
- (22) [OJ L 281, 23.11.1995, p. 31.](#)
- (23) [OJ L 8, 12.1.2001, p. 1.](#)
- (24) [OJ L 55, 28.2.2011, p. 13.](#)

Changes to legislation:

Regulation (EU) No 648/2012 of the European Parliament and of the Council, Introductory Text is up to date with all changes known to be in force on or before 16 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

[View outstanding changes](#)

Changes and effects yet to be applied to the whole legislation item and associated provisions

- Art. 2(30)-(33) inserted by [S.I. 2018/1184 reg. 7](#) (This amendment not applied to legislation.gov.uk. S.I. 2018/1184, reg. 7 substituted (1.3.2019) by The Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019 (S.I. 2019/405), regs. 1(2), 9)
- Art. 4(1)(a)(v) words substituted by [S.I. 2019/335 reg. 14\(2\)\(a\)](#) (This amendment not applied to legislation.gov.uk. Reg. 14(2)(a) substituted (30.10.2019) by S.I. 2019/1416, regs. 1(2), 14(a))
- Art. 4(1)(a)(iv) words substituted by [S.I. 2019/335 reg. 14\(2\)\(a\)](#) (This amendment not applied to legislation.gov.uk. Reg. 14(2)(a) substituted (30.10.2019) by S.I. 2019/1416, regs. 1(2), 14(a))
- Art. 4(1)(b)(ii) words substituted by [S.I. 2019/335 reg. 14\(2\)\(b\)\(i\)](#) (This amendment not applied to legislation.gov.uk. Reg. 14(2)(b) omitted (30.10.2019) by virtue of S.I. 2019/1416, regs. 1(2), 14(b))
- Art. 4(1)(b)(ii) words substituted by [S.I. 2019/335 reg. 14\(2\)\(b\)\(ii\)](#) (This amendment not applied to legislation.gov.uk. Reg. 14(2)(b) omitted (30.10.2019) by virtue of S.I. 2019/1416, regs. 1(2), 14(b))
- Art. 10(1)(a) word omitted by [S.I. 2019/335 reg. 20\(2\)\(b\)](#) (This amendment not applied to legislation.gov.uk. Reg. 20(2) substituted (30.10.2019) by S.I. 2019/1416, regs. 1(2), 17(a))
- Art. 10(1)(a) words omitted by [S.I. 2019/335 reg. 20\(2\)\(a\)](#) (This amendment not applied to legislation.gov.uk. Reg. 20(2) substituted (30.10.2019) by S.I. 2019/1416, regs. 1(2), 17(a))
- Art. 25(6A) inserted by [S.I. 2018/1184 reg. 8\(9\)](#) (This amendment not applied to legislation.gov.uk. Reg. 8 omitted (25.6.2020) by virtue of S.I. 2020/646, regs. 1(2)(c), 4(3))
- Art. 25(7)(c) words substituted by [S.I. 2018/1184 reg. 8\(10\)\(c\)](#) (This amendment not applied to legislation.gov.uk. Reg. 8 omitted (25.6.2020) by virtue of S.I. 2020/646, regs. 1(2)(c), 4(3))