Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

REGULATION (EU) 2019/2099 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 October 2019

amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

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) Regulation (EU) No 648/2012 of the European Parliament and of the Council[(4)] requires standardised OTC derivatives contracts to be cleared through a central counterparty (CCP) in line with similar requirements in other G20 countries. That Regulation also introduced strict prudential, organisational and business conduct requirements for CCPs and established arrangements for their prudential supervision in order to minimise risks to users of CCPs and underpin financial stability.

(2) Since the adoption of Regulation (EU) No 648/2012, the volume of CCP activity in the Union and globally has grown rapidly in scale and in scope. The expansion in CCP activity is set to continue in the coming years with the introduction of additional clearing obligations and the rise in voluntary clearing by counterparties not subject to a clearing obligation. Regulation (EU) 2019/834 of the European Parliament and of the Council[(5)] amends Regulation (EU) No 648/2012 in a targeted manner, improves its effectiveness and proportionality, creates further incentives for CCPs to offer central clearing of derivatives to counterparties, and facilitates access to clearing for small financial and non-financial counterparties. Deeper and more integrated capital markets resulting from the Capital Markets Union (CMU) will further increase the need for cross-border clearing in the Union, thus further increasing the importance and the interconnectedness of CCPs within the financial system.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2019/2099 of the European Parliament and of the Council. (See end of Document for details)*

(3) The number of CCPs currently established in the Union and authorised under Regulation (EU) No 648/2012 remains relatively limited, standing at 16 in August 2019. 33 third-country CCPs have been recognised by the European Securities and Markets Authority (ESMA) under that Regulation, allowing them to offer their services to clearing members and trading venues established in the Union. Clearing markets are well integrated across the Union but highly concentrated in certain asset classes and highly interconnected. The concentration of risk makes the failure of a CCP a low-probability but a potentially extremely high-impact event. In line with the G20 consensus, the Commission adopted a proposal for a Regulation on recovery and resolution of CCPs in November 2016 to ensure that authorities are appropriately prepared to address a failing CCP, safeguarding financial stability and limiting taxpayer costs.

(4) Notwithstanding that legislative proposal and in light of the growing size, complexity and cross-border dimension of clearing in the Union and globally, the supervisory arrangements for Union and third-country CCPs should be revisited. By addressing identified problems at an early stage and establishing clear and coherent supervisory arrangements both for Union and third-country CCPs, the overall stability of the Union financial system would be reinforced and the potential risk of a CCP failure should be lowered even further.

(5) In light of those considerations, the Commission adopted a Communication on 4 May 2017 on responding to challenges for critical financial market infrastructures and further developing the CMU, stating that further changes to Regulation (EU) No 648/2012 are necessary to improve the current framework that ensures financial stability and supports the further development and deepening of the CMU.

(6) The supervisory arrangements under Regulation (EU) No 648/2012 rely mainly on the home-country authority. CCPs established in the Union are currently authorised and supervised by competent authorities of the Member States in cooperation with colleges comprising of national supervisors, ESMA, relevant members of the European System of Central Banks (ESCB), and other relevant authorities. The colleges rely on coordination and information sharing by the CCP's competent authority which bears the responsibility of enforcing the provisions laid out in Regulation (EU) No 648/2012. Diverging supervisory practices for CCPs across the Union can create risks of regulatory and supervisory arbitrage, jeopardising financial stability and resulting in unhealthy competition. The Commission has drawn attention to those emerging risks and the need for greater supervisory convergence in its Communication on CMU of 14 September 2016 and in the public consultation on the operations of the European Supervisory Authorities (ESAs). Within the already existing general remit of ESMA to fulfil a coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, ensuring uniform procedures and consistent approaches, and strengthening consistency in supervisory outcomes, ESMA should in particular focus on supervisory areas which have a cross-border dimension or a possible cross-border impact. ESMA should determine the supervisory areas which have a cross-border dimension or a

possible cross-border impact based on its expertise and experience in the application of Regulation (EU) No 648/2012.

(7) In view of the global nature of financial markets and of the need to address inconsistencies in the supervision of Union and third-country CCPs, ESMA's ability to promote convergence in the supervision of CCPs should be enhanced. For that purpose, a permanent internal committee for CCPs ('CCP Supervisory Committee') should be created to handle tasks related to CCPs authorised within the Union and third-country CCPs. The establishment, the functions and composition of the CCP Supervisory Committee set up within ESMA should be a unique solution to bring together expertise in the field of CCP supervision and should not constitute a precedent for the ESAs.

(8) The CCP Supervisory Committee should be responsible for specific tasks assigned to it pursuant to Regulation (EU) No 648/2012 to ensure the proper functioning of the internal market as well as the financial stability of the Union and its Member States.

(9) In order to include the full range of practical experience and operational expertise regarding the supervision of CCPs, the CCP Supervisory Committee should be composed of a Chair, independent members, and the competent authorities of Member States with an authorised CCP. Where the CCP Supervisory Committee convenes in relation to authorised CCPs, central banks of issue of the Union currencies of the financial instruments cleared by those CCPs should be able to, on a voluntary basis, participate in the CCP Supervisory Committee in relation to the areas of Union-wide assessments of the resilience of CCPs to adverse market developments and relevant market developments, to facilitate access to information that could be relevant for carrying out their tasks. Where the CCP Supervisory Committee convenes in relation to third-country CCPs, central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the respective third-country CCP should be able to, on a voluntary basis, participate in the CCP Supervisory Committee for preparation of decisions in relation to third-country CCPs that are systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States (Tier 2 CCPs). Central banks of issue should be non-voting members of the CCP Supervisory Committee. The Chair of the CCP Supervisory Committee should be able to invite members of colleges as observers to ensure that the views of other relevant authorities are taken into account by the CCP Supervisory Committee.

(10) To provide for an appropriate level of expertise and accountability, the Chair and the independent members of the CCP Supervisory Committee should be appointed by ESMA's Board of Supervisors ('the Board of Supervisors') on the basis of merit, knowledge of clearing, post-trading, prudential supervision, and financial matters, as well as experience relevant to the supervision and regulation of CCPs, following an open selection procedure organised and managed by the Board of Supervisors, assisted by the Commission, which should respect the principle of gender balance. Before the appointment of the Chair and the independent members of the CCP Supervisory Committee, and up to one month after their selection by the Board of Supervisors, the

European Parliament should, after having heard the persons selected, approve or reject their designation. Only selected candidates approved by the European Parliament may be appointed by the Board of Supervisors.

(11) In order to ensure transparency and democratic control, as well as to safeguard the rights of the Union institutions, the Chair and the independent members of the CCP Supervisory Committee should be accountable to the European Parliament and to the Council for any decisions taken on the basis of Regulation (EU) No 648/2012.

(12) The Chair and the independent members of the CCP Supervisory Committee should act independently and objectively in the interest of the Union. They should ensure that appropriate account is taken of the proper functioning of the internal market as well as financial stability in each Member State, with or without authorised CCPs, and in the Union.

(13) In order to ensure an appropriate, effective and swift decision-making process in the CCP Supervisory Committee, the Chair, the independent members, and the competent authorities of the Member States with an authorised CCP should have voting rights. The representatives of the central bank(s), as well as observers, should have no voting rights. The CCP Supervisory Committee should take its decisions by a simple majority of its members, each voting member should have one vote and the Chair should have a casting vote in the event of a tie. The final decision-making power should remain with the Board of Supervisors.

(14) In order to ensure a coherent and consistent supervisory approach within the Union, the CCP Supervisory Committee should be responsible for preparing certain specific decisions and carrying out certain tasks which are entrusted to ESMA. Such responsibilities strengthen ESMA's coordination role between competent authorities and across colleges with a view to building a common supervisory culture and consistent supervisory practices, especially with regard to supervisory areas which have a cross-border dimension or a possible cross-border impact. In that respect, such relevant supervisory activities and decisions could include in particular supervisory areas where diverging supervisory practices can create risks of regulatory and supervisory arbitrage or jeopardise financial stability. ESMA should also be informed of all opinions adopted by colleges provided for in Regulation (EU) No 648/2012, including the basis of decision-making which the opinion of the college relates to and any recommendations adhered to in those opinions by the college.

(15) In addition, a mandatory *ex ante* exchange and discussion regarding draft decisions of competent authorities of CCPs on certain supervisory areas of particular importance should take place within the CCP Supervisory Committee. Moreover, on a voluntary basis and on the initiative of the competent authorities of CCPs, all draft decisions should be able to be subject to an exchange on an *ex ante* basis. ESMA should not provide an opinion where, as a result of the outcome of the discussion within the CCP Supervisory Committee, no diverging views have been identified. The power for ESMA to provide opinions should ensure that the CCP's competent authority receives an additional reaction regarding draft decisions by a group of supervisors specialised and experienced in the supervision of CCPs. Such opinions by ESMA should not have

any implication for the responsibility of the CCP's competent authority to take the final decision, which means that the final content of the respective decision would remain at the full discretion of the CCP's competent authority. Where the competent authority does not agree with an opinion of ESMA, it should provide comments to ESMA on any significant deviation from that opinion. The competent authority should be able to provide comments before, at the same time as, or after adopting a decision. However, where the competent authority provides comments after adopting a decision, it should do so without undue delay. The opinion provided by ESMA should not interfere with the power of colleges to determine the content of their opinion at their own discretion, where applicable.

(16) Where supervisory activities in relation to authorised CCPs show a lack of convergence and coherence in the application of Regulation (EU) No 648/2012, including on the basis of mandatory and voluntary consultation of ESMA by competent authorities and the discussions in the CCP Supervisory Committee, ESMA should promote the necessary degree of convergence and consistency, including by issuing guidelines, recommendations or opinions. To facilitate that process, the CCP Supervisory Committee should be able to request that the Board of Supervisors consider the adoption of guidelines, recommendations and opinions by ESMA. The CCP Supervisory Committee should also be able to submit opinions to the Board of Supervisors regarding decisions to be taken by ESMA concerning the tasks and activities of CCP competent authorities. The CCP Supervisory Committee should provide, for instance, opinions on draft technical standards or draft guidelines developed by ESMA in the area of authorisation and supervision of CCPs.

(17) To provide effective supervision in relation to third-country CCPs, the CCP Supervisory Committee should prepare complete draft decisions for approval by the Board of Supervisors and carry out the tasks entrusted to ESMA with regard to the provisions concerning the recognition and supervision of third-country CCPs laid down in Regulation (EU) No 648/2012. As cooperation and information are essential, the CCP Supervisory Committee should, when it convenes in relation to third-country CCPs, share with the third-country CCP college relevant information, including the complete draft decisions it submits to the Board of Supervisors, final decisions adopted by the Board of Supervisors, agendas and minutes of the meetings of the CCP Supervisory Committee and applications for recognition by CCPs established in a third country.

(18) In order to ensure the effective performance of its tasks, the CCP Supervisory Committee should be supported by dedicated staff from ESMA to prepare its meetings, prepare the analyses necessary to carry out its tasks and support it in its international cooperation.

(19) Central banks of issue should be involved in the preparation of decisions by the CCP Supervisory Committee in relation to the classification of third-country CCPs according to their systemic importance and the supervision of Tier 2 CCPs in order to ensure the proper exercise of their tasks related to the monetary policy and the smooth operation of payment systems. As decisions by ESMA in relation to Tier 2 CCPs on margin requirements, liquidity risk control, collateral, settlement and approval of