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Third countries
What form of equivalence for post-market infrastructures?

EXECUTIVE SUMMARY

By taking the first steps towards harmonised European post market regulation, in particular on central counterparties (CCP), EMIR has also logically addressed the question of infrastructures located in a third country state outside the European Union and wishing to offer their services within the European Union. This question was all the more resonant since implementation of the clearing obligation in the European Union not only helps strengthen the role of the infrastructures but also increases the competitive pressures weighing on them.

Dealing with relationships with third countries is based, in the European texts related to post-market infrastructures, on the principle of equivalence: provided the European Commission regards the law applicable in the third country as equivalent, the infrastructures located in this third state can offer their services freely in the European Union (namely, for example, for CCP, to have European clearing members), without further supervision other than that of their local regulator. Equivalence is outcome-based, i.e. based on an equivalence of results, unlike a line-by-line approach.

This principle of equivalence is not new and has long been implemented by European regulators. Thus, the AMF has substantial experience in terms of cooperating with third-country infrastructures' regulators. The European texts included this principle but amended the prism of its implementation since the initiative now rests with the European Commission. As such, this mechanism is relatively new, and its recent implementation for third-country CCP has revealed possible areas for improvement.

The profound change in the industry of post-market infrastructures, the competitive pressures to which they are subject but also the concentration of risks in these infrastructures make these improvements all the more necessary. The United Kingdom's exit from the European Union obviously cannot be overlooked having regard to the volume of activity represented by the London market and the number of infrastructures based there. This situation is in fact quite unprecedented since it could result in the application of the third-country regime to a state that now concentrates, in actual fact, the largest volumes of activity in euros particularly for clearing OTC derivatives and reporting transactions on derivatives. This regime, more conceived for the purpose of monitoring the risks taken by European market players in these infrastructures and not for the purpose of regulating these infrastructures, is not suitable for managing such risks for the financial stability of the European Union.

In addition, aside from the precedents from which a number of lessons may be learnt, the AMF takes the view that the current context necessitates all the more a review of the equivalence procedure. The AMF therefore takes the view that the EMIR review provides an opportunity for rethinking the entire equivalence mechanism.

In this context, the AMF wishes to make the following recommendations:

1. With its experience in cooperation with other regulators, the AMF wishes to reaffirm its attachment to the principle of equivalence.

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2. The criteria to be taken into account by the European Commission need to be further clarified in the texts to prevent any ambiguity concerning assessment of the equivalence of the result that needs to be obtained and concerning the provisions regarded as substantial for the European Union.

3. Equivalence should also ensure genuine competitive equality between sectors. This is not of course about preventing third-country infrastructures from providing their services in the European Union but about ensuring that they do not do so under more favourable competitive conditions. There may be situations where the concept of systemic risk is inconsistent but where the aspect of competitiveness is very much present. Both elements – risk and competitiveness – need to be taken into account. In the same spirit, equivalence must necessarily have as a corollary effective access under comparable conditions for European infrastructures to the third country's market.

4. The size of infrastructures should be taken into account in assessing equivalence: this size could be assessed on the basis of criteria such as the volume of European instruments in question (for example, products whose underlying is European or denominated in euros) or the volume represented by the clearing members or European clients (for the infrastructure but also from the viewpoint of the member or client itself). A more precise approach could lead to a distinction being made between three categories of infrastructures: (1) infrastructures whose activities denominated in euros or in other currencies of the European Union are of critical size for the European Union, (2) infrastructures of significant size for the European Union for other reasons, particularly the exposures of European countries to them, irrespective of the currency concerned (US dollar for example), and (3) smaller infrastructures. Assessment of equivalence should be adapted to these categories:
   - For the reasons set out in point 5, the equivalence regime is not suited to infrastructures whose activities denominated in euros or in other currencies of the European Union are of critical importance to the European Union,
   - Infrastructures of significant size for the European Union need to continue to benefit from equivalence but would be subject to authorisation by ESMA, based on line-by-line equivalence for the most important elements: this is because, in such cases, the volumes in question, and thus the risks taken by European members or clients are such that they justify a stricter approach to equivalence and to supervision also exercised at European level,
   - Smaller infrastructures would still be subject to recognition by ESMA, based on global but conditional equivalence as regards fundamental prudential requirements.

5. The equivalence regime is not appropriate when the infrastructure represents volumes in euros such that it poses a stability risk for the European Union. Incidentally, the equivalence regime was not conceived to be applied to this type of situation. The effects of applying equivalence would create a risk for the financial stability of the European Union, justifying the location of these infrastructures within the European Union. This location requirement is of particular relevance to:

- CCP of critical importance clearing products denominated in euros for their activity in euro. If the third-country regime were applied, the largest positions of clearing members and European clients would be cleared in infrastructures that would not be, in the future, supervised in the European Union. These extraneous factors can be sources of day-to-day concern for the supervisors of these entities and exacerbated in the event of a crisis if it was needed to access ECB' liquidity, particularly since the equivalence regime specified by EMIR does not require the existence of an appropriate regime for the recovery and resolution of third-country central counterparties. These extraneous elements present risks for the financial stability of the European Union when the size of the infrastructure is of critical importance for the European Union.
- Trade repositories. Since European players could continue to report their data in third-country trade repositories, they would be subject to equivalence. These trade repositories will no longer be directly supervised by ESMA and it is questionable to see most of the European data declared in an entity subject to requirements and supervision that may be different from those specified in the European Union. This could also lead to fragmentation of data, which could be detrimental to the exploitation of this data by European regulators and to the risk that regulators could not access the data whatever the reason.

  These risks justify the location of these infrastructures in the European Union for their activity in euro and the AMF pursues its reflexions to refine its terms of implementation.

6. As regards the procedure, while the European Commission needs to continue to play a major role in assessing equivalence, ESMA's role needs to be strengthened: besides the fact that ESMA's technical opinion should be given on a systematic basis, ESMA should play a major role in the identification of the provisions regarded as substantial for the European Union and in the identification of criteria making it possible to assess the importance of infrastructures. This role of ESMA's should be affirmed not only in the initial evaluation of equivalence but also in the necessary follow-up of this evaluation over time.

7. For significantly important infrastructures, the scope of recognition should be strengthened by conferring a genuine power of authorisation and supervision on ESMA, whereas the current texts confer only a notarial function on ESMA. The establishment of the College of regulators could accompany the conferring of such a power of supervision on ESMA.

8. The review of equivalence over time needs to be rethought. In particular, ESMA should be in charge of publishing, a report on equivalence on a regular basis, making it possible to evaluate whether the conditions under which equivalence has been granted are still relevant: would be addressed along with changes that have occurred in the legislative framework of the third country and in the European Union as well as their application in the infrastructure. This report should also assess whether the infrastructure's importance has changed (as regards the aforementioned categories) and justifies a different approach to equivalence. If ESMA's report concludes that it is necessary to review equivalence, the European Commission should be obliged to take a new decision or, failing this, justify it in a report to the Parliament and the Council. In all cases the European Commission should take immediate measures in the event of

changes in the third country's regulations that might generate a systemic risk or create conditions of regulatory arbitrage.

9. Review of the equivalence decision also needs to be proportionate to the size of the infrastructure in question: infrastructures of significant size and the jurisdictions in which they are established should be subject to a reassessment that is not only more regular, but also automatic when regulations are changed.

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SUMMARY TABLE

This table does not deal with critically important central counterparties clearing products denominated in euros: for these, for their activity in euro, equivalence is not appropriate and the terms for implementing the location of these infrastructures in the European Union are subject to specific considerations.

	Current regime	Significantly important infrastructures*	Smaller infrastructures**
Outcome-based equivalence	Yes	No	Yes
Initiative of the Commission	Yes	Yes	Yes
Technical opinion from ESMA before the equivalence decision	No (on request from the Commission)	Yes	Yes
Initial evaluation of equivalence	Global assessment	Line-by-line	Global assessment with conditions attached
Scope of recognition by ESMA	Recognition	Authorisation by ESMA	Recognition
Supervision by ESMA	No (simple cooperation with the local authority)	Yes	No (simple cooperation with the local authority)
ESMA's review report every three years	No	Yes (with immediate reaction in the event of a major change)	Yes
Systematic review of equivalence	No	Regular vote	On a proposal from ESMA's report

* A significantly important infrastructure is defined as an infrastructure that handles a significant volume of transactions on behalf of European counterparties.
** A smaller infrastructure is defined as an infrastructure that provides services to European counterparties but without handling significant volumes.

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PART 1

ANALYSIS OF THE EQUIVALENCE REGIME APPLICABLE TO POST-MARKET INFRASTRUCTURES REVEALS AMBIGUITIES AND EVEN INADEQUACIES

By taking the first steps towards harmonised European regulation of the post market, in particular CCP, EMIR has also logically addressed the question of infrastructures located in a third country state outside the European Union and wishing to offer their services within the European Union. This question is all the more resonant since implementation of the clearing obligation in the European Union not only helps strengthen the role of the central counterparties but also increases the competitive pressures weighing on them.

Handling relationships with third countries is based, in EMIR, on the principle of equivalence. This principle has been included in the various texts that have intervened in the post market, as an extension of EMIR: SFTR, CSDR. It is also the guiding principle in relationships with third countries in MiFID2/MiFIR.

Under this principle, since the European Commission regards the law applicable in the third country as equivalent, institutions or infrastructures located in this third country state may offer their services freely in the European Union, with no supervision other than that of their local regulator.

The principle of equivalence – traditionally defended by the AMF on the condition of reciprocity – rests on an outcome-based assessment and mutual trust between regulators (principle of deference of regulations and supervision recognised by the FSB).

From an economic standpoint, the principle of equivalence is a principle of opening competition to the third country. Hence equivalence, as conceived, rests on free access to third-country infrastructures since they do not run a substantially different level of risk in the European Union. From a strictly legal standpoint, while the size of the infrastructure can have an effect on the assessment of the risks that it poses to European players, equivalence does not rest on considerations of a competitive nature, or a principle of equality of arms. The condition of reciprocity, which sometimes accompanies the equivalence mechanism, means that free access to third-country infrastructures is conditional on reciprocal access of European infrastructures to the market of the third country in question. This condition is therefore more competitive in nature.

It ensues from the analysis that follows that European law leaves great freedom of assessment to the European Commission to assess equivalence, unrestricted by the texts and in practice, and hence uncertain to question *a posteriori.*

1. *The principle of equivalence is a principle of mutual trust that prevails in the texts related to post-market infrastructures*

The current principle of equivalence means that an institution located in a third country state may, by compliance with the legislation applicable in this third country state and under the exclusive supervision of its local regulator, offer its services in the European Union without having to apply the law of the European Union or to apply for an authorisation/be subject to the supervision of the competent authority of the European state in which it is based or proposes to offer its services.

It is outcome-based, i.e. it closely follows the equivalence of the results and covers both regulation (equivalence of rules) and supervision: it therefore concerns a principle of mutual trust that entails a role that is limited, not to say non-existent, for European supervisors (simple role of registration). It can be accompanied by a principle of reciprocity but this is not automatic. These characteristics mean that this principle leaves great freedom of assessment in its implementation.

It was recognised at G20 level in September 2013 under the name of the principle of deference: 'jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulation regimes.'

In the European Union, this principle is applicable, with variants, to market infrastructures (trading platforms, CCP, trade repositories, central depositories), to counterparties to a derivative and to investment service providers wishing to offer their services to professional clients or eligible counterparties.

2. *The terms of initial implementation of equivalence leave the European Commission with substantial room for manoeuvre:*

   a) *<u>As regards the form itself of the decision:</u>*

It is the European Commission that is charged with adopting an equivalence decision on the basis of – general – criteria and in accordance with the procedure specified by the European texts. To this end the European Commission may solicit ESMA's technical advice but is not obliged to do so unless the level-1 text so provides.

ESMA's role is also tending to be narrowed since certain texts specify registration of foreign institutions by ESMA (thus for central counterparties, trade repositories and with lesser scope foreign PSIs); this registration is often a formality, ESMA's role being limited to ensuring compliance with the conditions set by the texts (existence of an equivalence decision and conclusion of cooperation agreements). The national authorities also have a limited, purely consultative and non-systematic role.

Finally, therefore, while it is not the consultation procedure of committees, the European Commission's decision is crucial since the role of ESMA and the national authorities is relatively non-existent, and since the legal form of the act (decision) leaves it a sizeable margin in the initiative and the adoption of its

decision: thus for example, despite the potential political and strategic nature of these decisions, the European Commission is never obliged to adopt an equivalence decision and strictly speaking there is no procedure for objection from the European Parliament or Council (as it is provided for regulatory technical standards).

b) As regards the content of the decision:

The principle of outcome-based assessment itself involves a certain form of flexibility and latitude in the assessment since, unlike the line-by-line approach, it is based on global equivalence of result. This necessarily involves a choice, with not all the European provisions competing in the same way to obtain the result.

While such a method and flexibility are often desirable, the content of this decision is also subject to little or no regulation in the European texts. While European texts do indeed determine the general framework of equivalence, they do not go into the detail of the provisions seen as substantive for assessing equivalence, giving sizeable room for manoeuvre to the European Commission in its negotiations.

Where the criteria regulate the equivalence decision, they are not always clearly in line with the objectives assigned to equivalence. Thus, for example, MiFID comprises provisions enabling the European Commission to declare third-country markets equivalent; this equivalence will in particular make it possible to take the view that an institution that trades on a recognised foreign market respects its obligation to trade equities or derivatives (when they are subject to a trading obligation). In its assessment, the European Commission is obliged to take account of all the criteria dealing with application of the Prospectus, Transparency or Market Abuse directives, but there could be an ambiguity on the mandatory inclusion of certain provisions of MiFID (particularly pre- or post-trading transparency) by the European Commission.

In practice, as regards CCP, the European regime has been criticised by certain jurisdictions or market participants that take the view that this system lacks predictability.

3. The texts do not explicitly regulate the way in which equivalence is to be assessed over time

The European texts applicable to market and post-market infrastructures comprise only a handful of provisions related to the modifications occurring following the equivalence decision. These modifications may result from a change in the institution's activity, an amendment of the legislation applicable in the third country or an amendment of European law.

- The principle is that once equivalence has been granted, supervision is exercised by the local supervisor, and the European authorities have only a very limited role. Thus, while EMIR provides that when the third-country CCP (once recognised by ESMA) expands its activities and services into the European Union, ESMA re-examines the recognition of this central counterparty; the concept of expanding activity is not defined and cannot be understood restrictively. Finally, while the texts sometimes provide that ESMA may withdraw recognition when the company has seriously infringed the provisions applicable to it in the third country or

acts in a manner harmful to the interests of investors or the proper functioning of the markets, it is still necessary to fulfil these particularly strict conditions.

- Most often,[1] the texts are silent on cases where the third country's law or European law is amended. This being the case, the view could be taken that there is nothing to prevent the European Commission amending or repealing any equivalence decision, but the initiative for such a decision then rests exclusively with the European Commission, and there is no clause for automatic review of the equivalence mechanism.

- Certain texts specify the preparation of a periodic report on application of the equivalent framework by the third country. However, this report does not concern cases where the European framework is strengthened or the competitive situation has changed.

- Finally, while a majority of European texts specified the signing by ESMA of a memorandum of understanding with the regulator who supervises the entity of the third country recognised as equivalent, the content of these memoranda of understanding is generally fairly generous and consists more in an undertaking to exchange information.

[1] *Contra:* for example, the provisions applicable to investment service providers specifying that it is only stated in the Regulation that the '[t]he Commission shall assess whether the conditions under which a[n equivalence] Decision […] has been adopted continue to persist in relation to the third country concerned'.

PART 2

IMPLEMENTATION OF THE EQUIVALENCE REGIME AS REGARDS CCP CONFIRMS THE INADEQUACIES REVEALED BY THE THEORETICAL ANALYSIS

In terms of market and post-market infrastructures, the principle of equivalence has long been implemented by European regulators. Thus, the AMF has substantial experience in terms of cooperating with third-country infrastructures' regulators.

The European texts included this principle but amended the prism of its implementation since, as indicated in Part 1, the initiative now rests with the European Commission. As such, this mechanism is relatively new, and its implementation has uncovered possible areas for improvement.

It also comes within a context of profound change in the infrastructures industry, and increased competitive pressure, exacerbated by implementation of the obligation to clear and trade sufficiently liquid and standardised derivatives. In conferring a central role on infrastructures, implementation of these obligations likewise strengthens their systemic character. These combined elements – strengthening of competitive pressure and concentration of risk – make the question of equivalence all the more important and hence the vigilance that needs to surround these assessment conditions.

1. *Implementation of the principle of equivalence for CCP confirms the great freedom left to the European Commission*

Application of the equivalence regime for third-country central counterparties is reflected in a certain form of discretion granted to the European Commission.

On this basis, the European Commission has been able to:

- choose the provisions that it would regard as 'substantive' or those concerning which the existence of differences, even significant differences, subsist or did not intervene in support of a negative decision without the criteria of choosing between the various provisions being clearly defined. Thus, depending on the third countries, the period for the liquidation of margins retained by the central counterparties for calculating margins has sometimes been retained as a discriminating criterion but has at other times been ignored.

- adopt conditional equivalence: thus, as regards the CFTC rules, the European Commission granted equivalence provided American central counterparties complied, on a voluntary basis (in their operating rules), with the conditions set by the equivalence decision. Besides the fact that such a system is not specified by the texts, the question of enforcement of the undertakings thus made by the central counterparties merits being asked. What is more, only three conditions have

been retained in the equivalence decision of the CTFC rules: application, for listed derivatives, of a two-day liquidation period on the house accounts of European and American clearing members, anti-procyclicality measures, and Cover 2. Other elements have not been subjected to conditions, while participating in sound management of the central counterparty's risks: hence the provisions related to the period for liquidating margins for client accounts on listed derivatives or the 80% limit specified in the European Union for reductions in margins resulting from the practice, commonly known as portfolio margining. This decision ultimately provided an exception for purely American agricultural products even though the principle of such an exception is not specified by EMIR.

- introduce elements of proportionality into the assessment of equivalence even though this is not expressly specified by the texts. Thus, to recognise the law applicable to central counterparties in Singapore, the European Commission took the view, in its decision of 30 October 2014, that: 'This Decision is not only based, however, on a comparative analysis of the legally binding requirements applicable to CCPs in Singapore, but also on an assessment of the outcome of those requirements, and their adequacy to mitigate the risks that clearing members and trading venues established in the Union may be exposed to in a manner considered equivalent to the outcome of the requirements laid down in Regulation (EU) No 648/2012. The significantly lower risks inherent in clearing activities carried out in financial markets that are smaller than the Union financial market should thereby, in particular, be taken into account.' While the element of proportionality may be understandable, the terms for monitoring equivalence over time – which make its reconsideration difficult – make it an incentive (element) to establish an activity outside the European Union;

- introduce partial equivalence: while EMIR refers to the law of the third country applicable to the central counterparty, the European Commission has ruled only on the equivalence of the rules applied by the CFTC to central counterparties without examining the SEC's rules.

- assess flexibly the condition of reciprocity (when this is specified by the texts, which is not always the case): for the equivalence of American CCP, the European Commission's equivalence decision is based on a power permitted by the Dodd Franck Act, whereas until recently the CFTC required that European central counterparties be registered with it and apply its own rules and be submitted to its supervision.

2. *Implementation of the equivalence principle, in the current competitive context, attests to the limits of the mechanism*

While the majority of these European texts have not yet been implemented for their equivalence principle, the previous ones with the central counterparties are fairly emblematic of the freedom conferred on the European Commission in its negotiations but above all of the limits of the mechanism: equivalence not being a line-by-line approach – which, incidentally, is not necessarily desirable for all, with the European Commission capable of having regard only to the overall result. The difficulty also relates to the fact that while a provision taken in isolation cannot be perceived as more binding, the global nature of equivalence may lead to assessing the equivalence of the regulatory framework in its entirety, and to leaving 'aside'

certain nonetheless important provisions. Note too that it may be difficult for the European Commission to assess in concrete terms the supervision framework applicable in the third country, a theoretical assessment having been retained hitherto.

Since the texts do not strictly speaking specify taking into account any element of a competitive nature or associated with the size of the central counterparty, implementation of equivalence has not made it possible to ensure that third-country central counterparties access the European market under conditions similar to European central counterparties. This may lead to a distortion of competition to the detriment of European central counterparties, which are apparently subject to stricter standards. This situation also stems from the fact that the equivalence approach is incapable of taking account of the differences that do not generate systemic risks but distortions of competition. This state of affairs may be exacerbated by the absence of any genuine mechanism for reviewing equivalence, a recognised third-country central counterparty being able to benefit from an advantageous competitive position without systematic reassessment by the European authorities.

For this reason too, the result was a lowering of European standards to align them with the mechanisms retained by American central counterparties. This has particularly been the case for mechanisms related to calculations of margins by central counterparties on which competitive pressure can be the most marked. Modification of the European standards related to the period for the liquidation of margins applicable by European central counterparties on listed derivatives is in this respect fairly emblematic, since owing to the equivalence conditions retained by the European Commission for American central counterparties, ESMA has authorised European central counterparties to calculate margins taking account of a minimum liquidation period of one day, a period retained by the CFTC rules, for positions taken by clients on listed derivatives. Competitive considerations have led to a revision of said standards. While it is in fact difficult to compare the amounts of margins called between European and American central counterparties (owing to the different calculating terms, ie. gross or net), it is generally accepted that it can be difficult, depending on the liquidity of the products, to liquidate positions in one day.

These differences have also served as justification for certain European central counterparties not applying provisions nonetheless specified at European level: thus, the European provisions related to the practice known as portfolio margining*,* particularly the 80% cap on the gain realised owing to the calculation of the margin at portfolio level , these provisions now being variously applied in the European Union. The argument of an unlevel playing field with the United States is regularly mentioned.

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PART 3

THE AMF TAKES THE VIEW THAT THE EQUIVALENCE REGIME APPLICABLE TO POST-MARKET INFRASTRUCTURES NEEDS TO BE IMPROVED AS PART OF THE EMIR REVIEW

The foregoing analyses have highlighted a certain number of inadequacies in the current equivalence procedure. Beyond the precedents from which a number of lessons may be learnt, the AMF takes the view that the current context makes a review of this procedure all the more necessary. This is the case for all the texts applicable to market and post-market infrastructures. Given the volumes cleared there, the United Kingdom's exit from the European Union makes the matter of the location of infrastructures all the more relevant.

Thus, while a global review needs to be conducted, the AMF takes the view that the EMIR review needs to be the occasion for rethinking the entire equivalence mechanism.

In this context, the AMF wishes to make the following recommendations:

1. With its experience in cooperation with other regulators, the AMF wishes to reaffirm its attachment to the principle of equivalence.

2. The criteria to be taken into account by the European Commission need to be further clarified in the texts to prevent any ambiguity concerning assessment of the equivalence of the result that needs to be obtained and concerning the provisions regarded as substantial for the European Union.

3. Equivalence should also ensure genuine competitive equality between sectors. This is not of course about preventing third-country infrastructures from providing their services in the European Union but about ensuring that they do not do so under more favourable competitive conditions. There may be situations where the concept of systemic risk is inconsistent but where the aspect of competitiveness is very much present. Both elements – risk and competitiveness – need to be taken into account. In the same spirit, equivalence must necessarily have as a corollary effective access under comparable conditions for European infrastructures to the third country's market.

4. The size of infrastructures should be taken into account in assessing equivalence: this size could be assessed on the basis of criteria such as the volume of European instruments in question (for example, products whose underlying is European or denominated in euros) or the volume represented by the clearing members or European clients (for the infrastructure but also from the viewpoint of the member or client itself). A more precise approach could lead to a distinction being made between three categories of infrastructures: (1) infrastructures whose activities

denominated in euros or in other currencies of the European Union are of critical size for the European Union, (2) infrastructures of significant size for the European Union for other reasons, particularly the exposures of European countries to them, irrespective of the currency concerned (US dollar for example), and (3) smaller infrastructures. Assessment of equivalence should be adapted to these categories:

- For the reasons set out in point 5, the equivalence regime is not suited to infrastructures whose activities denominated in euros or in other currencies of the European Union are of critical importance to the European Union,
- Infrastructures of significant size for the European Union need to continue to benefit from equivalence but would be subject to authorisation by ESMA, based on line-by-line equivalence for the most important elements: this is because, in such cases, the volumes in question, and thus the risks taken by European members or clients are such that they justify a stricter approach to equivalence and to supervision also exercised at European level,
- Smaller infrastructures would still be subject to recognition by ESMA, based on global but conditional equivalence as regards fundamental prudential requirements.

5. The equivalence regime is not appropriate when the infrastructure represents volumes in euros such that it poses a stability risk for the European Union. Incidentally, the equivalence regime was not conceived to be applied to this type of situation. The effects of applying equivalence would create a risk for the financial stability of the European Union, justifying the location of these infrastructures within the European Union. This location requirement is of particular relevance to:

   - CCP of critical importance clearing products denominated in euros for their activity in euro. If the third-country regime were applied, the largest positions of clearing members and European clients would be cleared in infrastructures that would not be, in the future, supervised in the European Union. These extraneous factors can be sources of day-to-day concern for the supervisors of these entities and exacerbated in the event of a crisis if it was needed to access ECB' liquidity, particularly since the equivalence regime specified by EMIR does not require the existence of an appropriate regime for the recovery and resolution of third-country central counterparties. These extraneous elements present risks for the financial stability of the European Union when the size of the infrastructure is of critical importance for the European Union.
   - Trade repositories. Since European players could continue to report their data in third-country trade repositories, they would be subject to equivalence. These trade repositories will no longer be directly supervised by ESMA and it is questionable to see most of the European data declared in an entity subject to requirements and supervision that may be different from those specified in the European Union. This could also lead to fragmentation of data, which could be detrimental to the exploitation of this data by European regulators and to the risk that regulators could not access the data whatever the reason.

   These risks justify the location of these infrastructures in the European Union for their activity in euro and the AMF pursues its reflexions to refine its terms of implementation.

6. As regards the procedure, while the European Commission needs to continue to play a major role in assessing equivalence, ESMA's role needs to be strengthened: besides the fact that ESMA's technical opinion should be given on a systematic basis, ESMA should play a major role in the identification of the provisions regarded as substantial for the European Union and in the identification of criteria making it possible to assess the importance of infrastructures. This role of ESMA's should be affirmed not only in the initial evaluation of equivalence but also in the necessary follow-up of this evaluation over time.

7. For significantly important infrastructures, the scope of recognition should be strengthened by conferring a genuine power of authorisation and supervision on ESMA, whereas the current texts confer only a notarial function on ESMA. The establishment of the College of regulators could accompany the conferring of such a power of supervision on ESMA.

8. The review of equivalence over time needs to be rethought. In particular, ESMA should be in charge of publishing, a report on equivalence on a regular basis, making it possible to evaluate whether the conditions under which equivalence has been granted are still relevant: would be addressed along with changes that have occurred in the legislative framework of the third country and in the European Union as well as their application in the infrastructure. This report should also assess whether the infrastructure's importance has changed (as regards the aforementioned categories) and justifies a different approach to equivalence. If ESMA's report concludes that it is necessary to review equivalence, the European Commission should be obliged to take a new decision or, failing this, justify it in a report to the Parliament and the Council. In all cases the European Commission should take immediate measures in the event of changes in the third country's regulations that might generate a systemic risk or create conditions of regulatory arbitrage.

9. Review of the equivalence decision also needs to be proportionate to the size of the infrastructure in question: infrastructures of significant size and the jurisdictions in which they are established should be subject to a reassessment that is not only more regular, but also automatic when regulations are changed.