Financial Markets Law Committee ("FMLC")

Infrastructure Scoping Forum

Date: Monday 19 June 2017

Time: 9.00am to 11.00am

Location: the offices of Shearman & Sterling LLP, Broadgate West 9 Appold Street, London EC2A 2AP

In Attendance:

Barnabas Reynolds (Chair)	Shearman & Sterling LLP
Antony Beaves	Bank of England
Thomas Donegan	Shearman & Sterling LLP
Anouk Gauthier	The London Metal Exchange
Iona Levine	Minerva Chambers
Arun Srivastava	Baker McKenzie LLP
Paul Watkins	Blue Nile Clearing Advisory
Venessa Parekh	FMLC
Thomas Willett	FMLC

Regrets:

Nick Carew-Hunt	
Dorothy Delahunt	London Derivatives Exchange
Adam Eades	BATS Chi-X Europe
Lewis Lee	CLS Bank International
John Ewan	
William Ingram	CME Group
Matina Papadopoulou	CHAPS Co

Minutes:

1. Introduction

1.1. Barney Reynolds opened the meeting and gave a brief introduction.

2. Administration (Venessa Parekh)

a. Short presentation on the operation of FMLC Working Groups[1]

2.1. Venessa Parekh described the different characteristics of scoping fora and working groups: how working groups can be initiated and established; the objectives of working groups; the conduct of business of working groups; and how the Secretariat supports working groups.

b. Forum membership

2.2. Ms Parekh asked the Forum members if they would consider expanding membership of the Scoping Forum to include representatives of law firms. Hitherto, membership of the Forum has been open exclusively to representatives of infrastructure bodies apart from a few exceptions (although the Forum benefits from a list of Occasional Chairs which is populated by lawyers in private practice and has often hosted guest speakers from law firms). The participants resolved that the Occasional Chairs and regular guest speakers be invited to join the Forum permanently in order to diversify opinions and contributions.

3. The legal uncertainties arising from the European Commission's Proposals to amend the procedures and authorities involved for the authorisation of Central Counterparties ("CCPs") and requirements for the recognition of Third-Country CCPs (Barney Reynolds)

3.1. Barney Reynolds led a discussion on legal uncertainties concerning the European Commission's proposals to amend the procedures for the authorisation of CCPs and the requirements for the recognition of Third Country CCPs in 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 (the "**European Market Infrastructure Regulation**" or "**EMIR**"). Throughout the discussion, Mr Reynolds referred to a document he had circulated among attendees discussing the key points.[2]

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[1] Please see Appendix I below.

[2] Please see Appendix II below.

3.2. The first issue arises from the proposed changes to Article 25(2c) on the recognition of a Third-Country CCP, in which no time-frames are provided for ESMA's determination that a Third-Country CCP is so systematically important that it cannot be recognised. Mr Reynolds stressed the need for certainty around time-frames and proposed that a notice should be required if a CCP's application is to be denied or its recognition withdrawn. The lack of certainty could lead to systemic risk in the U.K. and E.U. markets. Similarly, no time-frames are provided for the European Commission to adopt its implementing act declaring that a CCP will not be recognised and that it can only provide clearing services in the E.U. if it establishes itself in the E.U. and is granted authorisation as an E.U. CCP. In the absence of built-in time-frames, Mr Reynolds observed that an application for recognition might be refused but the CCP would not know whether the possibility of establishing itself in the E.U. was available.

3.3. The Forum noted that the new requirement for the determination by ESMA of a CCP's "systemic importance" is rather arbitrary and identified additional instances of uncertainty located in Article 25(2a) and (2c). Where a Third-Country CCP is deemed by ESMA to be systemically important, ESMA may only grant recognition if the CCP fulfils specific additional conditions. The participants highlighted the ambiguity of the condition that the central bank of issue must, within 180 days of submission of the application, confirm that the CCP complies with any requirements imposed by it in carrying out its monetary policy tasks.

3.4. A key issue of legal uncertainty was identified in relation to Article 41 which addresses margin requirements. The Forum members emphasised that the requirement for a Third-Country CCP to impose, call and collect margins to reduce its credit exposures could potentially lead to heightened systemic risk which might pollute the rest of the world.

3.5. The members stressed that some form of consultation should take place between the European Commission and the U.K. to establish an agreement on a margining model and discretions.

3.6. The Forum members resolved that further work should be conducted on this issue and that a briefing note should be composed and presented to the FMLC. The FMLC should be asked to establish a Working Group.

3.7. Mr Reynolds further identified Articles 25c (on the subject of requesting information) and 25d (on general investigations) as lacking clarity. He highlighted ESMA's new powers to request information from the Third-Country CCP which could be provided by "lawyers

duly authorised to act". These lawyers remain fully responsible if the information is incomplete, incorrect or misleading. It is, however, unclear if this would include an external law firm acting for a client CCP. The Forum members noted that this might pose issues of legality in other jurisdictions. For example, under the Swiss Penal Code, official acts on Swiss territory on behalf of a foreign state are prohibited. As such, it will be illegal, in the case of Switzerland, for foreign lawyers acting for Swiss CCPs to provide information required under ESMA's new powers.

3.8. The participants agreed that this was a key issue of legal uncertainty which should be addressed further.

4. Legal uncertainties in the Capital Requirements Regulation provisions on cleared exposures for banks and financial intermediaries (Thomas Donegan)

4.1. Mr Donegan reiterated concerns related to the European Commission's proposed revisions to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (the "**Capital Requirements Regulation**" of the "**CRR**"), which he had covered in a meeting of the FMLC's Banking Scoping Forum. He observed the ambiguity as to how and when the 0% capital charge under Article 306(1)(c) of the CRR for exposures becomes available to intermediaries in "longer chains", such as when providing indirect clearing. This provision is applied to clients, including those offering indirect clearing, under Articles 305(2) and 305(3). Neither Article 306(1)(c) nor the definition of "bankruptcy remoteness", however, cater for longer chains, even in the proposed amendments to CRR, raising uncertainties as to how this provision applies. Participants agreed that 0% treatments should be available for intermediaries that act on a riskless basis with respect to the default of any non-client entity faced by an intermediary in a longer chain, and that CRR should be clarified.

4.2. Participants also discussed the lack of certainty surrounding the definition of a "sufficiently thorough legal review" under proposed amendments to Article 305(2)(c) of the CRR.

4.3. A second issue of legal uncertainty pertaining to the proposed new CRR provisions was located in Article 305(2)(a). Mr Donegan outlined that the article's wording describing client segregation broadly mirrored that used to describe European-style individual segregation in EMIR. He noted that this wording resulted in legal uncertainties as to whether the provisions also apply to legally segregated; operationally commingled ("**LSOC**") accounts at U.S., Singaporean and other clearing houses. Two solutions to

this issue were proposed: (i) to align the article with European "equivalence" requirements, so as to allow the individual segregation models of CCPs that are regulated or recognised under EMIR to be subject to the same capital requirements as are available for individual segregation in Europe; or (ii) to change the wording to reflect Basel III provisions, which are more generic in describing individual segregation models than CRR.[3] Participants agreed that under any teleological interpretation, the E.U. cannot have intended to deviate from Basel III standards on this important point and that either of these was a sensible interpretation of the provision as it stands.

4.4. The Forum members were in consensus with members of the Banking Scoping Forum that the Committee should be approached to further investigate these issues.

5. An update on the E.U. Commission's envisaged changes to draft Regulatory Technical Standards ("RTS") submitted by the European Banking Authority ("EBA") in accordance with the recast Payment Services Directive (Arun Srivastava)

5.1. Arun Srivastava updated the Forum members on the E.U. Commission's comments to the draft RTS on strong customer authentication and common and open standards of communication submitted by the EBA in accordance with Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (the "**Payment Services Directive**" or "**PSD**").

5.2. Mr Srivastava highlighted that the payment industry is gradually moving towards frictionless payments with an emphasis on making payments more secure.

5.3. The EBA mandate was aimed at enhancing security authentication processes for transactions above €10 and to introduce transaction risk assessments for transactions up to €500.

5.4. Mr Srivastava noted that the new payments services under the recast PSD will allow customers to use their existing bank relationships in new ways. Instead of turning to banks for every service, customers could choose to go to intermediaries.

5.5. Some participants stressed that there could be issues with such a risk-based approached to payments. One individual queried if new functionalities would need to be created to adopt this approach. Mr Srivastava stated that the EBA has advised banks to give access

[3] http://www.bis.org/bcbs/basel3/b3summarytable.pdf

to customers' accounts to intermediaries in the event the customer grants consent. The bank, therefore, would continue to hold the risk of the transactions, not the customers.

5.6. Concerns regarding liability and access were expressed by Forum members. They also stressed that this approach presents a massive opportunity for fraud and were concerned on the impact on incumbents.

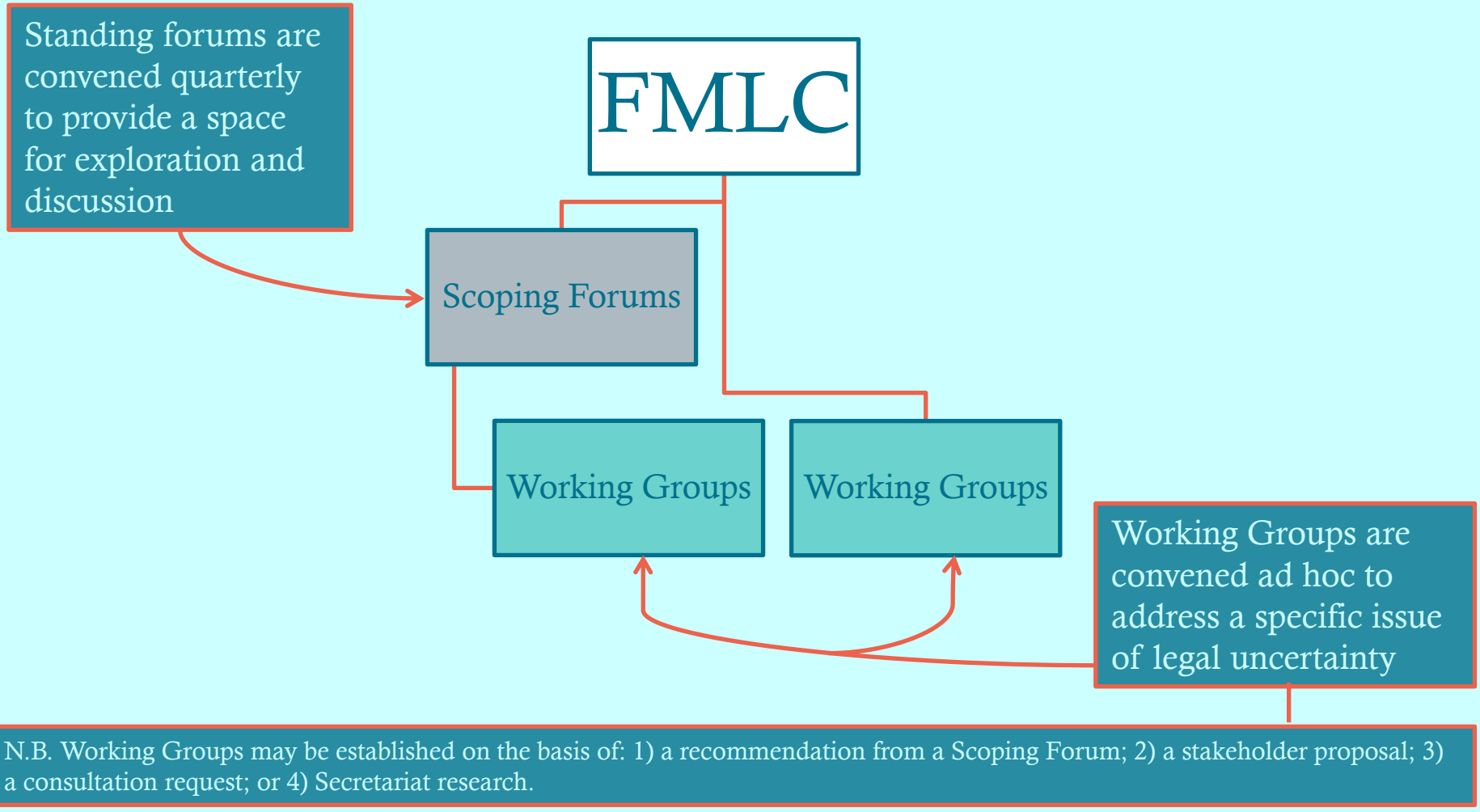
6. Any other business

6.1. No other business was raised.

Appendix I

Operation of FMLC Working Groups

Venessa Parekh, FMLC Acting Project Secretary


Standing forums are convened quarterly to provide a space for exploration and discussion
FMLC
Scoping Forums
Working Groups
Working Groups
Working Groups are convened ad hoc to address a specific issue of legal uncertainty
N.B. Working Groups may be established on the basis of: 1) a recommendation from a Scoping Forum; 2) a stakeholder proposal; 3) a consultation request; or 4) Secretariat research.

Working groups: objectives

- The ultimate function of a Working Group established by the FMLC is to assist the Committee to address a specific issue of legal uncertainty by expressing an authoritative consensus.
- Pursuant to this aim and to the FMLC's remit, a Working Group will have the following objectives:
  1. to encourage discussion and the expression of a range of views;
  2. to build consensus that can be expressed in an FMLC publication; and
  3. to produce a draft publication to which, ideally, as many Working Group members have contributed as possible.

How are working groups initiated?

- Working Groups are established by the FMLC on the basis of a note specifying the relevant legal uncertainty (the "brief").
- This brief defines the scope of work to be undertaken. It serves a threefold function:
  - to establish controls over the group's output on behalf of FMLC Members;
  - to inform prospective contributors as to the scope of the project; and
  - to assist the Chair and Secretariat to allocate appropriate resources to the project, according to its expected size and complexity.
- In the case of work recommended by the members of a Scoping Forum or any other stakeholder(s), the brief should be prepared by the person or persons making the recommendation and put before the FMLC Committee for approval. (The FMLC Secretariat will normally offer formatting and other assistance in preparing the brief.)

Working groups: conduct of business

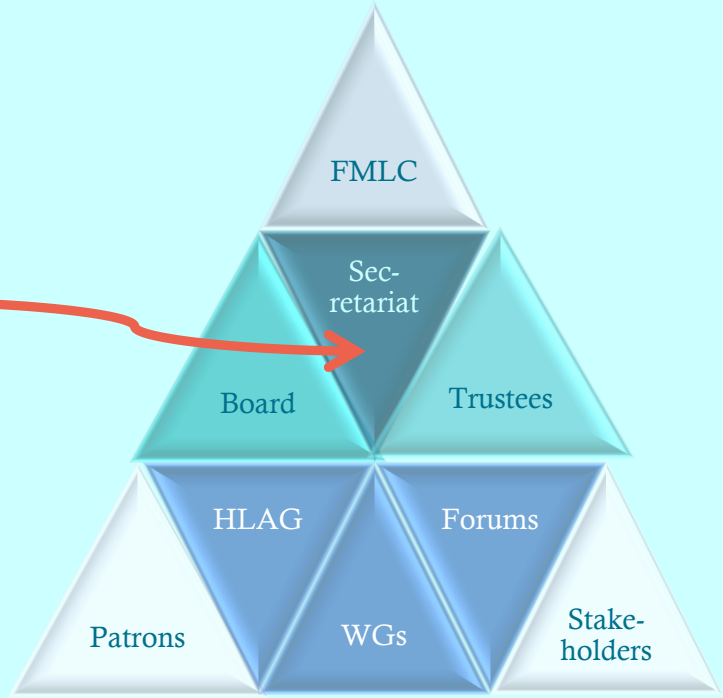
- Working groups are convened under Terms of Reference, including conduct of business guidelines. These include the following:

  1. to encourage a diversity of perspectives, Working Group participation is limited to one member per organisation;
  2. to ensure accountability and transparency, alternates are, as a general rule, not permitted to attend meetings; and
  3. to foster individual engagement, Working Group meetings are to be attended in person, where possible. (Accordingly, the FMLC Secretariat does not provide dial-in details for working group meetings unless a member is based abroad.)

- Work within the Group follows a schedule ("Milestones") established at the inaugural meeting and implemented by the FMLC Secretariat.

Working groups: FMLC Secretariat

- The Secretariat supports the Chair and the Working Group during meetings, and manages Group-related communications outside meetings.
- The Secretariat helps draft and circulate meeting agenda and related documents in advance of Working Group meetings and takes minutes.
- Contributors are asked to send draft submissions to the Secretariat, whether directly or in copy.



Forum Membership

Conclusion / The End

Financial Markets Law Committee
Communications@FMLC.org
+44 (0)20 7601 3272

SHEARMAN & STERLING LLP

FRAMEWORK FOR DISCUSSION AT FMLC INFRASTRUCTURE SCOPING FORUM MEETING, 19TH JUNE 2017

PROPOSALS TO REVISE EMIR

Determination that a TC CCP is too systemically important to be recognised

1. No time frames are provided for:

   a) the determination by ESMA that a third-country CCP ("TC CCP") is so systemically important that it cannot be recognised. Presumably, this is within the overall application deadline. Note that this determination is made by ESMA in agreement with the central banks of issue of the most relevant EU currencies of the financial instruments to be cleared.

      - Need certainty and notice if a CCP is not going to be recognised or recognition is going to be withdrawn. Otherwise this can create systemic risk in UK and EU markets.

      - UK needs a say in this since otherwise requires grossing up of cross-currency net positions.

   b) the Commission to adopt its implementing act declaring that a CCP will not be recognised and that it can only provide clearing services in the EU once it has been granted authorisation as an EU CCP.

      - Without any timeframes built in, an application for recognition might be refused but the CCP would not know whether the possibility of establishing itself in the EU was available.

      - Effectively means you have to be able to close down the business, which brings you back to the point above.

(new Article 25(2c))

Recognition of TC CCPs

2. There is a new condition for TC CCPs to gain recognition: ESMA must determine that the CCP is not systemically important or not likely to become systemically important for the financial stability of the EU or one of its member states, taking into account certain criteria such as nature, size and complexity of the CCP's business, the effect that failure of the CCP would have on the financial markets, FIs or financial system, the CCPs clearing membership structure and CCP's relationship, interdependencies etc with other FMIs, FIs and the broader financial system. The EC will be adopting a secondary legislation to further spell out these criteria.

   - The "likely to become systemically important" part of this condition gives ESMA a large degree of discretion - how to avoid arbitrary discretion.

   - There is no definition of "systemically important" and it is unlikely that the EC's secondary legislation will provide any definitive guide as to its meaning for this purpose.

(Article 25(2) and 25(2a))

3. Where a TC CCP is deemed by ESMA to be systemically important or likely to become systemically important, ESMA may only grant recognition if the TC CCP fulfils certain additional conditions. These CCPs will be known as Tier 2 CCPs. These are:

   a) The prudential requirements for EU CCPs, including initial capital of EUR 7.5 million, the governance requirements for CCPs (Titles IV) and the interoperability requirements (Title V). The CCP can ask ESMA to assess its comparable compliance with these requirements by providing the factual basis for a finding of comparability and the reasons why compliance with the requirements in the third-county satisfied them – the EC is to adopt secondary legislation on the minimum elements to be assessed and the conditions and modalities to carry out the assessment;

      - See comments in point 4 below

   b) The central banks of issue confirm, within 180 days of submission of the application, that the CCP complies with any requirements imposed by those central banks in carrying out their monetary policy tasks. If no confirmation by the deadline, ESMA to assume this requirement is fulfilled;

   c) CCP provides its unconditional written consent, signed by the legal representative of the CCP, to provide within 72 hours after service of a request by ESMA any documents, records, information and data held at the time and that ESMA may access the CCP's business premises. An independent legal opinion will be required to confirm that the consent is valid and enforceable under the relevant applicable laws.

      - Likely to be difficult for a CCP to provide "unconditional" consent

   d) The CCP has put in place all the necessary measures to ensure effective compliance with points (a) and (c).

   e) The Commission has not adopted a decision that the CCP is too systemically important.

(Article 25(2b) read with Article 25a)

Withdrawal of recognition

4. ESMA will have powers to withdraw the recognition of a TC CCP where:

   a) the CCP does not make use of the recognition within 6 months,

   b) the CCP obtained recognition through false statements,

   c) the CCP is a Tier 2 CCP that no longer meets the conditions set for Tier 2 CCPs

   d) the equivalence decision is withdrawn or suspended or any conditions attached to it are no longer satisfied.

   e) For Tier 2 CCPs, ESMA may also withdraw recognition for an infringement (listed in new Annex III)

ESMA may limit the withdrawal to a particular service, activity or class of financial instruments. ESMA must "endeavour" to minimise market disruption when setting the effective date for any withdrawal of recognition. Tier 2 CCPs will be given a set time (limited to max 3 months) to remedy the situation. Other EU authorities may request ESMA to withdraw recognition of a TC CCP but the final decision is with ESMA.

- It is not sufficient for ESMA to "endeavor" to minimise disruption. Definitive timeframes are needed for withdrawal of recognition to avoid market disruption.

- Likewise, the TC CCP needs to be given notice of the withdrawal (the current draft only refers to notice being given to its TC authority unless it is a Tier 2 CCP that has infringed a requirement in which case a notice is given to the CCP). The timing of the notice and the effective date of withdrawal needs to be set out clearly to avoid systemic risk.

(Articles 25m and 25n)

Review of existing recognition decisions

5. New transitional provisions provide that ESMA must review the recognition decisions granted before the date of entry into force of the proposed revisions to EMIR. The review must take place within 12 months of entry into force of the EC's secondary legislation on the criteria for systemic importance. The review will cover, among other things, the 5 key elements for recognition – equivalence decision, CCP authorisation and effective supervision in third country, cooperation arrangements, third country has high standard AML and CFT laws and CCP's systemic importance.

6. ESMA's review powers have also been amended to provide that it must review the recognition of a recognised CCP at least every two years.

- See the comments made in points 1 to 4 above

(Article 89(3b) read with Article 25(2a), 25(2) to (5))

Transitional provisions on provisions relating to systemic importance

7. ESMA's powers to determine that a CCP is systemically important, to impose the additional requirements on a Tier 2 CCP and to recommend to the EC that a TC CCP is too systemically important to be granted recognition are deferred until the EC's secondary legislation on the criteria for systemic importance comes into force.

- There will be a huge amount of uncertainty around the provisions relating to systemic importance until the EC's secondary legislation is finalised. This impacts both TC CCPs that will be seeking recognition and those already recognised because of the review powers discussed in point 5 above.

- The drafting on this provision needs to be changed as the incorrect paragraph in Article 25 is currently referenced.

(Article 89(3a))

Supervision of Tier 2 CCPs

8. ESMA will become responsible for supervision of the compliance of Tier 2 CCPs with the prudential requirements for CCPs (Article 16), the governance requirements for CCPs (Titles IV) and the interoperability requirements (Title V).

    - This is enhanced extra-territorial impact with ESMA directly supervising non-EU entities on the basis of an unconditional consent from the non-EU CCP.
    - Uncertain remit of ESMA's responsibilities - somewhat open-ended.
    - How to avoid arbitrary discretion. This is supranational authority with no protections since you have to sign up to obey their commands.
    - Need to build in protections or UK will need overriding statute giving protections. Otherwise ESMA's actions could cause systemic risk in the UK.
    - Really need an agreement between ESMA and BOE to underpin this.

(new Articles 25b(1), 25d and 25e)

9. In order to supervise Tier 2 CCPs, ESMA is given powers to conduct investigations of those CCPs and on-site inspections of those CCPs' business premises. ESMA will inform the Tier 2 CCP of an investigation but the CCP will be "required to submit to investigations launched on the basis of a decision of ESMA". On-site inspections may be carried out "where proper conduct and efficiency require" without notice to the CCP although notice must be given to the relevant TC authority. A Tier 2 CCP must "submit to the on-site inspections". The only limit to ESMA's ability to carry out investigations or on-site inspections is if the relevant TC authority objects. ESMA will have powers to enforce compliance by levying periodic penalty payments.

    - Some of the language around periodic penalty payments needs to be tightened up.
        - There is a requirement for the amount to be effective and proportionate and yet the amounts are set out.
        - The payment amounts are set according to the turnover of legal persons and earnings of natural persons – it needs to be made clear that these amounts will be those of the relevant entity or natural person to whom ESMA has addressed its notice/request.

(Articles 25d and 25e)

ESMA's powers to impose fines

10. ESMA will have powers to impose fines on CCPs that intentionally or negligently commit an infringement (listed in new annex III). Intention will be based on ESMA finding objective factors that demonstrate that a CCP or its senior management acted deliberately. Caps are set on the fines.

    - These powers appear to apply to all CCPs as it is not specified that it is a recognised or authorised CCP.

- The cap for CCPs references "10% of the total annual turnover" of a legal person... presumably this is a drafting error and does not mean that the cap can be set according to the turnover of any random legal entity selected by ESMA. Other provisions in this Article indicate that the intention is to limit it according to the turnover of the relevant CCP.

(Article 25g)

11. Fines levied by ESMA will be enforceable, governed either by the civil laws in force in the member state or third country in which "it" is carried out.

- Query whether fines will be enforceable in all third countries?

(Article 25j(4))

ESMA's powers to request information

12. When ESMA requests information from a TC CCP and that information is provided by "lawyers duly authorised to act", the lawyers remain fully responsible if the information is incomplete, incorrect or misleading.

- Unclear if this would include an external law firm acting for a client CCP.

13. The provision of information to ESMA by a TC CCP and the penalties where information provided is incorrect or misleading do not include any requirement for the incorrect or misleading information to have been provided intentionally.

- This brings in human rights type issues. The UK must have an override on this such that basic protections apply and there's no arbitrary process. Need to bring back in ECHR or other human rights type protections applicable to corporates.

(Articles 25c and 25d)

4. Requests for information by ESMA from TC CCPs and related third parties to whom the CCP has outsourced functions is qualified by the requirement that the information must be necessary "to enable ESMA to carry out its duties under [EMIR]". ESMA may also request information under the ESMA Regulation but the request must be a "duly justified and reasoned request" and can only be made once ESMA has exhausted other routes such as obtaining the information from the CCPs national regulator, the relevant ministry responsible for finance, national central bank or national statistical office.

- Unclear how these two versions of ESMA's powers to request information will interact
    - will ESMA be bound by the requirements of the ESMA Regulation when making a request using its new powers under EMIR and vice versa?
    - Will the EMIR penalties for incomplete or misleading information apply to requests made under the ESMA Regulation?

- Note that under the ESMA Regulation, the requirement for ESMA to explain why the request is necessary has been removed. The new EMIR provisions require ESMA to indicate the "purpose of the request", among other things.

(EMIR, new Article 25c and ESMA, revised Article 35)

The CCP Executive Session

1. The Board of Supervisors in Executive Session for CCPs (CCP Executive Session) will be a new part of ESMA. The permanent members of the CCP Executive Session will be on ESMA's Board of Supervisors as non-voting members.

2. The CCP Executive Session will be composed of:

   a) permanent members:

      (i) the Head and two Directors, voting;

      - The EC will conduct the initial selection procedure and provide a short list to the EP and Council who must approve the final appointments.

      (ii) a representative of the ECB, non-voting

      (iii) a representative of the Commission, non-voting;

   b) non-permanent members specific to each CCP:

      (i) a representative of the national regulator for each EU CCP (in relation to which the CCP Executive Session is convened), voting;

      (ii) a representative of each of the relevant central banks of issue for each EU CCP (in relation to which the CCP Executive Session is convened), non-voting.

3. Voting is by simple majority with the Head having the casting vote.

4. The Head may invite, where appropriate and necessary, as observers to the meetings of the CCP Executive Session:

   a) other members of the college of the relevant CCP;

   b) authorities of recognised third-country CCPs.

CCP Executive Session and TC CCPs

5. Where a task of the CCP Executive Session does not relate to a specific EU CCP, it shall be composed only of the permanent members (and, where relevant, the central banks of issue of EU CCPs).

   - This means that all decisions relating to TC CCPs will be taken by 3 people; the Head and two directors.

- These 3 people will be responsible (helped by staff) for the recognition and supervision of TC CCPs and for monitoring of regulatory and supervisory developments in third countries.
- Until such time as these individuals take up their posts, their role will be filled by the Board of Supervisors.

CCP Executive Session and EU CCPs

6. CCP Executive Session powers and responsibilities over EU CCPs involves providing consent to draft decisions of national regulators of EU CCPs on a range of issues:

   a) granting and withdrawal of CCP authorisation (Arts. 14 & 20)

   b) extension of CCP activities(Art. 15)

   c) access to CCPs and trading venues (Arts. 8 &9 and under MiFIR)

   d) capital requirements (Art. 16)

   e) review and evaluation of a CCPs' compliance with EMIR and risks (Art. 21)

   f) shareholders and qualifying holdings (Art. 30)

   g) information to be provided to CCP's national regulator on senior management changes and M&A-type transactions (Art. 31)

   h) outsourcing (Art. 35)

   i) stress testing (Art. 49)

   j) interoperability arrangements (Title V)

   k) all of the governance requirements (Title IV)

      - These are wide-ranging and represent a shift of responsibility and power from national regulators (and member states) to centralised EU authorities

CCP Executive Session and Market Powers & Responsibilities

7. The CCP Executive Session will also take on other powers and tasks which currently sit within ESMA in any event, including, preparing the RTS determining the classes of derivatives that should be subject to the clearing obligation.

Indications of more clarification

1. The EC may adopt legislation to further clarify the equivalence criteria (Article 25(6b)).

New CCP segregation provisions

1. These require "positions and assets to be bankruptcy remote of the CCP"

   - This applies a property law concept to contracts (positions)

- Probably means CCPs can no longer invest cash in repo markets, as they no longer own their own money

2. Insolvency law protections for CCP default actions vs. ability to invest cash margin. An attempt to improve insolvency protections for CCPs and clearing members has been made. However, it is a bit of a botch-job. Under new article 39(11) of EMIR (see attached, foot of p. 29), "11. Where the requirement referred to in paragraph 9 is satisfied, the assets and positions recorded in those accounts shall not be considered part of the insolvency estate of the CCP or the clearing member.". Paragraph 39(9) is the requirement to distinguish assets and positions at a CCP by using separate accounts between which netting cannot occur.

   As a result, all the customer positions and customer margin assets would be subject to this insolvency remoteness principle. Default funds will not be covered and proprietary accounts probably are not covered. Unfortunately, this proposed approach has several shortcomings:

   - It does not provide immunity from insolvency law challenges from actions required under default rules or post-default management steps required under EMIR.

   - It potentially creates greater trouble than it is worth for investment programmes. If the margin is in the form of cash, then a CCP will be required (and want) to invest the cash margin in non-cash assets through reverse repos and securities purchases. However, it is very difficult to see a repo counterparty accepting a transaction with a CCP under which the CCP does not have any ownership interest in the collateral in its own insolvency.

   - The provision does not seem reconcilable with the Financial Collateral Directive.

   - In relation to positions, these are contracts to which the CCP is party, so the drafting is rather clumsy and would be of uncertain effects.

3. Reporting issues: there will now be "single sided" reporting for ETD. There is a proposed new provision assigning reporting responsibilities as between the parties for most transactions (article 9(1a)).

   - However, this provision does not set out responsibilities for reporting OTC cleared transactions. It is not clear whether this is a deliberate omission (and two-sided reporting should take place in which both sides have responsibility for reporting) or if it should be requested for the clearing house to be given that responsibility.