Commission Delegated Regulation (EU) 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2020/1303

of 14 July 2020

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[(1)], and in particular the second subparagraph of Article 25(2a) thereof,

Whereas:

(1) When assessing the degree of systemic risk that a third-country CCP presents to the financial stability of the Union or of one or more of its Member States, ESMA should consider a range of objective quantitative and qualitative considerations that justify its decision to recognise a third-country CCP as a Tier 1 or a Tier 2 CCP. It should also take into account any conditions under which the Commission may have adopted its equivalence decision. In particular, when assessing the risk profile of a third-country CCP, ESMA must consider objective and transparent quantitative activity indicators with regard to the business conducted with respect to clearing participants established in the Union or denominated in Union currencies, at the time of the assessment. While ESMA must consider the business conducted by the CCP in a holistic manner, its assessment should reflect the risk that a particular CCP could bring to the financial stability of the Union.

(2) In specifying the criteria that ESMA is to take into account when determining the tier of a third-country CCP, the nature of the transactions cleared by the CCP, including their complexity, risk profile and average maturity, as well as the transparency and liquidity of the markets concerned and the degree to which the CCP's clearing activities are denominated in euro or other Union currencies should be considered. In this regard, specific features concerning certain products, such as agricultural products, listed and executed on regulated markets in third countries, which relate to markets that

largely serve domestic non-financial counterparties in that third country who manage their commercial risks through those contracts, may pose a negligible risk to clearing members and trading venues in the Union as they have a low degree of systemic interconnectedness with the rest of the financial system.

(3) The countries where the CCP operates, the extent of the services it provides, the characteristics of the financial instruments it clears as well as the volumes cleared are objective indicators of the complexity of the CCP's business. When taking into account the criterion set out in point (a) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA should therefore consider the ownership, business and corporate structure of the CCP, as well as the range, nature and complexity of clearing services offered by the CCP and the extent to which those services are of importance to clearing members and clients ('clearing participants') established in the Union. While the systemic importance of a CCP should be assessed in a holistic way, ESMA should take specific account of the proportion of the business of the CCP conducted in Union currencies, as well as the proportion of the business of the CCP originated from clearing participants established in the Union. For a CCP more likely to be of systemic importance to the Union it is important that ESMA assesses the structure and ownership of the group of which the CCP might be part in order to determine whether the interests of the Union are at risk. Additionally, the depth, liquidity and transparency of the markets served by such a CCP should also be assessed so that ESMA can better grasp the risk to clearing members established in the Union in the conduct of a default management auction.

(4) The capital of the CCP and the financial resources committed by clearing participants as well as the type and nature of the collateral that they provide, are essential elements to be considered when assessing the capacity of a CCP to withstand any adverse development. When taking into account the criterion set out in point (b) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA should therefore have an overview of the financial resources available to the CCP in case of a default or a non-default event. ESMA should also consider the secured, unsecured, committed, uncommitted, funded or unfunded nature of these resources as well as the means used by the CCP to provide legal certainty and confidence as to the settlement of the payments it effects and the collateral it has to deal with. Finally, ESMA should consider the existence, nature and effect of a recovery and resolution framework for CCPs in the jurisdiction the CCP applying for recognition operates. Such recovery and resolution frameworks should be assessed against internationally agreed guidance and key attributes. When looking at settlement and liquidity risk, ESMA should pay particular attention for those CCPs that are likely to be systemic on how securely those CCP access liquidity as well as the liquidity strains on Union currencies. While the safety of payments and settlements might be reinforced through the use of distributed ledger technology or other recent technologies, ESMA should pay attention to the additional risk it may bring to the CCP, in particular cyber risk.

(5) The nature of the conditions imposed by a CCP in order for clearing participants to access its services and the interlinkages between those clearing participants have repercussions on the way a CCP may be affected by an adverse event in relation to those participants. Therefore, when taking into account the criterion set out in point (c) of

Article 25(2a) of Regulation (EU) No 648/2012, ESMA should determine to the extent possible the identity of clearing participants to the CCP, in particular where that CCP provides services to clearing participants established in the Union. ESMA should also determine the relevant market share or relative importance of clearing participants or groups of clearing participants in that CCP. Insofar as necessary to assess the impact it might have on the clearing membership structure, ESMA should assess the conditions and options under which the CCP provides access to its clearing services. With respect to a CCP that is likely to be systemic to the Union, ESMA should assess whether the legal and prudential requirements that a CCP imposes on its clearing members are sufficiently stringent.

(6) In the event of a disruption to a CCP, clearing participants may have to rely, whether directly or indirectly, on the provision by other CCPs of similar or identical services. In order to assess the relative importance of the CCP applying for recognition, ESMA should therefore, when taking into account the criterion set out in point (d) of Article 25(2a) of Regulation (EU) No 648/2012, determine whether clearing participants may substitute some or all of the clearing services provided by that CCP with services provided by other CCPs, in particular where those alternative CCPs are authorised or recognised in the Union. Where clearing members and clients established in the Union can only clear certain products subject to a clearing obligation in one third-country CCP, the systemic importance of that CCP should be considered with acute attention by ESMA.

(7) CCPs may be connected in many ways to other financial infrastructures such as other CCPs or central securities depositaries. A disruption those connections may adversely affect the good functioning of the CCP. Therefore, when taking into account the criterion set out in point (e) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA should assess the extent to which the CCP is connected with other financial market infrastructures or financial institutions in a way that could impact the financial stability of the Union or of one or more of its Member States. In doing this ESMA should give particular attention to those connections and interdependencies with entities located in the Union. Finally, ESMA should identify and assess the nature of the services outsourced by the CCP and the risk such arrangements might pose to the CCP in case they were to be interrupted or impaired in any way.

(8) Where, as determined using objective quantitative indicators, the exposure of clearing members and clients established in the Union to a CCP is significant, ESMA should assess additional elements for each criterion. The more of those indicators are met by a CCP, the greater the likelihood that ESMA concludes that that CCP is of systemic importance for the financial stability of the Union or of one or more of its Member States.

(9) This Delegated Regulation should enter into force as a matter of urgency to ensure the fastest operationalisation of Regulation (EU) 2019/2099[(2)] of the European Parliament and of the Council,

HAS ADOPTED THIS REGULATION:

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2020/1303. (See end of Document for details)*

Article 1

The nature, size and complexity of the CCP's business

1 When taking into account the criterion set out in point (a) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA shall assess the following elements:

a the countries where the CCP provides or intends to provide services;

b the extent to which the CCP provides other services in addition to clearing services;

c the type of financial instruments cleared or to be cleared by the CCP;

d whether the financial instruments cleared or to be cleared by the CCP are subject to the clearing obligation under Article 4 of Regulation (EU) No 648/2012;

e the average values cleared by the CCP over one year, at the following levels:

(i) the level of the CCP;

(ii) the level of each clearing member that is an entity established in the Union or an entity part of a group subject to consolidated supervision in the Union;

(iii) the level of clearing members established outside of the Union or that are not part of a group subject to consolidated supervision in the Union where they clear on behalf of clients and indirect clients established in the Union, in aggregate;

f whether the CCP has completed an assessment of its risk profile based on internationally agreed standards or otherwise, the methodology used and the result of the assessment.

2 For the purposes of point (e) of paragraph 1, ESMA shall assess the following values separately:

a for securities transactions (including securities financing transactions according to Regulation (EU) 2015/2365 of the European Parliament and of the Council)[(3)], the value of open positions or open interest;

b for derivative transactions traded on a regulated market within the meaning of Directive 2014/65/EU of the European Parliament and of the Council[(4)], the value of open interest or turnover;

c for over-the-counter (OTC) derivatives transactions, the gross and net notional outstanding amount.

Those values shall be assessed per currency and per asset class.

3 Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall also assess the following elements:

a the ownership structure of the CCP;

b where the CCP belongs to the same group as another financial market infrastructure, such as another CCP or central securities depository, the corporate structure of the group to which the CCP belongs;

c whether the CCP provides clearing services to clients or indirect clients established in the Union through clearing members established outside of the Union;

d the nature, depth and liquidity of the markets served and the level of available information on the adequate pricing data to market participants and any generally accepted and reliable pricing sources;

e whether quotes, pre-trade bid and offer prices and depths of trading interests are made public;

f whether post-trade price, volume and time of the transactions executed or concluded, on and off the markets served by the CCP are made public.

Article 2

The effect of failure of or a disruption to a CCP

1 When taking into account the criterion set out in point (b) of Article 25(2a) of Regulation (EU) No 648/2012, ESMA shall assess the following elements:

a the capital, including retained earnings and reserves, of the CCP;

b the type and amount of collateral accepted and held by the CCP, the haircuts applied, the corresponding haircut methodology, the currencies in which the collateral is denominated and the extent to which the collateral is provided by entities established in the Union or that are part of a group subject to consolidated supervision in the Union;

c the maximum amount of margins collected by the CCP on a single day during a period of 365 days preceding ESMA's assessment;

d the maximum amount of margins collected by the CCP on a single day during a period of 365 days preceding ESMA's assessment from each clearing member that is an entity established in the Union or an entity part of a group subject to consolidated supervision in the Union, per asset class or segregated default fund where applicable;

e where applicable for each default fund of the CCP, the maximum default fund contributions required and held by the CCP on a single day during a period of 365 days preceding ESMA's assessment;

f where applicable for each default fund of the CCP, the maximum default fund contributions required and held by the CCP on a single day during a period of 365 days preceding ESMA's assessment from each clearing member that is an entity established in the Union or an entity part of a group subject to consolidated supervision in the Union;

g the estimated largest payment obligation on a single day in total and in each Union currency that would be caused by the default of any one or two largest single clearing members (and their affiliates) in extreme but plausible market conditions;

h the total amount and for each Union currency of liquid financial resources to the CCP's benefit separated by type of resources, including cash deposits, committed or uncommitted resources;

i the amount of total liquid financial resources committed to the CCP by entities established in the Union or that are part of a group subject to consolidated supervision in the Union.

2 Where any of the indicators referred to in Article 6 applies, ESMA, in addition to the elements listed in paragraph 1 of this Article, shall also assess the following elements:

a the identity of the liquidity providers established in the Union or which are part of a group subject to consolidated supervision in the Union;

b the average and peak aggregate daily values of incoming and outgoing Union currency payments;

c the extent to which central bank money is used for settlement and payment or whether other entities are used for settlement or payment;

d the extent to which the CCP applies technologies such as distributed ledger technology in its settlement/payment process;

e the recovery plan of the CCP;

f the resolution regime applicable to the CCP;

g whether a crisis management group has been established for that CCP.