

DECISION OF THE BOARD OF SUPERVISORS

To adopt supervisory measures and impose fines in respect of infringements committed by DTCC Derivatives Repository Plc

The Board of Supervisors ('Board'),

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

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹, as amended by Regulation (EU) 2019/2175 of 18 December 2019² ('ESMA Regulation'), and in particular Article 43(1) thereof,

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 repositories³, and in particular Articles 65 and 73 thereof,

Having regard to Commission Delegated Regulation (EU) No 667/2014 supplementing Regulation No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority⁴ including rules on the right of defence and temporal provisions,

Whereas:

- i. The Supervision Department within ESMA concluded, following preliminary investigations with respect to DTCC Derivatives Repository Plc (or the 'PSI') that there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012 of the European

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 334, 27.12.2019, p. 1–145.

³ OJ L 201/1 27.07.2012, p. 1.

⁴ OJ L 179, 19.6.2014, p. 31.

Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories⁵.

- ii. On 19 September 2019 ESMA's Executive Director appointed an independent investigating officer ('IIO') pursuant to Article 64(1) of Regulation (EU) No 648/2012.
- iii. On 2 July 2020 the IIO sent to DTCC Derivatives Repository Plc her initial Statement of Findings, which found that the entity had committed one or more of the infringements listed in Annex I to Regulation (EU) No 648/2012.
- iv. In response to the IIO's initial Statement of Findings, written submissions dated 3 August 2020 were made by DTCC Derivatives Repository Plc.
- v. Following the receipt of written submissions referred to in point 4 above, the IIO amended her initial Statement of Findings and incorporated those amendments into her Statement of Findings.
- vi. On 12 February 2021, the IIO submitted to the Board her file relating to DTCC Derivatives Repository Plc, which included the initial Statement of Findings dated 2 July 2020, the written submissions made by the entity on 3 August 2020 and the Statement of Findings dated 12 February 2021.
- vii. The Board thoroughly discussed the case at its meeting on 23 March 2021.
- viii. On 13 April 2021, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file⁶.
- ix. The Board, at its meeting on 20 May 2021, provided clear directions and delegated the Chair to finalise, adopt and submit to the PSI the Board's initial Statement of Findings.
- x. On 8 June 2021, on behalf of the Board, ESMA sent the Board's initial Statement of Findings to the PSI.
- xi. On 22 June 2021, the PSI provided its written submissions in respect of the Board's initial Statement of Findings.
- xii. The Board discussed the case further at its meeting on 8 July 2021.
- xiii. Pursuant to Article 65 of the Regulation (EU) No 648/2012, where ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine.
- xiv. Pursuant to Article 73 of the Regulation (EU) No 648/2012, where ESMA finds that a trade repository has committed one of the infringements listed in Annex I, it shall take a supervisory measure, taking into account the nature and seriousness of the infringement.

⁵ OJ L 201, 27.7.2012, p.1.

⁶ Ruling of the Enforcement Panel (ESMA41-356-170).

Having considered the IIO's Statement of Findings, the material in the complete file and the written submissions made on behalf of the PSI, the Board sets out below its findings.

STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS

1 Background

1. The PSI was registered as a Trade Repository (TR) with ESMA since 14 November 2013⁷. The PSI, formally registered as DTCC Derivatives Repository Ltd, changed its legal form from private limited company (Ltd) to public limited company (plc) on 31 July 2017.⁸
2. As of October 2018, the PSI had the largest market share (measured in number of reports per TR) in the European Union, with a 42% market share.⁹ Overall, between 2014 and 2018, the PSI received more than 35 billion reports¹⁰ of almost 80 billion reports in total¹¹.
3. As regards the financial year ended 31 December 2020, the PSI had an annual turnover of approximately USD 124,6 million¹² (i.e. approximately EUR 109,1 million¹³) out of which approximately USD 88,7 million¹⁴ (i.e. approximately EUR 77.7 million) were generated through the PSI's activities as a TR under Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories¹⁵ (the 'Regulation' also referred to as 'EMIR').

2 Facts

The PSI's Reporting and Reconciliation System

4. The PSI put in place the Global Trade Repository (GTR) system before the EMIR reporting obligations entered into force on 12 February 2014¹⁶. The GTR system enabled market participants to make a single submission of trades for all asset classes

⁷ Supervisory Report, Exhibit 001 - 2013-ESMA-1595 - DDRL Registration Decision.

⁸ Exhibit 16, DTCC Derivatives Repository Plc - Overview (Companies House).

⁹ Exhibit 20, Public Information folder, "ESMA80-199-273, ESMA's Supervision – 2018 Annual Report and 2019 Work Programme", p. 16.

¹⁰ Exhibit 20, ESMA80-199-273, ESMA's Supervision – 2018 Annual Report and 2019 Work Programme, p. 17.

¹¹ Exhibit 20, ESMA80-199-273, ESMA's Supervision – 2018 Annual Report and 2019 Work Programme, p. 16.

¹² Exactly USD 124 633 000 as per the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

¹³ The exchange rate calculations regarding revenues stated in USD to EUR are based on the figures set out in the statistical annex of the ECB's Economic Bulletin, Issue 3/2021, which states that the average exchange rate for 2020 was EUR 1 = USD 1.142. The ECB's Economic Bulletin can be found here: <https://www.ecb.europa.eu/pub/economic-bulletin/html/eb202103.en.html>.

¹⁴ Exactly USD 88 686 000 as per the PSI's annual report and financial statements for the year ended 31 December 2020, p. 28.

¹⁵ OJ L 201/1 27.07.2012, p. 1.

¹⁶ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5; Exhibit 34, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q2 folder, "GTR Functional Description v.6.1"; Exhibit 35, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q2 folder, "GTR Functional Description v.6.2".

and discharge, at the same time, reporting obligations in multiple jurisdictions (including EMIR).¹⁷

5. When participants specified that their trades should be reported under EMIR, the data was routed to the EU data centre for processing and EMIR specific regulatory validation rules applied.¹⁸ Before the data could be reported to ESMA and other relevant EU regulatory authorities, i.e. regulators identified in Article 81(3) of the Regulation (also referred to as “Regulators”), the data was uploaded to the PSI’s [...] ingestion database and then passed to the PSI’s [...] database where the relevant information for each of the reports was extracted.¹⁹
6. The GTR system also provided pairing and matching processes to identify both sides of reported trades²⁰ and to reconcile the data submitted by or on behalf of each counterparty²¹, both internally²² and externally with other TRs (Inter-TR Reconciliation)²³.
7. In October 2017²⁴, the PSI re-architected the GTR System, in particular “to enhance the customer experience, reduce the complexity of support, reduce the costs to maintain the existing application and to reduce costs when expanding into new jurisdictions or new services”.²⁵

The set-up of asset manager accounts in Static Data Operations (SDO)²⁶ and the data access rights granted to asset managers

The PSI’s policies and procedures to onboard asset managers and give them access to the data

8. The reporting obligation under the Regulation entered into force on 12 February 2014.²⁷
9. Since then, the process to onboard and give data access to clients (including fund asset managers) has been governed by different policies and procedures. In particular, the following:

¹⁷ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, p. 8.

¹⁸ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, pp. 15 and 33; Exhibit 34, GTR Functional Description v.6.1, pp. 15 and 39; Exhibit 35, GTR Functional Description v.6.2, pp. 15 and 40.

¹⁹ Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p. 16, para. 69.

²⁰ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, p. 66: “Within the GTR a trade describes a discrete, unitary economic relationship between two counterparties that can be defined by a single contract and is represented by a UTI.”

²¹ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, p. 16.

²² Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, p. 66-68

²³ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, p. 68-70.

²⁴ Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p.19, para. 95.

²⁵ Exhibit 36, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 27.3”, p.8.

²⁶ The SDO is the application used by the PSI to onboard clients and setup client accounts. See e.g. Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, p. 5 and Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0, p. 13.

²⁷ 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, OJ L 201, 27.7.2012, Article 9(1).

- The Client Onboarding Procedure as amended on 10 January 2014 (the “Client Onboarding Procedure”)²⁸;
- The DTCC SACFORM Procedure (the “SACFORM Procedure”), which was adopted on 15 October 2013 and revised on 28 November 2014²⁹;
- The DTCC Standard Operating Procedure – Implementation Process (the “Onboarding Implementation Procedure”), adopted on 1 May 2015;³⁰
- The DerivSERV Onboarding Standard Operating Procedure adopted on 27 September 2016 (“V1 Onboarding SOP Procedure”) ³¹ and subsequently amended on 13 October 2016 (“V2 Onboarding SOP Procedure”) ³², 16 November 2016 (“V3 Onboarding SOP Procedure”) ³³, 5 December 2016 (“V4 Onboarding SOP Procedure”) ³⁴, 24 February 2017 (“V5 Onboarding SOP Procedure”) ³⁵, 2 March 2017 (“V6 Onboarding SOP Procedure”) ³⁶, 6 September 2018 (“V7 Onboarding SOP Procedure”) ³⁷ and 9 August 2019 (“V8 Onboarding SOP Procedure”) ³⁸;
- The DTCC-GTR Exclusivity Exception Process, adopted on 25 April 2017;³⁹ and
- The DDRL Exclusivity Recertification Process, adopted on 25 June 2018. ⁴⁰

The process to onboard and the data access rights granted to asset managers

The conception of the Exclusivity Access Functionality

10. Before 12 February 2014 (i.e. date in which the reporting obligation under the Regulation started), the PSI’s system was designed in a way that “access to trade data was provided based on the counterparties to a trade”.⁴¹
11. According to the PSI, shortly after that the EMIR reporting obligations came into force in February 2014, its asset manager clients requested the PSI to have a functionality

²⁸ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, Standard operating procedure dated 12 August 2013.

²⁹ Supervisory Report, Exhibit 028, SACFORMS Procedure.

³⁰ Supervisory Report, Exhibit 036, Standard operating procedure dated 10 April 2015, Standard operating procedure dated 10 April 2015.

³¹ Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016.

³² Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0.

³³ Supervisory Report, Exhibit 024, DerivSERV Onboarding Standard Operating Procedures - v3.

³⁴ Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1.

³⁵ Supervisory Report, Exhibit 026, DerivSERV Onboarding Standard Operating Procedures- v5.

³⁶ Supervisory Report, Exhibit 027, DerivSERV Onboarding Standard Operating Procedures - v6.

³⁷ Supervisory Report, Exhibit 047, Standard operating procedure dated, 6 September 2018.

³⁸ Exhibit 37, First RFI to the PSI folder, PSI’s Response to the IIO’s First RFI folder, “Document 08.3”.

³⁹ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017.

⁴⁰ Exhibit 38, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 18.7”.

⁴¹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 11, para. 36.

whereby they could have access to the trades they executed on behalf of investment funds.⁴²

12. In response to this request, the PSI “implemented [a] functionality whereby an asset manager could access trades they executed on behalf of funds if they were identified in the Execution Agent field”⁴³ (the “Execution Agent Functionality”).
13. However, the PSI realised that the Execution Agent Functionality was not widely used or could not be used by the asset managers and after discussing with asset managers, came to the conclusions that when a fund was exclusive to an asset manager, a kind of parent-child relationship could be established and, therefore, decided to implement a functionality allowing asset managers to access all the data of the funds which were exclusively managed by them (the “Exclusivity Access Functionality”).⁴⁴
14. As a result, when an asset manager was granted access to all the data of its investment funds (“Exclusive Access Rights”), it was set up in the Static Data Operations application (SDO) as if the asset manager and the funds were established within the same corporate family of entities.
15. The possibility to request to be granted Exclusive Access Rights over a fund was thus included on the Client Onboarding Procedure adopted on 10 January 2014.⁴⁵ According to the information provided in the Client Onboarding Procedure, in order to be granted Exclusive Access Rights over a fund, asset managers had to indicate by means of a checkbox in the User Agreement and Service Request Form (SRF) that their “reporting relationship” was “exclusive”.⁴⁶

The first amendment to the Exclusivity Access Functionality

16. On 1 April 2015, the PSI moved to a process according to which any user requesting to have exclusivity access rights to a fund had to sign a Full User Access Agreement, which served as a legal authorisation.⁴⁷ This new process was formalised in the Onboarding Implementation Procedure that was adopted on 1 May 2015.⁴⁸

The internal audit report into the Client Set-Ups and SDO of 29 May 2015

⁴² Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 11, para. 36. See also Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 2: “At the commencement of EMIR reporting it was determined that there was industry demand for the TR to support functionality that would allow a User access to all of the transactions reported to DDRL on behalf of an entity identified on the Annex I to the User’s Agreement. Absent this functionality a User is only able to see the details of those transactions that they submit on behalf of a counterparty to a trade or those transactions where the transaction record identifies them as the Execution Agent”.

⁴³ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 11, para. 37.

⁴⁴ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 11, para. 38.

⁴⁵ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, pp. 39 and 40; Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 12, para. 43.

⁴⁶ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, pp. 39 and 40; Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 12, para. 43.

⁴⁷ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, pp. 12-13, para. 44; Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 2.

⁴⁸ Supervisory Report, Exhibit 036, Standard operating procedure dated 10 April 2015.

17. On 29 May 2015, the PSI adopted the internal audit report about the Client Set-Ups and SDO (the “Internal Audit Report”). This report identified significant issues related to the data access rights granted to asset managers.⁴⁹ In particular, the report identified issues related to the design of the control environment regarding the onboarding of asset managers, the validation controls used to establish client access to the Global Trade Repository (GTR) portal, the onboarding edit and validation checks during onboarding and the process followed by the PSI to modify client accounts.⁵⁰
18. In this regard, the executive summary of the Internal Audit Report noted that “a variety of gaps exist that have led to inappropriate access. For example, as self-identified by the Onboarding Team prior to the start of the Audit, the current onboarding process does not support certain complex client types. As a result, asset managers that only manage a portion of a fund have been granted access to view all positions within the fund. Clients have also been granted access to view other client’s confidential trade information because the existing client set-up process for the GTR Portal is not supported by strong validation controls. In addition, a process to verify that only authorized client personnel can make requests to change account information has not been defined. While this gap has not led to privacy or exclusivity incidents, this process could compromise a client’s information or disrupt their access to the GTR”.⁵¹
19. The issues identified in the Internal Audit Report, along with the respective actions plans agreed by the PSI’s management, are included in an issue matrix attached to the report.⁵²
20. In October 2015, as a follow-up to the Internal Audit report of 29 May 2015, the PSI launched a global review of the SDO accounts set-up known as “the SDO Scrubbing Exercise” and whose aim was “to identify and remediate any SDO account setups where Exclusivity Access Rights had been incorrectly granted”.⁵³ The SDO Scrubbing Project was documented in a report (the “SDO Scrubbing Report”) dated 6 April 2016.⁵⁴

Further amendments to the Exclusivity Access Functionality

21. On 14 September 2016, the PSI’s Management presented a proposal to its Board of Directors to progressively remove the Exclusive Access Functionality.[...] The PSI’s Management also proposed to work with the industry to ensure that the Execution Agent field was correctly populated and also referred to the possibility of creating a new data field ([...]) where the reporting party could indicate other entities which were not acting as execution agents.

⁴⁹ Supervisory Report, Exhibit 039, Internal Audit report ‘2015 GTR – Client Set-Ups and Static Data Operations (SDO)’.

⁵⁰ Supervisory Report, Exhibit 039, Internal Audit report ‘2015 GTR – Client Set-Ups and Static Data Operations (SDO)’, pp. 5-7 and 9.

⁵¹ Supervisory Report, Exhibit 039, Internal Audit report ‘2015 GTR – Client Set-Ups and Static Data Operations (SDO)’, p. 2.

⁵² Supervisory Report, Exhibit 039, Internal Audit report ‘2015 GTR – Client Set-Ups and Static Data Operations (SDO)’, p. 3.

⁵³ Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p. 14, para. 54.

⁵⁴ Exhibit 39, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 19.2”.

22. On 27 September 2016, the PSI adopted the Onboarding SOP Procedure.⁵⁵ Under this procedure, new asset manager clients were no longer allowed to request exclusive access over the investment funds that they were onboarding in SDO. However, existing clients retained their Exclusive Access Rights and could request the PSI to set up additional funds as exclusive in SDO or to modify an existing non-exclusive account into an exclusive account.⁵⁶
23. The Onboarding SOP Procedure was amended on 13 October 2016 (“V2 Onboarding SOP Procedure”)⁵⁷ and 16 November 2016 (“V3 Onboarding SOP Procedure”)⁵⁸. However, with regards to the process to onboard asset managers and the Exclusivity Access Functionality, the V2 and V3 Onboarding SOP Procedure remained largely unchanged.
24. On 5 December 2016 (“V4 Onboarding SOP Procedure”)⁵⁹, 24 February 2017 (“V5 Onboarding SOP Procedure”)⁶⁰ and 2 March 2017 (“V6 Onboarding SOP Procedure”)⁶¹, the Onboarding SOP Procedure was subject to further amendments. In particular, since December 2016, the Onboarding SOP Procedure indicated that “[a]s the February 1st there will no longer be an option for Asset Managers to onboard investment funds as “Exclusive””.⁶²
25. On 25 April 2017, at the demand of some firms, which have raised concerns as regards the dismantling of the Exclusive Access Functionality planned for 1 February 2017 and demanded to be granted an exception,⁶³ the PSI adopted the “GTR Exclusivity – Exception Process”.⁶⁴ According to this new exception procedure, the PSI would in principle only grant Exclusive Access Rights to those clients which appear on a “exception list”.⁶⁵
26. However, if a client (not appearing on that list) expressed his discontent with the PSI’s refusal to grant Exclusive Access rights, the matter was escalated internally and, after collecting the relevant information from the client (including “written confirmation that the client understands they will have to commit to a monthly certification and that failure to do so will result in all exclusive settings to revert to multi managed”⁶⁶ and “written confirmation that the client understands they will have to provide an e mail from the Fund Administrator conforming they have exclusive rights over the account/s in

⁵⁵ Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016.

⁵⁶ Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016, pp. 17 and 96-97; Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0, pp. 18 and 97-98.

⁵⁷ Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0.

⁵⁸ Supervisory Report, Exhibit 024, DerivSERV Onboarding Standard Operating Procedures - v3, p. 7.

⁵⁹ Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1.

⁶⁰ Supervisory Report, Exhibit 026 DerivSERV Onboarding Standard Operating Procedures- v5.

⁶¹ Supervisory Report, Exhibit 027, DerivSERV Onboarding Standard Operating Procedures - v6.

⁶² Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1, pp. 19 and 107; Supervisory Report, Exhibit 026 DerivSERV Onboarding Standard Operating Procedures- v5, pp. 18 and 125; Supervisory Report, Exhibit 027, DerivSERV Onboarding Standard Operating Procedures - v6, pp. 20 and 129.

⁶³ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 2.

⁶⁴ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017,

⁶⁵ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 3, points 1 to 3.

⁶⁶ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 3, point 6, sixth bullet.

question⁶⁷) and receiving confirmation from the PSI's Chief Executive Officer (CEO), Exclusive Access Rights could be granted to that client.⁶⁸

27. According to the PSI, "no new users requested "Exclusive Access" under the "GTR Exclusivity – Exception" process dated 25 April 2017 [...]. There were 14 users which had been granted "Exclusive Access prior to the implementation of the Exception Process which continued to have access to onboard exclusive funds under their organisation and were part of the monthly recertification process".⁶⁹

28. On 21 September 2017, the PSI adopted the "DDRL Exclusivity Recertification Process". This document described the recertification process and included a list of clients which were subject to the monthly recertification process and, therefore, could keep their Exclusive Access Rights. Originally, there were 13 clients on that list. However, the "DDRL Exclusivity Recertification Process" was amended in June 2018 to include a fourteenth client to the list.⁷⁰ Previously, the Exclusivity Recertification Process had also been amended on 16 April and 29 May 2018.⁷¹ In particular, the amendment of 29 May 2018 aimed at reflecting that "[...] On April 2018 the DDRL business changed the original requirement to no longer allow clients who were granted an exception to add additional exclusive funds to their organization. These clients will be recertified on a monthly basis. All existing clients making use of the Exclusive Access functionality will keep their access unchanged until an alternative solution is implemented."⁷²

Notification to the clients of the Exclusivity Access Functionality being permanently disabled as of 1 October 2018

29. On 30 March 2018, the PSI notified to its Industry Steering Committee its intention to remove the Exclusive Access Functionality on 1 October 2018.⁷³ This intention was subsequently communicated by an e-mail that was sent by GTR Communications on 17 April 2018.⁷⁴ Further follow-up notifications were sent by the PSI between 22 June and 17 September 2018.⁷⁵

30. The e-mails indicated that "all existing exclusive accounts will be switched to a non-exclusive status on Oct 1st 2018, or before with the firm's permission".⁷⁶ Once the

⁶⁷ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 3, point 6, seventh bullet.

⁶⁸ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 3, points 6 to 9.

⁶⁹ Exhibit 10, PSI's Response to the IIO's First RFI, p. 9, para. 28.

⁷⁰ Exhibit 38, Document 18.7, pp. 5 and 9.

⁷¹ Exhibit 38, Document 18.7, pp. 1 and 9.

⁷² Exhibit 38, Document 18.7, pp. 5 and 9.

⁷³ Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p. 15, para. 65.

⁷⁴ Supervisory Report, Exhibit 042, DDRL notification to clients for end of exclusivity dated 17 April 2018.

⁷⁵ Supervisory Report, Exhibit 041, DDRL notification to clients for end of exclusivity, dated 22 June 2018; Supervisory Report, Exhibit 043, DDRL notification to clients for end of exclusivity, dated 17 July 2018; Supervisory Report, Exhibit 044, DDRL notification to clients for end of exclusivity, dated 10 September 2018; Supervisory Report, Exhibit 045, DDRL notification to clients for end of exclusivity dated 13 September 2018; Supervisory Report, Exhibit 046, DDRL notification to clients for end of exclusivity, dated 17 September 2018.

⁷⁶ Supervisory Report, Exhibit 042, DDRL notification to clients for end of exclusivity dated 17 April 2018, p. 2; Supervisory Report, Exhibit 041, DDRL notification to clients for end of exclusivity, dated 22 June 2018, p. 1; Supervisory Report, Exhibit 043, DDRL notification to clients for end of exclusivity, dated 17 July 2018, p.1; Supervisory Report, Exhibit 044, DDRL notification to clients

Exclusivity Access Functionality was disabled, asset managers would only have access to trades if: (i) they were identified as counterparty to the trade; (ii) they were identified as an execution agent on the trade; (iii) they were identified as an eligible third party viewed to the trade.⁷⁷ If none of these conditions were met, the asset manager would no longer be able to see the trades of a fund after 1 October 2018.⁷⁸ With regards to historical trades, the asset manager clients had until 1 October 2018 to save copies of all the reports. With regards to EMIR, they were able to download up to six months of submission data from the portal.⁷⁹

31. According to the PSI, “between the date DDRL sent out the first email notifying its asset managers clients that the “Exclusive Access” functionality would be decommissioned and 1 October 2018, those clients were technically able to access trade state reports and trade activity reports which they were permitted to access in accordance with their specific DDRL permissions. Where an asset manager had “Exclusive Access” permissions for one or more underlying funds, the trade state reports and trade activity reports to which those asset manager clients had access would include all data for those underlying funds”.⁸⁰

Last amendment to the Exclusivity Access Functionality

32. On 6 September 2018, the Onboarding SOP Procedure was subject to further amendments (“V7 Onboarding SOP Procedure”)⁸¹ and on 30 October 2018, the PSI completed a second review of asset manager accounts (the “2018 Clean Up Exercise”).⁸² Among others, the V7 Onboarding SOP Procedure indicated that “minus a small number of exceptions, all funds must now be set as non-exclusive on the system (as a client profile account). [...]”⁸³ As a result, in order to be able to see the transactions reported for a fund, the asset manager clients had to be indicated in the “Execution Agent” field or in the “Third Party Viewer Functionality”.⁸⁴

for end of exclusivity, dated 10 September 2018, p. 2; Supervisory Report, Exhibit 045, DDRL notification to clients for end of exclusivity dated 13 September 2018, p. 1; Supervisory Report, Exhibit 046, DDRL notification to clients for end of exclusivity, dated 17 September 2018, pp. 1-2.

⁷⁷ Supervisory Report, Exhibit 042, DDRL notification to clients for end of exclusivity dated 17 April 2018, p. 2; Supervisory Report, Exhibit 041, DDRL notification to clients for end of exclusivity, dated 22 June 2018, p. 2; Supervisory Report, Exhibit 043, DDRL notification to clients for end of exclusivity, dated 17 July 2018, pp. 1-2; Supervisory Report, Exhibit 044, DDRL notification to clients for end of exclusivity, dated 10 September 2018, p. 2; Supervisory Report, Exhibit 045, DDRL notification to clients for end of exclusivity dated 13 September 2018, p. 2; Supervisory Report, Exhibit 046, DDRL notification to clients for end of exclusivity, dated 17 September 2018, p. 2.

⁷⁸ Supervisory Report, Exhibit 042, DDRL notification to clients for end of exclusivity dated 17 April 2018, p. 2; Supervisory Report, Exhibit 041, DDRL notification to clients for end of exclusivity, dated 22 June 2018, p. 2; Supervisory Report, Exhibit 043, DDRL notification to clients for end of exclusivity, dated 17 July 2018, p. 2; Supervisory Report, Exhibit 044, DDRL notification to clients for end of exclusivity, dated 10 September 2018, p. 2; Supervisory Report, Exhibit 045, DDRL notification to clients for end of exclusivity dated 13 September 2018, p. 2; Supervisory Report, Exhibit 046, DDRL notification to clients for end of exclusivity, dated 17 September 2018, p. 2.

⁷⁹ Supervisory Report, Exhibit 042, DDRL notification to clients for end of exclusivity dated 17 April 2018, p. 2; Supervisory Report, Exhibit 041, DDRL notification to clients for end of exclusivity, dated 22 June 2018, p. 2; Supervisory Report, Exhibit 043, DDRL notification to clients for end of exclusivity, dated 17 July 2018, p. 2; Supervisory Report, Exhibit 044, DDRL notification to clients for end of exclusivity, dated 10 September 2018, p. 2; Supervisory Report, Exhibit 045, DDRL notification to clients for end of exclusivity dated 13 September 2018, p. 2; Supervisory Report, Exhibit 046, DDRL notification to clients for end of exclusivity, dated 17 September 2018, p. 2.

⁸⁰ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 9, para. 30.

⁸¹ Exhibit 41, First RFI to the PSI folder, PSI’s Response to IIO’s First RFI folder, “Document 45.1”, p. 1.

⁸² Supervisory Report, Exhibit 047, Standard operating procedure dated, 6 September 2018.

⁸³ Supervisory Report, Exhibit 047, Standard operating procedure dated, 6 September 2018, p. 20.

⁸⁴ Supervisory Report, Exhibit 047, Standard operating procedure dated, 6 September 2018, p. 21.

33. On 9 August 2019, the Onboarding SOP Procedure (“V8 Onboarding SOP Procedure”) ⁸⁵ was once again modified. In particular, the V8 Onboarding SOP Procedure indicated that “[...] As of 1st October 2018, the historic population of funds, trusts and other entities onboarded as exclusive to an asset manager were corrected to non-exclusive [...]”. ⁸⁶ However, it also indicates that “the 2018 clean up consisted of all accounts existing under an asset manager or fund administrator role in SDO. However, there may be some asset manager type entities where the role selected on their initial documentation was incorrect, and as such they were not included in the scope”. ⁸⁷ In this regard, the procedure provides indications about what needs to be done in case the PSI’s staff in charge of onboarding (the “Onboarding Agent”) discovers that there is a fund which is still set up as exclusive to a client. ⁸⁸

The Exclusivity Incidents

34. Between the start of the reporting obligation under the Regulation and the disabling of the Exclusive Access Functionality on 1 October 2018, the PSI identified 35 instances in which a total of 32 asset managers were incorrectly granted Exclusive Access Rights over investment funds (“Exclusivity Incidents”). The table below ⁸⁹ provides an overview of all these incidents.

⁸⁵ Exhibit 37, Document 08.3.

⁸⁶ Exhibit 37, Document 08.3, p. 23.

⁸⁷ Exhibit 37, Document 08.3, p. 26.

⁸⁸ Exhibit 37, Document 08.3, p. 26.

⁸⁹ The Board makes reference to the table created by the IIO. For the purpose of the table, when the Exclusivity Incident began before the starting of the reporting obligation under the Regulation the IIO has taken the 12 February 2014 (i.e. date in which the reporting obligation started) as the date in which the infringement began.

	Date in which the incident was discovered by the PSI	Date in which the incident was notified to ESMA's Supervisors	Period of time during which DDRL was giving access to such trade records		Duration of the Exclusivity incident
			Beginning of the incident	End of the incident	
1	17/02/2014	20/02/2014	12/02/2014	20/02/2014	0 years, 0 months, 8 days
2	11/04/2014	11/04/2014	12/02/2014	05/03/2014	0 years, 0 months, 21 days
			13/03/2014	11/04/2014	0 years, 0 months, 29 days
3	25/11/2014	Not reported	24/06/2014	03/02/2015	0 years, 7 months, 10 days
4	16/01/2015	Not reported	13/01/2015	17/01/2015	0 years, 0 months, 4 days
5	20/01/2015	Not reported	12/02/2014	15/01/2015	0 years, 11 months, 3 days
6	11/08/2015	Not reported	11/08/2015	13/10/2015	0 years, 2 months, 2 days
7	20/09/2015	02/10/2015	24/03/2014	18/09/2015	1 years, 5 months, 25 days
8	10/09/2015	22/08/2016	05/03/2014	15/12/2015	1 years, 9 months, 10 days
9	Oct-15	22/08/2016	12/02/2014	09/06/2015	1 years, 3 months, 28 days
10	Oct-15	22/08/2016	12/02/2014	27/10/2014	0 years, 8 months, 15 days
11	08/10/2015	22/08/2016	27/03/2014	09/11/2015	1 years, 7 months, 13 days
12	12/10/2015	22/08/2016	10/03/2014	01/12/2015	1 years, 8 months, 21 days
13	16/11/2015	22/08/2016	10/04/2015	25/11/2015	0 years, 7 months, 15 days
14	26/11/2015	22/08/2016	21/05/2014	11/06/2015	1 years, 0 months, 21 days
15	02/12/2015	22/08/2016	12/02/2014	16/12/2015	1 years, 10 months, 4 days
16	03/12/2015	22/08/2016	05/05/2014	03/12/2015	1 years, 6 months, 28 days
17	23/12/2015	22/08/2016	12/02/2014	23/12/2015	1 years, 10 months, 11 days
18	23/12/2015	22/08/2016	11/03/2014	23/12/2015	1 years, 9 months, 12 days
19	08/01/2016	22/08/2016	05/11/2014	22/01/2016	1 years, 2 months, 17 days
20	01/09/2016	05/02/2018	29/04/2016	19/05/2016	0 years, 0 months, 20 days
21	02/11/2016	Not reported	19/10/2016	04/11/2016	0 years, 0 months, 16 days
22	28/12/2016	Not reported	03/03/2014	11/05/2016	2 years, 2 months, 8 days
23	26/04/2017	Not reported	07/03/2014	31/12/2017	3 years, 9 months, 24 days
24	23/05/2017	08/05/2018	01/01/2015	07/10/2016	1 years, 9 months, 6 days
25	13/06/2017	13/02/2018	05/03/2014	21/04/2016	2 years, 1 months, 16 days
26	11/07/2017	24/11/2017	08/09/2014	13/12/2016	2 years, 3 months, 5 days
27	26/02/2018	Not reported	10/03/2016	03/10/2016	0 years, 6 months, 23 days
28	24/04/2018	21/06/2018	01/04/2018	06/04/2018	0 years, 0 months, 5 days
29	17/05/2018	18/05/2018	04/04/2018	09/04/2018	0 years, 0 months, 5 days
30	11/06/2018	11/06/2018	22/07/2014	12/06/2018	3 years, 10 months, 21 days
31	24/07/2018	Not reported	21/03/2014	04/04/2014	0 years, 0 months, 14 days
32	21/08/2018	Not reported	02/10/2015	04/10/2016	1 years, 0 months, 2 days
33	21/08/2018	Not reported	12/10/2015	22/03/2018	2 years, 5 months, 10 days
34	21/08/2018	Not reported	07/04/2017	07/12/2017	0 years, 8 months, 0 days
35	21/08/2018	Not reported	15/07/2016	21/12/2016	0 years, 5 months, 6 days

The onboarding of Regulators in SDO

The process to onboard Regulators before 2 January 2018

35. Until 2 January 2018, the PSI followed the steps described in section A.2 of the Preliminary Views Letter (“PVL”) to onboard Regulators⁹⁰. These steps, which were also described in the Supervisory Report⁹¹, can be summarised as follows:

- 1) The Regulators sent an e-mail to the PSI requesting access to its data.⁹²
- 2) The PSI replied to the Regulators, using a response e-mail template⁹³, in which the two forms to be completed and returned by the Regulators (i.e. the Regulator Onboarding Form⁹⁴ and the Super Access Coordinators (SAC) Form⁹⁵) were attached.⁹⁶
- 3) The Regulator had to fill out the two forms and return them to the PSI via e-mail and by ordinary mail.⁹⁷
- 4) Once the Regulator had returned the completed forms, the EU Regulatory Reporting Team (RRT) checked the forms for completeness and accuracy based on publicly available information.⁹⁸ In particular, RRT verified that: (i) all mandatory fields were filled; (ii) any handwritten information was legible; (iii) the Regulator’s name and the email domain provided in the form were complete and valid; (iv) the type of Regulator and mandate provided in the form were valid; and (v) the forms were signed.⁹⁹
- 5) Where further information or clarifications were needed, RRT contacted the Regulator.¹⁰⁰
- 6) Once RRT had all the necessary information / the forms were complete, it sent requests to the Onboarding, Account Administration and the Registration Support Group (RSG) Teams requesting them to set up the accounts of the Regulators in SDO and to create the SAC accounts.¹⁰¹
- 7) Once these teams had completed their tasks, they informed RRT, which then checked that the set-up was in line with its instructions.¹⁰²

⁹⁰ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, para. 12, p. 3: “the steps detailed in section A.2 of the Preliminary Views letter is factually correct and based on the information provided by [the PSI] to ESMA during the on-site interviews of the 2017 inspection”; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, pp. 7- 9.

⁹¹ Exhibit 1, Supervisory Report.

⁹² See, by way of example, Exhibit 42, First RFI to the PSI folder, PSI’s Response to the IIO’s First RFI folder, “Document 35.1”.

⁹³ See, by way of example, Exhibit 43, First RFI to the PSI folder, PSI’s Response to the IIO’s First RFI folder, “Document 35.2”.

⁹⁴ Supervisory Report, Exhibit 029, DDRL Regulator Onboarding Form.

⁹⁵ Supervisory Report, Exhibit 030, Super_Access_Coordinator_Form (V.28-11-2013).

⁹⁶ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 17, para. 63.

⁹⁷ Exhibit 1, Supervisory Report, p. 11; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 7.

⁹⁸ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 17, para. 63.

⁹⁹ Exhibit 1, Supervisory Report, pp. 11-12; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 7.

¹⁰⁰ Exhibit 1, Supervisory Report, p. 12; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 7.

¹⁰¹ Exhibit 1, Supervisory Report, p. 12; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, pp. 7-8.

¹⁰² Exhibit 1, Supervisory Report, p. 12; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 8.

8) Finally, RRT would contact back the Regulator to inform that their access had been set up and to provide guidance in using the portal.¹⁰³

36. According to the PSI, access to the data was granted based on the information that each Regulator had provided in the Regulator Onboarding Form and the information contained in the “Traceability ESMA Regulatory Reporting FS chart” (the “Traceability Matrix”)^{104, 105}

37. In response to ESMA’s PVL, the PSI committed on 20 September 2017 to “document and operationalize a process to include all email exchanges related to the clarification or correction of regulators’ access”, and to include these processes in the on-boarding procedures, which would be completed by 16 March 2018.¹⁰⁶

The PSI’s policies and procedures regarding the process to onboard Regulators and give them access to the data

The PSI’s policies and procedures covering the Regulators onboarding process before 2 January 2018

38. Between 12 February 2014 and 2 January 2018, the PSI did not have a specific policy regarding the onboarding of Regulators.¹⁰⁷ According to the PSI, this was due to the small population involved.¹⁰⁸

39. However, the PSI had several internal policies and procedures referring to its process to onboard and give access to the data that it holds, including to some aspects of the process to onboard Regulators. These policies and procedures were the following:

- the “DTCC GTR Onboarding Procedure (SDO Onboarding – Account Setups)”, which was adopted on 24 January 2012 (the “Account Setup Procedure”);¹⁰⁹
- the DTCC Standard Operating Procedure – GTR Client Onboarding Process as amended on 10 January 2014 (the “Client Onboarding Procedure”).¹¹⁰ The Client Onboarding Procedure was further amended on 10 April 2015¹¹¹, however the changes introduced in this version did not relate to the regulator onboarding section of the document;

¹⁰³ Exhibit 1, Supervisory Report, p. 12; Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 8.

¹⁰⁴ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0.

¹⁰⁵ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 17, para. 63.

¹⁰⁶ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 3.

¹⁰⁷ Supervisory Report, Exhibit 006, 20170310 ESMA RFI DDRL Response Letter, p. 2, response to question 5; see also Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p. 3, para. 13.

¹⁰⁸ Supervisory Report, Exhibit 006, 20170310 ESMA RFI DDRL Response Letter, p. 1, response to question 1.

¹⁰⁹ Supervisory Report, Exhibit 021, Operations Procedure -GTR Onboarding -Account Setup Procedures - Jan 24.

¹¹⁰ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013; See also Exhibit 10, PSI’s Response to the IIO’s First RFI, p.4, footnote 4. In page 2 of Exhibit 032 to the Supervisory Report, 1/10/13 is indicated to be the date in which the second version of the Client Onboarding Procedure was adopted by the PSI. However, in its response to the IIO’s First RFI, on 13 November 2019, the PSI indicated that “the date for version 1.1. in this document is recorded as “1/10/13 in the version control on page 2. DDRL understands that the date was formatted as MM/DD/YY and that there was also a typographical error which incorrectly recorded the year as “13” instead of “14”. The procedure was updated on 10 January 2014”.

¹¹¹ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 6, para. 16.

- the DTCC SACFORM Procedure (the “SACFORM Procedure”), which was adopted on 15 October 2013 and revised on 28 November 2014;¹¹² and
- the DerivSERV Onboarding Standard Operating Procedure (the “Onboarding SOP Procedure”), which was adopted on 27 September 2016 and subsequently amended on 13 October 2016, 16 November 2016, 5 December 2016, 24 February 2017 and 2 March 2017.¹¹³

40. According to the PSI, these policies and procedures “operated collectively as a suite of policy and procedure documents to govern in practice the entire regulator onboarding process” (the “Suite of Documents”)¹¹⁴ together with¹¹⁵ the Regulator Onboarding Form¹¹⁶ and the SAC Form¹¹⁷.

41. In addition, as part of the registration procedure, the PSI submitted a document [...], which had not been finalized but [...] was part of the Suite of Documents that were used by the PSI to onboard and give access to data to the Regulators.¹¹⁸

The PSI’s policies and procedures in place covering the Regulators onboarding process since 2 January 2018

42. As part of the remedial actions that the PSI proposed to undertake on 20 September 2017¹¹⁹ following the receipt of ESMA’s Supervisors’ PVL¹²⁰, the PSI proposed to “document procedures from the start to the finish of the on-boarding process and upload the procedures to the DTCC Enterprise Policy Repository (“EPR”) by 30 October 2017”¹²¹ and “By 1 January 2018, DDRL will create a run book that will include the end-to-end processes required to on-board regulators and provide access to on-boarded regulators in line with their respective legal mandates”¹²² and which would “cover the task and controls performed, and reflect the roles and responsibilities of each of the teams involved in DDRL’s on-boarding process including changes from re-architecture and will be uploaded and maintained on the DTCC EPR”.¹²³ In addition, the PSI stated that “by the 16 March 2018, [it] will implement a procedure to periodically review whether the information collected during on-boarding and used for reporting purposes has changed.”¹²⁴

¹¹² Supervisory Report, Exhibit 028, SACFORMS Procedure.

¹¹³ Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016; Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0; Supervisory Report, Exhibit 024, DerivSERV Onboarding Standard Operating Procedures - v3; Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1; Supervisory Report, Exhibit 026, DerivSERV Onboarding Standard Operating Procedures- v5; Supervisory Report, Exhibit 027, DerivSERV Onboarding Standard Operating Procedures - v6.

¹¹⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 5, para. 11.

¹¹⁵ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 5, para. 11.

¹¹⁶ Supervisory Report, Exhibit 029, DDRL Regulator Onboarding Form.

¹¹⁷ Supervisory Report, Exhibit 030, Super_Access_Coordinator_Form (V.28-11-2013).

¹¹⁸ Exhibit 10, PSI’s response to the IIO’s First RFI, pp. 4-5, paras. 10-11; See also p. 3 para. 9.

¹¹⁹ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL.

¹²⁰ Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL.

¹²¹ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 2.

¹²² Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 2.

¹²³ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p.2.

¹²⁴ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 2.

43. On 16 March 2018, the PSI notified to ESMA's Supervisors that it had "operationalised and documented within its existing procedure the process in which email exchanges related to clarification or correction of regulator access is handled"¹²⁵ and that "a new procedure was drafted and implemented to periodically review and validate the continued relevance of the information collected during on-boarding that is used for reporting purposes"¹²⁶ (the "Regulator Onboarding Review Policy"¹²⁷).
44. According to the PSI, "the process of formalising these policies and procedures was undertaken in the months preceding 2 January 2018"¹²⁸ but the formal end-to-end policy and procedure for the onboarding process, which comprises both¹²⁹ the Regulator Onboarding Policy (the "ROP")¹³⁰ and the Regulator Onboarding Runbook (the "Runbook")¹³¹, has been in effect only since 2 January 2018.¹³² The ROP has been revised by the PSI in several occasions.¹³³ The versions of the ROP and the Runbook applicable as of 23 October 2019 (date of the IIO's First RFI) were both dated 17 October 2019.¹³⁴
45. In addition, the V7 Onboarding SOP Procedure¹³⁵ effective until 9 August 2019, and the V8 Onboarding SOP Procedure¹³⁶ effective from that date, also make references to the process to set up Regulator accounts¹³⁷.

The use of mapping rules to transform the data reported to the PSI by counterparties and Central Counterparties (CCPs) for EMIR reporting purposes

46. According to the information provided by the PSI in response to the IIO's First RFI, "DDRL's original system design pre-dated EMIR and was built to accept inputs coded in Financial products Markup Language (FpML) and Comma-Separated values (.csv)."¹³⁸ "[...] Given the timeframe within which DDRL was required to modify its systems to account for EMIR-mandated data reporting, DDRL decided that implementing mapping rules to transform FpML/.csv inputs to those compatible with the EMIR-specific data fields would be more efficient than modifying DDRL's original

¹²⁵ Exhibit 29, 20180319 ESMA Deliverables 3.16.18, p. 2; Exhibit 44, Correspondence with ESMA's Supervisors folder, Supervisors' Response to IIO's Request folder, Q5 folder, "20180319 Regulator Onboarding".

¹²⁶ Exhibit 29, 20180319 ESMA Deliverables 3.16.18, p. 1.

¹²⁷ Exhibit 45, Correspondence with ESMA's Supervisors folder, Supervisors' Response to IIO's Request folder, "20180319 Periodic EU Authority Onboarding Review".

¹²⁸ Exhibit 10, PSI's response to the IIO's First RFI, p.5, para. 13 and p. 6 para. 18; Exhibit 46, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 04.1"; Exhibit 47, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 04.2".

¹²⁹ Exhibit 10, PSI's response to the IIO's First RFI, p. 6, para. 17.

¹³⁰ Exhibit 48, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 07.1".

¹³¹ Exhibit 49, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 07.2".

¹³² Exhibit 10, PSI's response to the IIO's First RFI, p. 6 para. 17.

¹³³ After the 2 January 2018, the Regulator Onboarding Policy was revised on 7 March 2018, 2 May 2018, 10 November 2018, 19 September 2019 and 17 October 2019. See Exhibit 50, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 08.1", p. 15.

¹³⁴ Exhibit 10, PSI's Response to the IIO's First RFI, p. 6, para. 19; Exhibit 50, Document 08.1; Exhibit 51, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 08.2".

¹³⁵ Supervisory Report, Exhibit 047, Standard operating procedure dated, 6 September 2018.

¹³⁶ Exhibit 37, Document 08.3.

¹³⁷ Supervisory Report, Exhibit 047, Standard operating procedure dated, 6 September 2018, pp. 16 and 166-173; Exhibit 37, Document 08.3, p. 19 and 203-206.

¹³⁸ Exhibit 10, PSI's Response to the IIO's First RFI, p. 11, para. 37.

functioning system design.”¹³⁹ The PSI also explained that “as DDRL’s counterparty and Central Counterparty (CCP) clients were accustomed to reporting information in FpML, DDRL determined that it would be time efficient and cost effective for all parties involved in data reporting if DDRL implemented mapping rules to transform the FpML field data received from counterparties and CCPs into a format that could be stored in the ITR table”.¹⁴⁰

The process to define and implement mapping rules

47. According to the PSI, “DDRL’s process to define and implement mapping rules was completed on a discrete basis for each of the relevant asset classes in relation to which DDRL reported data [...]”¹⁴¹ and, inter alia, involved (i) the appointment of a product lead for each asset class, who was responsible for identifying which in-bound fields received in FpML/.csv format corresponded to each out-bound field/ EMIR data field and preparing the message template; (ii) the consolidation of the message templates prepared by each product lead into a mapping spreadsheet that was then used in the development of the Inter-Trade Repository reconciliation (ITR) table; and (iii) consultations with external industry working groups (IWG) to finalise and agree on the definition of the mapping rules for each asset class and to ensure its correct implementation.¹⁴²

48. The “Verification of the mapping rules was undertaken in conjunction with the IWG [...]. Each of the Message Templates constructed by the relevant product lead was reviewed internally and at IWG level on a field-by-field basis. This review included analysis as to how each FpML/.csv field corresponded to the data required under EMIR.”¹⁴³ In addition, “[...] internal reviews were carried out by DDRL business managers, including those involved in managing the Regulator Reporting team, as well as DDRL product managers working on EMIR delivery programmes, and those specifically focussed on ETD, OTC and OTC Lite work streams.”¹⁴⁴

The use of mapping rule to populate the EMIR counterparty side field in the ITR table

49. The mapping rules were implemented in the PSI’s system to transform the data before storing it in the ITR table, which was the data source used by the PSI to report data to Regulators under the Regulation.¹⁴⁵

50. The mapping spreadsheet used by the PSI for the development of the ITR table included different mapping rules per asset class and EMIR field.¹⁴⁶

¹³⁹ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 11, para. 39.

¹⁴⁰ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 11, para. 40.

¹⁴¹ Exhibit 10, PSI’s Response to the IIO’s First RFI, p.12, para. 41.

¹⁴² Exhibit 10, PSI’s Response to the IIO’s First RFI, p.12, para. 41.

¹⁴³ Exhibit 10, PSI’s Response to the IIO’s First RFI, pp. 12-13, para. 42.

¹⁴⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 13, para. 43.

¹⁴⁵ Exhibit 10, PSI’s Response to the IIO’s First RFI, p.11, para. 40.

¹⁴⁶ Supervisory Report, Exhibit 062, Document 30.1.

The implementation of the “counterparty side” mapping rule regarding the FX derivatives asset class

51. With regards to the FX derivatives asset class, an incorrect mapping rule was identified on 30 June 2014 by the PSI’s Regulatory Reporting team “[...] during a routine validation of DDRL reports following an unrelated code release that took place over the weekend of 28-29 June 2014.”¹⁴⁷ According to the information provided in the incident report, “[...] the Counterparty Side field for the ESMA FX Regulatory Reports had been incorrect since inception (12th February 2014) in [Redacted: database] for the population of FX OTC trades. This was due to incorrect logic behind the BUY and SELL indicator decision making [...]”¹⁴⁸.
52. From 12 February 2014 to 21 August 2014, with respect to all OTC trades within the FX asset class, where the buyer value was blank, the seller value was incorrectly populated in the counterparty side field (rather than a blank value being replicated).¹⁴⁹ However, according to the PSI, “Due to the fluctuation in population over the time period (110 reporting days) and the number of back-loaded trades, the number of trades impacted could only be estimated. Based on a (then) current population of approximately 5,3 million ESMA reportable FX trades, it was calculated that the incorrect Mapping Rule impacted approximately 2.15 million (or approximately 40.6%) of the FX records within the DDRL system”.¹⁵⁰
53. The issue had an impact on four Regulator reports (i.e. the OTC Foreign Exchange Party Counter Party Position Report, the OTC Foreign Exchange Trade Activity Report, the OTC Foreign Exchange Trade Modification Report and the OTC Foreign Exchange Trade State Report) and two participant reports (i.e. the ESMA OTC Positions Report and the ESMA OTC Activity Report).¹⁵¹ The TR reconciliation was also impacted.¹⁵²
54. On 22 August 2014, a corrective code was deployed to update the mapping rule.¹⁵³ [...] The corrective code applied to trades from 25 August 2014 onwards.¹⁵⁴
55. The PSI indicated that “No Lesson Learned analysis was carried out in 2014 in respect of the Mapping Rule issue applicable to the FX asset class as this was not part of DDTC’s post incident analysis framework at that time”.¹⁵⁵ The PSI notified the issue to ESMA’s Supervisors on 17 July 2014 and provided further information on 30 July 2014.¹⁵⁶

¹⁴⁷ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 22, para. 108; See also Exhibit 52, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 33.1”.

¹⁴⁸ Exhibit 52, Document 33.1, p. 2.

¹⁴⁹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 101; See also Exhibit 53, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q20 folder, “30.07.2014_RE Notice of Potential Incident”.

¹⁵⁰ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 23, para. 112.

¹⁵¹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 23, para. 113.

¹⁵² Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 23, para. 114.

¹⁵³ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 102;

¹⁵⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 14, para. 50.

¹⁵⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 25, para. 121, footnote 7.

¹⁵⁶ Exhibit 53, 30.07.2014_RE Notice of Potential Incident.

The implementation of “counterparty side” mapping rule regarding the equity derivatives asset class

56. With regards to the equity derivatives asset class, “The incorrect Mapping Rule applicable to the Equity asset class was identified on 20 January 2017, as a result of a client communication.”¹⁵⁷ According to the information provided in the incident report, “This was caused by an incorrect ITR mapping rule between the buyer value and the ITR counterparty side field. If the buyer value is blank, this is being incorrectly mapped as a seller value instead of a blank value. [...]”¹⁵⁸
57. From 12 February 2014 to 27 April 2017, with respect to all OTC trades within the equity asset class, where the buyer value was blank, the seller value was incorrectly populated in the counterparty side field (rather than a blank value being replicated).¹⁵⁹ However, according to the PSI, “Due to the length of the time period impacted, the number of trades impacted could only be estimated. In estimating the impact, seven sample days were reviewed between the dates of 2 June 2016 and 17 February 2017. Based on that sample, it is estimated that approximately 300,000 trades per day were impacted by the incorrect mapping of buyer value to counterparty side field.”¹⁶⁰ However, this estimation only covers the period from November 2015.¹⁶¹
58. The issue had an impact on two types of Regulator reports (i.e. the OTC Equity Trade State Reports and the OTC Equity Trade Activity Reports), five types of TRACE reports (i.e. the FR-Trade Activity Reports, the FR2-Trade State Reports, the FR3- Trade Activity Reports, the FR4-Trade Activity Reports and the FR5-W-Trade Activity Reports) and six types of participant reports (the Equity ESMA OTC Activity Report, the Equity ESMA OTC Position Reports, the Equity OTC Unmatched Reports, the Equity Expired OTC Unpaired Report, the Equity Expired OTC Unmatched Reports and the Equity Expired OTC Matched Status Report).¹⁶² On 11 April 2017, the PSI stated that the issue had also an impact on two types of public reports (i.e. the OTC Position Corrected Public Reports and the OTC Transaction Corrected Public Reports). However, the PSI subsequently determined that the Public reports were not affected by the mapping issue.¹⁶³
59. Between 12 February 2014 and 29 April 2017, the reconciliation trade reports between TRs for the equity asset class were also impacted.¹⁶⁴

¹⁵⁷ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 22, para. 109; Exhibit 55, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 33.2”; Exhibit 56, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 33.3”, p. 2.

¹⁵⁸ Exhibit 56, Document 33.3, p. 3.

¹⁵⁹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 21, para. 104 and p. 23, para. 115; Exhibit 57, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q16 folder, “GI900 ESMA 10 Questions”.

¹⁶⁰ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 23, para. 116.

¹⁶¹ Exhibit 58, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 36.1”, p. 2.

¹⁶² Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, pp. 23-24, para. 117.

¹⁶³ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 24, para 117, footnote 6.

¹⁶⁴ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 24, para. 118.

60. On 28 April 2017, a corrective code was deployed to update the mapping rule and permanently resolve the mapping issue.¹⁶⁵ [...] The corrective code applied to trades from 28 April 2017 onwards.¹⁶⁶

61. With regards to the mapping rule applicable to the Equity asset class, the PSI conducted a Lesson Learned analysis¹⁶⁷ “[...] to document the knowledge derived from the review of the incident and to assist in reducing the likelihood of recurrence.”¹⁶⁸ The mapping issue was initially notified to ESMA’s Supervisors on 17 February 2017,¹⁶⁹ further information on the incident was provided on 11 April 2017¹⁷⁰ and a full notification including an impact analysis was provided on 20 April 2017¹⁷¹.

The implementation of “counterparty side” mapping rules regarding the ETD, credit derivatives and interest rates derivatives asset classes

62. The “counterparty side” mapping rules applied with regards to ETD, OTC credit derivatives and certain OTC interest rates derivatives asset classes were similar to the ones applied to the OTC equity and FX derivatives asset classes.¹⁷²

63. However, according to the PSI, “DDRL did not receive any incident reports about the buyer value to counterparty side mapping rule issue for the ETD, credit derivative or interest rate derivative asset classes, and accordingly concluded that the buyer value to counterparty side mapping rule had no impact on DDRL processing for those asset classes”.¹⁷³ For the same reason, the PSI did not perform an evaluation of the mapping rules that were used to populate the counterparty side field for those asset classes and their impact.¹⁷⁴

Controls regarding the correctness and accuracy of reports regarding the “counterparty side” field

64. When ESMA’s Supervisors requested the PSI to submit all applicable versions of documents (internal process, policies, procedures, etc.) by which the PSI controlled the accuracy of the reported data when the buyer value was blank and the correctness and accuracy of reports on buyer value and counterparty side, the PSI indicated that “the buyer value field was not a required field in RTS 1.0 [Delegated Regulation (EU) No 148/2013] and therefore no controls on what the client submitted were required”.¹⁷⁵ The

¹⁶⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 21, para. 105.

¹⁶⁶ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 25, para. 120; Exhibit 58, Document 36.1, p. 2.

¹⁶⁷ Exhibit 58, Document 36.1.

¹⁶⁸ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 25, para. 121.

¹⁶⁹ Exhibit 59, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q20 folder, “20170217 Notification of reportable incidents”.

¹⁷⁰ Exhibit 60, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q16 folder, “Reportable incidents”; Exhibit 57, GI900 ESMA 10 Questions.

¹⁷¹ Exhibit 58, Document 36.1, p. 6.

¹⁷² Exhibit 61, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 30.2”.

¹⁷³ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 13, para. 45.

¹⁷⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 13, para. 46 and p. 14, para. 47.

¹⁷⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 25, para. 124.

PSI also indicated that “there were no controls on the correctness of the reported values for counterparty side (buyer value is not included in any reports); DDRL was incorrectly reporting values that had not been submitted by clients”.¹⁷⁶

The implementation of the RTS 2.0 by the PSI

65. On 30 October 2017, the PSI implemented the Delegated Regulation (EU) 2017/104 (“RTS 2.0”)¹⁷⁷, “at which point the Mapping Rule was eliminated for all asset classes, the counterparty side field was renamed and it became a field that the submitting party was required to fill.”¹⁷⁸ Thereafter, “When a blank value is submitted the message is rejected and the client will receive a Negative Acknowledgement.”¹⁷⁹

The use of filtering rules to determine the content of the reports to be provided to the onboarded Regulators

66. In order to determine the content of the reports to be provided to each onboarded Regulator, the PSI defined filtering rules, which were then implemented in SDO¹⁸⁰.

67. The data to be included in the regulatory reports that the PSI sent to the onboarded Regulators was determined by the information set up in SDO at the level of the Regulators’ and clients’ profiles and the trade information stored in the ITR table.¹⁸¹

68. The filtering rules were described in the EMIR Business Requirements Document (the “BRD”)¹⁸² and ACER Business Requirements Document¹⁸³. According to the BRD, “[...] The rules have been derived by interpretation of the EMIR legislation (level 1 text) and the final draft of technical standards (level 2 text). The rules are based on taking attributes from the transactions and static data from the counterparty and individual regulator setups within SDO.”¹⁸⁴

69. The filtering rules were also contained in the Traceability ESMA Regulatory Reporting Matrix (the “Traceability Matrix”)¹⁸⁵, which was an excel spreadsheet created by the PSI’s business analysts on the basis of the version 1.3f of the BRD¹⁸⁶ to streamline the

¹⁷⁶ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 26, para. 125.

¹⁷⁷ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 21, para. 103 and 106 and p. 26 para. 126.

¹⁷⁸ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 21, para. 103 and 106; Exhibit 62, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 30.3”.

¹⁷⁹ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 26, para.126.

¹⁸⁰ Exhibit 1, Supervisory Report, p. 26, para. 113.

¹⁸¹ See Exhibit 63, First RFI to the PSI folder, PSI’s Response to the IIO’s First RFI folder, “Document 29.1”.

¹⁸² Exhibit 64, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q2 folder, “Business Requirements Document - EMIR - v2.2”; Exhibit 65, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q2 Folder, “Business Requirements Document - EMIR - v2.3”; Supervisory Report, Exhibit 063, Business Requirements Document - EMIR - v2.4.

¹⁸³ Supervisory Report, Exhibit 066, 06_BRD ACER; Exhibit 66, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q2 folder, “Business Requirements Document - ACER REMIT Reporting TR - v3”.

¹⁸⁴ Exhibit 64, Business Requirements Document - EMIR - v2.2, p. 79.

¹⁸⁵ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0; Supervisory Report, Exhibit 065, 05_20170605 Traceability ESMA Regulatory Reporting.

¹⁸⁶ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 15, para. 54.

content of the BRDs¹⁸⁷. However, the updates to the Traceability Matrix and the BRD were not carried out at the same time or in reference to each other and at times their content differed.¹⁸⁸

70. Between 12 February 2014 and 25 January 2017, there were no changes in the design of the filtering rules.¹⁸⁹ During this period, the PSI implemented the filtering rules as contained in the Traceability Matrix and not as described in the BRD¹⁹⁰. According to the PSI, “[...] The traceability matrix document was maintained and updated and was the document which internal teams used in practice to maintain the systems which used the filtering rules (as opposed to the BRD)”¹⁹¹, “the traceability matrix document was the preferred source of information to determine queries regarding the filtering rules as it was a streamlined version of the BRDs, containing only the filtering rules”.¹⁹²

The process to define and implement filtering rules

71. According to the PSI, the process to define and implement filtering rules involved the following steps:

- the PSI reviewed the requirements under the Regulation regarding the access to the data to be granted to Regulators (“EMIR Data Access Rules”);¹⁹³
- the PSI analysed the EMIR-prescribed fields for which it would be required to provide data to each onboarded Regulator and, drawing on its pre-existing experience, it defined filtering rules that were responsive to the EMIR Data Access Rule;¹⁹⁴
- the filtering rules were reviewed by the PSI’s Legal and Compliance, Production Services, Product Management and Regulatory Reporting teams;¹⁹⁵
- the filtering rules and implementation processes were described in the BRD;¹⁹⁶
- a traceability matrix document setting out how the filtering rules would be implemented was developed by the PSI’s business analysts;¹⁹⁷ and

¹⁸⁷ Exhibit 10, PSI’s Response to the IIO’s First RFI, p.15, para. 55.

¹⁸⁸ Exhibit 10, PSI’s Response to the IIO’s First RFI, p.15, para. 56.

¹⁸⁹ Supervisory Report, Exhibit 006, 20170310 ESMA RFI DDRL Response Letter, p. 3, response to question 8; Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 4, para. 16; Exhibit 15, Supervisors’ Response to the IIO’s Request, pp. 9-10, response to question 21;

¹⁹⁰ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 4, para. 17; Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 15, para. 57.

¹⁹¹ Exhibit 10, PSI’s Response to the IIO’s First RFI, pp. 15-16, para. 57.

¹⁹² Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 16, para. 58.

¹⁹³ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 14, para. 52, point (a).

¹⁹⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 14, para. 52, point (b); Exhibit 63, Document 29.1

¹⁹⁵ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 14, para. 52, point (c); Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 15, para. 53: “Members of DDRL’s Production Services, Product Management and Regulatory Reporting Teams met with DDRL’s Legal and Compliance teams as part of the verification process. At this meeting, the filtering rules were explained by members of the Production Services, Product Management and Regulatory Reporting teams to the Legal and Compliance teams, and they were reviewed in their entirety in order to verify that they were compliant with EMIR requirements”.

¹⁹⁶ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 14, para. 52, point (d).

¹⁹⁷ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 14, para. 52, point (d).

- the filtering rules were then coded into the PSI's system in order to provide tiered access to the onboarded Regulators.¹⁹⁸

The use of filtering rules to report data to CCP Supervisors and Overseers

72. The PSI created a single set of filtering rules per asset class for the data access rules set out in Articles 2(4), 2(9) and 2(10) of the Delegated Regulation (EU) No 151/2013 both in the BRD¹⁹⁹ and in the Traceability Matrix²⁰⁰.
73. According to the filtering rule contained in the Traceability Matrix (which was the document that the PSI used in practice), access to transaction data was provided to the European System of Central Banks (ESCB) members when any of the following conditions was met: (i) the location of the counterparty (derived from either the Legal Entity Identifier (LEI) of any of the two counterparties or from the "Reporting Party branch location" on the trade position) was the same as the location of the ESCB member ("R1"); or (ii) the underlying was any basket or index ("R3"). With regards to credit and equity derivatives, access to transaction data was also provided where the location of the underlying was the same as the location of the ESCB member ("R2" and "R6").²⁰¹
74. The PSI confirmed to ESMA's Supervisors that, since the start of the EMIR reporting obligation, it provided regulators having a CCP supervisory or oversight mandate ("CCP Supervisors and Overseers") with transaction data where a CCP located in their jurisdiction was acting as a counterparty of the trade but not where a CCP in their jurisdiction was only reported in the EMIR "CCP" field.²⁰²
75. In the PVL dated 24 August 2017, ESMA's Supervisors expressed concerns about the PSI's filtering rules not being adequate to ensure that regulators receive the exact data that they are entitled to receive under EMIR.²⁰³ In particular, ESMA's Supervisors expressed concerns about the fact that there were no specific rules implemented in the PSI's system to provide the data on trades cleared by CCPs to CCP Supervisors and Overseers.²⁰⁴ According to ESMA's Supervisors, "Contrary to DDRL's expectation that the CCP is always reported as a counterparty to the trade, ESMA considers that there are business scenarios whereby the CCP is not a direct counterparty and as such the information on the CCP is only available in the EMIR field dedicated to the identification of the CCP clearing the trade (most notably for exchange-traded derivatives)".²⁰⁵

¹⁹⁸ Exhibit 10, PSI's Response to the IIO's First RFI, p. 14, para. 52, point (d).

¹⁹⁹ Exhibit 64, Business Requirements Document - EMIR - v2.2, pp. 81-88.

²⁰⁰ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0.

²⁰¹ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0; Supervisory Report, Exhibit 065, 05_20170605 Traceability ESMA Regulatory Reporting.

²⁰² Exhibit 1, Supervisory Report, p. 26, para. 118; Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 5, para. 18.

²⁰³ Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 11.

²⁰⁴ Supervisory report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 13.

²⁰⁵ Supervisory report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 13.

76. On 20 September 2017, the PSI responded to the PVL²⁰⁶. In its response, the PSI stated that “DDRL believes that the filtering rules it has implemented comply with EMIR 81.3(c). DDRL has interpreted EMIR 81.3(c) to limit the provision of data to the regulators of CCPs to the transactions where the CCPs in their jurisdiction are acting as counterparties [...]”²⁰⁷ and explained it as follows: “Dealer A has a customer X that wishes to enter into a derivative transaction. Dealer A arranges a transaction with Dealer B. Dealer B has a customer Y that will hold the opposite position as customer X. Dealer A enters into a derivative [transaction] with customer X, Dealer B enters into a derivative transaction with customer Y, Dealer A and B novate their transactions to a CCP. The CCP reports the entire chain of transactions to the TR as a delegated reporting entity. It is DDRL’s interpretation that the transactions between Dealer A and Customer X and between Dealer B and Customer Y are reportable as uncleared transactions. Thus, only the novating transactions between Dealer A and the CCP and Dealer B and the CCP are cleared transactions which should be reported to the CCP’s regulators. The opening transactions, as well as any back-to-back transactions between dealers, are of interest to the regulators overseeing market abuse in their jurisdictions whereas the novated transactions are of interest to the CCP’s regulators as the CCP has a risk position only in the novated transactions.”²⁰⁸
77. The PSI also stated that there was confusion across the industry regarding the reporting of cleared trades²⁰⁹, and, therefore, ESMA’s guidance was sought.²¹⁰ The PSI indicated that “In the event that ESMA disagrees with DDRL’s interpretation of EMIR 81.3(c), DDRL will add functionality into the SDO to identify CCPs by regulator and implement this within DDRL’s technical solution”.²¹¹
78. On 24 October 2017, ESMA sent to the PSI a Remedial Action Plan (“RAP”)²¹². In the cover letter, ESMA confirmed that “regulators of CCPs should receive all the reports where a CCP in their jurisdiction is reported in the CCP field. This is to ensure that in the event of the failure of a CCP/in advance of a CCP failing, the supervisor is able to access information in relation to every single entity which is part of the chain of transactions, not only the clearing member which deals directly with the CCP, in order to understand where detriment / risks may occur.”²¹³ According to Action 4a of the RAP, “ESMA expects DDRL to: [...] update its filtering rules to ensure that the regulators that have a CCP supervisory or oversight mandate receive the data in accordance with ESMA’s guidance provided in this letter. Assess exact impact of DDRL’s current set-up and remediate as and if required (e.g. provide relevant regulators with unreported data)” by 31 December 2017.²¹⁴

²⁰⁶ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL.

²⁰⁷ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, pp. 3-4.

²⁰⁸ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 4.

²⁰⁹ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 4.

²¹⁰ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, pp.3-4.

²¹¹ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 4.

²¹² Supervisory Report, Exhibit 016, ESMA80-189-1891.

²¹³ Supervisory Report, Exhibit 016, ESMA80-189-1891, p. 2.

²¹⁴ Supervisory Report, Exhibit 016, ESMA80-189-1891, pp.7-8.

79. The PSI performed an assessment of the impacted trades on 31 December 2017.²¹⁵ The PSI provided ESMA's Supervisors with the results of this assessment as part of its submission of 2 January 2018²¹⁶. In total, more than 21 million of OTC and ETD positions and more than 589 million of ETD transactions were not sent to CCP Regulators.²¹⁷
80. The submission of 2 January 2018²¹⁸ also included a new version of the BRD²¹⁹, according to which: "Regulator reports should also include the data on trades cleared by a CCP to regulators that have a CCP supervisory or oversight mandate. To support this SDO is to be updated with a new Type called CCP Jurisdiction in the Entity Regulator Mapping Active Details section. When selected a list of ISO 2 digit country codes can be selected which will identify the country code that the regulator has oversight for. The regulator reports should also include the data where the country code in SDO CCP Jurisdiction matches the country code of the LEI (from GLEIF) submitted from the field Clearing Venue – ID".²²⁰
81. On 9 March 2018, in response to a request from ESMA's Supervisors regarding the remedial actions taken by the PSI under the Action 4a of the RAP, the PSI indicated that with regards to historical data, "The data that was not provided to CCP regulators is available to them and to ESMA through Trace. We can also run ad hoc queries for authorities that do not have Trace access"²²¹ and provided a new Traceability Matrix, according to which ESCB members and market regulators having a CCP supervisory or oversight mandate, have to be also provided with transaction data when, according to the information in the Entity Regulator Mapping in SDO, the CCP is under their jurisdiction.²²² In addition, the PSI's Product Management Team requested the PSI's Application Development team to also update the SDO.²²³
82. On 29 September 2018, the PSI confirmed that the issue was fully remediated on 16 March 2018, when the filtering rules were updated.²²⁴

The filtering rules used by the PSI to report data to market regulators

83. The PSI created two sets of filtering rules per asset class for the data access rules set out in Articles 2(5) and 2(8) of the Delegated Regulation (EU) No 151/2013, depending on whether the regulator to be onboarding was a market regulator or a prudential regulator.

²¹⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 5, para. 18.

²¹⁶ Supervisory Report, Exhibit 067, 20180102 ESMA Response Letter.

²¹⁷ Supervisory Report, Exhibit 067, 20180102 ESMA Response Letter, p. 2.

²¹⁸ Exhibit 67, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q5 folder, "20180115 Vault prin screen".

²¹⁹ Exhibit 68, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q2 folder, "Business Requirements Document - ESMA RTS 2.0".

²²⁰ Exhibit 68, Business Requirements Document - ESMA RTS 2.0, p. 83.

²²¹ Supervisory Report, Exhibit 068, RE Follow-up question on the Remedial action plan 4a.

²²² Exhibit 69, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q5 folder, "Regulator Entitlements – TRACE".

²²³ Supervisory Report, Exhibit 068, RE Follow-up question on the Remedial action plan 4a.

²²⁴ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 5, para. 18.

84. According to the filtering rules contained in the EMIR traceability matrix (which was the document that the PSI used in practice), with regards to market regulators, access to transaction data was provided when any of the following conditions was met: (i) the location of the counterparty (derived from either the LEI of any of the two counterparties or from the “Reporting Party branch location” on the trade position) was the same as the location of the market regulator (“R1” – Party Registered Office Mapping); (ii) the location of the execution venue was the same as the location of the market regulator (“R5” – Execution Venue Location Mapping (VLM)); (iii) the underlying was any basket or index (“R3”); or (iv) at least one of the counterparties declared the market regulator as its direct supervisor (“R4”). With regards to credit and equity derivatives, access to transaction data was also provided where the location of the underlying was the same as the location of the market regulator (respectively, “R2” – Reference Entity Location Mapping (ELM) - and “R6” – Reuters Instrument Code (RIC) location Mapping).²²⁵
85. Regarding Prudential Regulators, access to transaction data was provided when any of the following conditions was met: (i) at least one of the counterparties declared the prudential Regulator as its direct supervisor (“R4”); or (ii) the underlying was any basket or index (“R3”).²²⁶

The configuration of the SDO profile of the AFM

86. The Autoriteit Financiële Markten (AFM) was onboarded by the PSI on 11 February 2014.²²⁷
87. In the Regulator Onboarding Form, the AFM indicated “Financial market regulator” and indicated the Regulation and the Dutch legal act transposing Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID) as the applicable legal acts pursuant to which they possess a regulatory mandate.²²⁸
88. According to the excel spreadsheet containing the SDO Regulator set up parameters,²²⁹ as of 16 May 2017, with regards to the equity derivatives asset class, the value type “RIC Location Mapping” was not among the SDO Regulator set up parameters for the AFM.²³⁰ The issue was identified by ESMA’s Supervisors,²³¹ who discussed it with the PSI on 6 July 2017.²³²

²²⁵ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0. See also Supervisory Report, Exhibit 065, 05_20170605 Traceability ESMA Regulatory Reporting.

²²⁶ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0. See also Supervisory Report, Exhibit 065, 05_20170605 Traceability ESMA Regulatory Reporting.

²²⁷ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 7, paras. 24 and 25.

²²⁸ Exhibit 70, First RFI to the PSI folder, PSI’ response to the IIO’s First RFI folder, “Document 35.12”.

²²⁹ Supervisory Report, Exhibit 069, 03_20170516 SDO Regulator setup parameters.

²³⁰ Supervisory Report, Exhibit 069, 03_20170516 SDO Regulator setup parameters, p.2.

²³¹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 7, para. 27; See also Exhibit 71, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 9.1”.

²³² Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 8, para. 28.

89. On 11 July 2017, the PSI reported the incident to ESMA's Supervisors.²³³ According to the PSI, "[...] this was human error in not ensuring the accounts were correctly updated"²³⁴, "after the AFM returned its completed regulatory onboarding form on 3 February 2014, DDRL inadvertently incorrectly entered the "RIC Location Mapping" for AFM into the SDO on 11 February 2014".²³⁵
90. The person responsible for the "RIC Location Mapping" issue in relation to the AFM was the Data Reporting Manager, who reported to the Vice President of Product Manager. The PSI had no applicable procedures for mapping set-up parameters into SDO account in place at the relevant time and the Data Reporting Manager did not oversee the mapping set-up parameters of the SDO account of the AFM.²³⁶
91. According to the information provided by the PSI on 9 October 2017 following a request from ESMA's Supervisors, as a result of this incident, a total of 16 070 Unique Transaction Identifiers (UTIs) were not reported to the AFM ([...]).²³⁷ This figure corresponds to transaction data reported to the PSI in 2014. According to the PSI, "analysis did not identify any EQ trades that were under-reported between 2015 and 1/8/17 which would have been reported solely via the missing 9CSF and 9NAM SDO setup. EQ [equity] trades which fell under those missing OCDO setup were covered in the other regulatory reporting criteria hence were reported correctly."²³⁸
92. In addition, according the information provided by the PSI to ESMA's Supervisors on 29 September 2018, with regards to the AFM, the incident impacted a total of 29 458 records and 32 reports.²³⁹
93. The incident was permanently resolved on 6 July 2017 when the AFM account in SDO was updated.²⁴⁰ The Reports of 7 July 2017 included all relevant data.²⁴¹ In addition, "Since 2 January 2018, DDRL's end-to-end onboarding policies and procedures have required SDO mapping reviews to be carried out on an annual basis to mitigate the risk of mapping errors."²⁴²
94. The PSI did not notify AFM about the incident.²⁴³

The configuration of the SDO profile of the CSSF

²³³ Exhibit 71, Document 9.1; Exhibit 72, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q6 folder, "Document 9.2"; Exhibit 73, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q6 folder, "Document 10.1".

²³⁴ Exhibit 72, Document 9.2.

²³⁵ Exhibit 10, PSI's Response to the IIO's First RFI, p. 17, para. 64.

²³⁶ Exhibit 10, PSI's Response to the IIO's First RFI, p. 18, para. 66.

²³⁷ Exhibit 71, Document 9.1.

²³⁸ Exhibit 10, PSI's Response to the IIO's First RFI, p. 19, para. 68; Exhibit 74, First RFI to the PSI folder, PSI's response to the IIO's First RFI folder, "Document 38.1", p. 1.

²³⁹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, pp.9-10, para. 29.

²⁴⁰ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 8. See also p. 7: "The information regarding the start and termination dates is taken from the Static Data Operations (SDO), which records: (a) the date and time when each regulator was on-boarding; and (b) when amendments are made to the setup parameters for each regulator".

²⁴¹ Exhibit 72, Document 9.2.

²⁴² Exhibit 10, PSI's Response to the IIO's First RFI, p. 16, para. 62.

²⁴³ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 10, para. 31.

95. The Commission de Surveillance du Secteur Financier (CSSF) completed and signed the Regulator Onboarding and SAC forms on 28 November 2014²⁴⁴ but it had already been onboarded on 22 May 2014.²⁴⁵
96. In the Regulator Onboarding Form, the CSSF indicated that “the CSSF is the competent authority responsible for the prudential supervision of credit institutions, professionals of the financial sector, undertakings for collective investment, alternative investment fund managers, pension funds having the form of a SEPCAV or an ASSEP, authorised securitisation undertakings, fiduciary-representatives dealing with securitisation undertakings, SICARs, payment institutions and electronic money institutions. The CSSF is also the competent authority responsible for the supervision of the securities markets, including their operators [...]”.²⁴⁶
97. According to the excel spreadsheet containing the SDO Regulator set up parameters²⁴⁷, as of 16 May 2017, with regards to the equity derivatives asset class, the value type “RIC Location Mapping” was not among the SDO Regulator set up parameters for the CSSF.²⁴⁸ The issue was identified by ESMA’s Supervisors,²⁴⁹ who discussed it with the PSI on 6 July 2017.²⁵⁰
98. On 11 July 2017, the PSI reported the incident to ESMA’s Supervisors.²⁵¹ According to the PSI, “[...] this was human error in not ensuring the accounts were correctly updated,”²⁵² “after the CSSF returned its completed regulatory onboarding form on 28 November 2014, DDRL inadvertently incorrectly entered the “RIC Location Mapping” for CSSF into the SDO on 17 December 2014”.²⁵³
99. The person responsible for the “RIC Location Mapping” issue in relation to the CSSF was the Data Reporting Manager, who reported to the Vice President of Product Manager. The PSI had no applicable procedures for mapping set-up parameters into SDO account in place at the relevant time and the Data Reporting Manager did not oversee the mapping set-up parameters of the SDO account of the CSSF.²⁵⁴
100. According to the information provided by the PSI on 9 October 2017 following a request from ESMA’s Supervisors, as a result of this incident, a total of 3 189 UTIs were not reported to the CSSF ([...]).²⁵⁵ This figure corresponds to transaction data reported to the PSI in 2014. According to the PSI, “analysis did not identify any EQ trades that were under-reported between 2015 and 1/8/17 which would have been

²⁴⁴ Exhibit 75, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q3 folder, “07 CSSF- LU - DOC011214-01122014094041”.

²⁴⁵ Exhibit 76, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 8.1”, p.3.

²⁴⁶ Exhibit 75, 07 CSSF- LU - DOC011214-01122014094041.

²⁴⁷ Supervisory Report, Exhibit 069, 03_20170516 SDO Regulator setup parameters.

²⁴⁸ Supervisory Report, Exhibit 069, 03_20170516 SDO Regulator setup parameters, pp. 2-3.

²⁴⁹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 7, para. 27; See also Exhibit 71, Document 9.1.

²⁵⁰ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 8, para. 28.

²⁵¹ Exhibit 71, Document 9.1; Exhibit 72, Document 9.2; Exhibit 73, Document 10.1.

²⁵² Exhibit 72, Document 9.2.

²⁵³ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 18, para. 64.

²⁵⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 18, para. 66.

²⁵⁵ Exhibit 71, Document 9.1.

reported solely via the missing 9CSF and 9NAM SDO setup. EQ trades which fell under those missing OCDO setup were covered in the other regulatory reporting criteria hence were reported correctly”.²⁵⁶

101. In addition, according to the information provided by the PSI to ESMA’s Supervisors on 29 September 2018, with regards to the CSSF, the incident impacted a total of 5 733 records and 32 reports.²⁵⁷

102. The incident was permanently resolved on 6 July 2017 when the CSSF account in SDO was updated.²⁵⁸ The Reports of 7 July 2017 included all relevant data.²⁵⁹ In addition, “Since 2 January 2018, DDRL’s end-to-end onboarding policies and procedures have required SDO mapping reviews to be carried out on an annual basis to mitigate the risk of mapping errors.”²⁶⁰

103. The PSI did not notify CSSF about the incident.²⁶¹

The configuration of the SDO profiles of FSMA, CONSOB, BdP, ASF, NBS and HANFA

104. With regards to the Autoriteit voor Financiële Diensten en Markten (FSMA), the Commissione Nazionale per le Società e la Borsa (CONSOB), the Banco de Portugal (BdP), the Autoritatea de Supraveghere Financiară (ASF), the Národná banka Slovenska (NBS) and the Hrvatska agencija za nadzor financijskih usluga (HANFA), the profiles in SDO were also not consistent with the information on the mandates and responsibilities provided by the Regulators in the Regulator Onboarding Form.

105. The PSI explained to the IIO that “The discrepancy between the type of authority provided in the regulatory onboarding form and the type of authority listed in SDO is the result of data entered incorrectly into DDRL’s SDO system.”²⁶² “The data provided by the FSMA, CONSOB, BdP, ASF, NBS and HANFA in the “Regulatory Onboarding Form” was incorrectly entered into the SDO by DDRL as a result of human error. The circumstances [...] broadly mirror the circumstances described [...] with respect to the incorrect setup of the AFM, the CSSF and the ECB (albeit the dates differ).”²⁶³

106. The PSI has not identified any documents that would show that an assessment dating from before 17 August 2017 was made by the PSI concerning the impact that the discrepancies between the data entered into the SDO accounts of FSMA, CONSOB, BdP, ASF, NBS and HANFA had or could have had in their access to the data held by the PSI, including as regards the existence of under- or over-reporting.²⁶⁴

²⁵⁶ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 19, para. 68; Exhibit 74, Document 38.1, p. 1.

²⁵⁷ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, pp.9-10, para. 29.

²⁵⁸ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 8. See also p. 7: “The information regarding the start and termination dates is taken from the Static Data Operations (SDO), which records: (a) the date and time when each regulator was on-boarding; and (b) when amendments are made to the setup parameters for each regulator”.

²⁵⁹ Exhibit 72, Document 9.2.

²⁶⁰ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 16, para. 62.

²⁶¹ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 10, para. 31.

²⁶² Supervisory Report, Exhibit 009 - 20170817 Request for clarification of 2 August 2017, p. 1.

²⁶³ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 18, para. 67.

²⁶⁴ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 19, para. 70.

“However, DDRL confirms, based on its knowledge of its systems, that the entry of incorrect data in the SDO for these authorities did not have an impact on their access to data. This is because the field that was incorrectly populated in the SDO for these authorities (the “REGULATOR TYPE” field) did not impact any data filtering criteria. In other words, the data filtering criteria for these authorities was based on other fields in the SDO which had been populated correctly”.²⁶⁵

The filtering rules used by the PSI to report data to the European Central Bank (ECB)

107. As explained above, the PSI created a single set of filtering rules per asset class for the data access rules set out in the former Articles 2(4), 2(9) and 2(10) of the Delegated Regulation (EU) No 151/2013.
108. In addition, according to the Regulatory Reporting Assumption 5f described in the EMIR business requirements document, the “ECB Regulator [had to be] mapped to 17 European jurisdictions that use the Euro (€) currency in SDO”.²⁶⁶
109. According to the filtering rules contained in the Traceability Matrix (which was the document that the PSI used in practice), central banks (including the ECB) were provided with transaction data when any of the following was met: (i) the location of the counterparty was the same as the location of the central bank (“R1”); or (ii) the underlying is any basket or index (“R3”). With regards to credit and equity derivatives, access to transaction data was also provided where the location of the underlying was the same as the location of the ESCB member (“R2” and “R6”).²⁶⁷

The configuration of the SDO profile of the ECB and Lithuania’s entry into the Euro

110. On 19 March 2014, the ECB sent the signed onboarding forms to the PSI and requested to be provided access to the data in accordance with the former Article 81(3)(e) of the Regulation and Article 2(9) of the Delegated regulation (EU) No 151/2013.²⁶⁸
111. On 27 March 2014, the RRT sent an e-mail to the Onboarding team requesting them to onboard the ECB (Regulator account ID R022) as per its instructions²⁶⁹: On 28 March 2014, the onboarding of the ECB in SDO was completed²⁷⁰.

²⁶⁵ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 19, para. 70.

²⁶⁶ Exhibit 64, Business Requirements Document – EMIR - v2.2, p. 80.

²⁶⁷ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0; Supervisory Report, Exhibit 065, 05_20170605 Traceability ESMA Regulatory Reporting.

²⁶⁸ Exhibit 77, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q3 folder, “07 ECB - DDRL cover”; Exhibit 78, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q3 folder, “07 ECB - DDRL Regulatory Onboarding Form”; Exhibit 79, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q3 folder, “07 ECB - DDRL Super Access Coordinator form”.

²⁶⁹ Exhibit 80, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q3 folder, “07 ECB - RE Please can you setup European Central Bank in SDO - RSG setup”.

²⁷⁰ Exhibit 80, 07 ECB - RE Please can you setup European Central Bank in SDO - RSG setup.

112. On 1 January 2015, Lithuania adopted the euro as its currency²⁷¹. However, the PSI did not update the information for the ECB in SDO to map the ECB to Lithuania.²⁷² The issue was identified by ESMA's Supervisors²⁷³, who discussed it with the PSI on 6 July 2017²⁷⁴.
113. On 11 July 2017, the PSI reported the incident to ESMA's Supervisors.²⁷⁵ According to the PSI, "it was missed that Lithuania had now started to use the EURO and the system had not been updated"²⁷⁶, due to an inadvertent human error²⁷⁷.
114. According to the information provided by the PSI on 9 October 2017 following a request from ESMA's Supervisors, as a result of this incident, between 1 January 2015 and 7 July 2017, 20 416 UTIs were not reported to the ECB.²⁷⁸ In addition, according to the information provided by the PSI to ESMA's Supervisors on 29 September 2018, 912 815 records were not provided to the ECB and 6 761 reports were impacted.²⁷⁹
115. The incident was permanently resolved on 6 July 2017 when the ECB account in SDO was updated.²⁸⁰ The Reports of 7 July 2017 included all relevant data²⁸¹. In addition, "Since 2 January 2018, DDRL's end-to-end onboarding policies and procedures have required SDO mapping reviews to be carried out on an annual basis to mitigate the risk of mapping errors."²⁸²
116. The PSI did not notify ECB about the incident.²⁸³

The exclusion of OTC Intraday trades from the reports to the Regulators and from the Inter-TR Reconciliation

117. On 7 January 2016,²⁸⁴ the PSI indicated ([...]) that there was an issue regarding the data that the PSI was reporting in the regulatory and public transaction reports as well as its inter-TR reconciliation process (the "Intraday Reporting and Reconciliation Issue").²⁸⁵ According to the incident report, "It has been discovered that trades opened and exited/terminated on the same day are not being fed down to the ITR table which

²⁷¹ Exhibit 81, Public Information folder, "Council Press Release - Lithuania to adopt euro on 1 January 2015".

²⁷² Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 8; See also Supervisory Report, Exhibit 069, 03_20170516 SDO Regulator setup parameters, pp.1-2.

²⁷³ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 7, para. 27; See also Exhibit 72, Document 9.1.

²⁷⁴ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 8, para. 28.

²⁷⁵ Exhibit 71, Document 9.1; Exhibit 72, Document 9.2; Exhibit 73, Document 10.1.

²⁷⁶ Exhibit 72, Document 9.2.

²⁷⁷ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 8; Exhibit 10, PSI's Response to the IIO's First RFI, p. 16, para. 62.

²⁷⁸ Exhibit 71, Document 9.1.

²⁷⁹ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, pp. 9-10, para. 29.

²⁸⁰ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 8. See also p. 7: "The information regarding the start and termination dates is taken from the Static Data Operations (SDO), which records: (a) the date and time when each regulator was on-boarding; and (b) when amendments are made to the setup parameters for each regulator".

²⁸¹ Exhibit 72, Document 9.2.

²⁸² Exhibit 10, PSI's Response to the IIO's First RFI, p. 16, para. 62.

²⁸³ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 10, para. 31.

²⁸⁴ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 17, para. 79; Supervisory Report, Exhibit 074, GTR Incident GI-576, p. 3; Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016.

²⁸⁵ Supervisory Report, Exhibit 074, GTR Incident GI-576, p. 2.

is the data source for the regulator and public reports. Only open positions at EOD are sent to the ITR. Additionally, activity is only included in the (regulator) Trade Activity Report (TAR) and in the OTC New Trade Count Public Report if there is an associated open position in the ITR. Therefore if a position cannot be found in the ITR table it is not included in these reports. The exception to this are exits and cancels which are included in the regulator reports.”²⁸⁶ It also stated that “In January 7th 2016, it was identified that OTC trades which expired/terminated on, or before, the day they were first reported to the GTR are not being captured in regulatory and public transaction reports or in the reconciliation process. This is because the code for regulatory and public reporting (plus the reconciliation process) selects transactions based on positions yet positions were not built for these trades. As a result, although all transactions are correctly included in the [...] database tables, those which do not have a corresponding position are not included in transaction reports. This issue has been occurring since inception on 12th February 2014.”²⁸⁷

118. The PSI notified ESMA about the Intraday Reporting Issue on 11 January 2016, and on 18 January 2016, it provided further information.²⁸⁸

119. In 2018, the PSI explained to ESMA’s Supervisors that “After the EOD cut off (midnight UTC), for each report date, a series of processing activities commenced which were collectively referred to by the PSI as the “T+1 cycle”. One of the first activities executed after the EOD [end of the day] was the “position calculation” which populated trade state tables with all OTC trades which were outstanding (i.e. not matured, early terminated, errored or compressed) by the first end-of-day (EOD) after they were reported by the submitter. A number of subsequent T+1 report activities, including the creation of trade activity reports and eligibility for intra/inter TR reconciliation, were driven from lookups from these trade state table. As these trade state tables did not include OTC trades which were already cancelled/existed by the first report cycle, the downstream reports excluded information related to these trades.”²⁸⁹

120. The PSI further explained that “[f]rom the inception of the EMIR reporting requirements on 12 February 2014, DDRL used the data captured in its internal databases ([...]), which were also used for reconciliation purposes, to populate its reports [...]. The system adopted for this purpose was that each day a computer script or code would be run over the EOD positions, extract the relevant data and feed that data into Inter-Trade Repository Reconciliation (“ITR”) table which is the data source for the regulator and public reports”.²⁹⁰

121. However, the PSI also indicated that “One exception to the position described above [was] that for OTC trades, the message type of “Exit” and “Cancel” were included in the TAR even when there was no corresponding open position in the ITR table at

²⁸⁶ Supervisory Report, Exhibit 074, GTR Incident GI-576, p. 2.

²⁸⁷ Supervisory Report, Exhibit 074, GTR Incident GI-576, p. 3.

²⁸⁸ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016. See also Supervisory Report, Exhibit 078, Summary as of 11 February 2016.

²⁸⁹ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 16, paras. 70-71.

²⁹⁰ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, pp. 17-18, paras. 80-81.

EOD. As a result, for an OTC intraday trade where an “Exit” or “Cancel” message has been submitted for the UTI, the TAR will include the exit or cancel message, but not any of the other activity submitted for that UTI”.²⁹¹ According to the PSI this was because “they are effectively ‘pass through’ messages”.²⁹²

122. The amount of data included in Cancel messages varied depending on the method used by the PSI’s clients to submit the transaction data. Under the Core Method, the PSI’s clients were not required to populate all the same fields that they were required to populate when submitting an Initial Trade Message. Whereas, under the OTC Lite Method, the PSI’s clients were required to populate all the same fields that they had to populate when submitting an Initial Trade message.²⁹³

123. With regards to OTC New Trade Count Public Report, the Intraday Reporting Issue took place from the start of the reporting obligation on 12 February 2014²⁹⁴ until 26 February 2016²⁹⁵; whereas with regards to the TAR and the Inter-TR Reconciliation Process it lasted until 15 April 2016.²⁹⁶

124. The PSI carried out an impact assessment of a subset of transaction data (i.e. from 2 November 2015 to 15 January 2016) and concluded that 11.2 million newly reported UTIs were not included in the reports.²⁹⁷ According to the PSI, before that date it was not possible to calculate the actual impact of the Intraday Reporting Issue because “there is no way to separate newly reported trades from modified trades because the Action field was not uniquely populated by clients as New”.²⁹⁸ However, extrapolating the results of the impact assessment, since 12 February 2014 approximately 100 million trades would not have been included in the TAR and they would also have been excluded from the Inter-TR Reconciliation process.²⁹⁹

125. In order to correct the issue regarding the TAR and Inter-TR Reconciliation process and the issue regarding the OTC new trade count public reports, the PSI had to apply two separate fix codes.³⁰⁰

126. With regards to public reporting, a temporary workaround was implemented by the PSI on 26 February 2016.³⁰¹ A permanent fix was scheduled for 17 June 2016.³⁰²

²⁹¹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 18, para. 85; See also Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016.

²⁹² Supervisory Report, Exhibit 078, Summary as of 11 February 2016, p. 2. See also Exhibit 10, PSI’s Response to the IIO’s First RFI, pp. 20-21, paras. 78 and 79.

²⁹³ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 20, paras. 78-79.

²⁹⁴ Supervisory Report, Exhibit 074, GTR Incident GI-576, p. 2; Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 16, para. 73; Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016.

²⁹⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 17, para. 77.

²⁹⁶ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 17, para. 77.

²⁹⁷ Supervisory Report, Exhibit 078, Summary as of 11 February 2016, p.1.

²⁹⁸ Supervisory Report, Exhibit 078, Summary as of 11 February 2016, p.1.

²⁹⁹ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016; Supervisory Report, Exhibit 075, Extract from DDRL metric stream for incidents, p. 3.

³⁰⁰ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 21, para. 81.

³⁰¹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 18, para. 90.; Exhibit 10, PSI’s Response to the IIO’s First RFI, p.21, para. 82.

³⁰² Supervisory Report, Exhibit 076, ESMA29_00039, p. 23; Exhibit 10, PSI’s Response to the IIO’s First RFI, p.21, para. 82.

Public reports from the period going from 6 November 2015 to 19 February 2016 were regenerated and posted by the PSI in March 2016.³⁰³

127. With regards to the TAR and the Inter-TR Reconciliation Process there was no available temporary fix code.³⁰⁴ The permanent fix required more testing before it could be applied.³⁰⁵ A permanent fix for regulatory reporting (on a go-forward basis) was applied on 15 April 2016.³⁰⁶
128. As a result of the implementation of the fix, TAR and the reconciliation process began to include all trades for which a trade state (i.e. a position) had been calculated each day, irrespective of whether the trade was active or it had expired/terminated.³⁰⁷
129. In July 2016, the PSI identified an issue with the TAR reports generated since April 2016, which required to be corrected.³⁰⁸ The incident was resolved on 14 December 2016.³⁰⁹
130. With regards to the historical data, a fix was implemented in October 2016 in order to report the OTC Intraday Trades submitted using the OTC Lite Method and on 27 October 2017 to report the OTC Intraday Trades submitted using the Core Method.³¹⁰ With regards to the reconciliation of historical reporting, the PSI reconcile all the trades reported through the OTC Lite method by November 2017 and agreed with ESMA's Supervisors that it would postpone the reconciliation of the trades reported through the Core Method until the re-architecture of the PSI's took place.³¹¹ The reconciliation of the latter was completed by 12 June 2018.³¹²
131. As part of the re-architecture of its reporting and reconciliation system,³¹³ the PSI has also implemented controls aiming at ensuring that OTC intraday trades are included in the reports,³¹⁴ which did not exist before.³¹⁵

3 Applicable legal provisions

132. References to the Regulation in this decision refer to the text of the Regulation (EU) No 648/2012 (as amended where relevant) in force at all material times in relation to the matters which are the subject of this investigation.

³⁰³ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 92.

³⁰⁴ Exhibit 10, PSI's Response to the IIO's First RFI, p. 21, paras. 81-83.

³⁰⁵ PSI's response to the IIO's First RFI, 13 November 2019, p.21, para. 83.

³⁰⁶ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 18, paras. 88 and 89; Exhibit 10, PSI's Response to the IIO's First RFI, p. 21, para.83: "there was no reliable temporary fix available for the TAR/inter-TR reconciliation issue. Accordingly, because only a permanent fix was available it required more testing in accordance with industry standard test methods (...)"

³⁰⁷ Exhibit 10, PSI's Response to the IIO's First RFI, p.21, para. 80.

³⁰⁸ Exhibit 82, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q6 folder, "Document 27.1", p. 2.

³⁰⁹ Exhibit 82, Document 27.1, p. 1.

³¹⁰ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 91.

³¹¹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 94.

³¹² Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 95.

³¹³ Exhibit 68, Business Requirements Document - ESMA RTS 2.0; Exhibit 36, Document 27.3.

³¹⁴ Exhibit 36, Document 27.3, pp. 111,112, 126, 127, 136, 137, 141 and 142.

³¹⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 98.

133. Following the amendments introduced by the Regulation (EU) 2015/2365³¹⁶, which entered into force on 12 January 2016, the numbering of some of the provisions in the Regulation changed. This decision refers to the current numbering. However, some of the documents used as evidence refer to the original numbering of those provisions.
134. With the entry into force of Regulation (EU) 2019/834³¹⁷, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. However, the new base amounts are not applicable because the facts of this case occurred before the adoption and entry into force of Regulation (EU) 2019/834.
135. The Regulation lays down the rules to which TRs are subject. Article 1 states: “This Regulation lays down clearing and bilateral risk-management requirements for over-the-counter (‘OTC’) derivative contracts, reporting requirements for derivative contracts and uniform requirements for the performance of activities of central counterparties (‘CCPs’) and trade repositories.”
136. Besides the provisions of the (initial) Regulation, which entered into force on 16 August 2012, account must also be taken of the amendments to the Regulation introduced by Regulation (EU) 2015/2365³¹⁸, which entered into force on 12 January 2016.³¹⁹
137. Finally, the following EMIR Level 2 measures should also be considered:
138. The Delegated Regulation (EU) No 148/2013, which entered into force on 15 March 2013. It supplements the Regulation and sets out regulatory technical standards (RTS) on the minimum details of the data to be reported to TRs. It has been amended by the Delegated Regulation (EU) 2017/104, which entered into force on 10 February 2017.
139. The Delegated Regulation (EU) No 149/2013, which entered into force on 15 March 2013. It supplements the Regulation and sets out RTS on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP. It was amended by the Delegated Regulation (EU) 2017/2155, which entered into force on 11 December 2017.

³¹⁶ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, OJ L 337, 23.12.2015, p. 1.

³¹⁷ Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories, OJ L 141, 28.5.2019, p. 42.

³¹⁸ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, OJ L 337, 23.12.2015, p. 1.

³¹⁹ The Regulation has been further amended by Regulation (EU) 2019/834, which entered into force on 17 June 2019, and Regulation (EU) 2019/2099, which entered into force on 1 January 2020.

140. The Delegated Regulation (EU) No 150/2013, which entered into force on 15 March 2013. It supplements the Regulation and sets out RTS specifying the information to be provided to ESMA as part of an application for registration as a trade repository.³²⁰
141. The Delegated Regulation (EU) No 151/2013, which entered into force on 15 March 2013. It supplements the Regulation and sets out RTS specifying the data to be published and made available by TRs. It was amended by the Delegated Regulation (EU) 2017/1800, which entered into force on 27 October 2017.³²¹
142. The Implementing Regulation (EU) No 1247/2012, which entered into force on 10 January 2013. It lays down ITS with regards to the format and frequency of trade reports to TRs. It was amended by the Implementing Regulation (EU) 2017/105, which entered into force on 10 February 2017.

Relevant legal provisions regarding the obligation to ensure the confidentiality, integrity and protection of the information received from Counterparties and CCPs by TRs

143. Article 9(1) of the Regulation provides that: “Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.”
144. Article 80(1) of the Regulation stipulates that: “A trade repository shall ensure the confidentiality, integrity and protection of the information received under Article 9”.
145. In this regard, Point (c) of Section II of Annex I of the Regulation stipulates:
“II. Infringements relating to operation requirements: [...] (c) a trade repository infringes Article 80(1) by not ensuring the confidentiality, integrity or protection of the information received under Article 9.”.

Relevant legal provisions regarding the obligation to ensure that Regulators have direct and immediate access to the data held in TRs

146. In addition to Article 9(1) of the Regulation set out above, Article 81(2) and Article 81(3) of the Regulation read as follows:
“2. A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.
3. A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

³²⁰ Delegated Regulation (EU) 150/2013 has been amended by the Delegated Regulation (EU) 2019/362, which entered into force on 11 April 2019.

³²¹ Delegated Regulation (EU) 151/2013 has been further amended by Delegated Regulation (EU) 2019/361, which entered into force on 11 April 2019.

- (a) ESMA;
- (b) the ESRB;
- (c) the competent authority supervising CCPs accessing the trade repository;
- (d) the competent authority supervising the trading venues of the reported contracts;
- (e) the relevant members of the ESCB;
- (f) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;
- (g) supervisory authorities appointed under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids;
- (h) the relevant Union securities and market authorities;
- (i) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA as referred to in Article 76;
- (j) the Agency for the Cooperation of Energy Regulators.”

147. Article 81(3) has been amended by Regulation (EU) 2015/2365 and Regulation (EU) 2019/834 to include further relevant regulators. As a result, the numbering of Article 81(3) has also been modified.³²²

148. In this regard, Point (b) of Section III of Annex I of the Regulation stipulates:

“III. Infringements relating to transparency and the availability of information: [...] (b) a trade repository infringes Article 81(2) by not allowing the entities referred to in Article 81(3) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.”

149. Recital 41 of the Regulation reads as follows: “It is important that market participants report all details regarding derivative contracts they have entered into to

³²² Article 81(3) of the Regulation, as amended by Regulation (EU) 2015/2365, reads as follow: “A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

- (a) ESMA;
- (b) EBA;
- (c) EIOPA;
- (d) the ESRB;
- (e) the competent authority supervising CCPs accessing the trade repositories;
- (f) the competent authority supervising the trading venues of the reported contracts;
- (g) the relevant members of the ESCB, including the ECB in carrying out its tasks within a single supervisory mechanism under Council Regulation (EU) No 1024/2013;
- (h) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;
- (i) supervisory authorities designated under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council;
- (j) the relevant Union securities and market authorities whose respective supervisory responsibilities and mandates cover contracts, markets, participants and underlyings which fall within the scope of this Regulation;
- (k) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA, as referred to in Article 76;
- (l) the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council;
- (m) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council;
- (n) the Single Resolution Board established by Regulation (EU) No 806/2014;
- (o) competent authorities or national competent authorities within the meaning of Regulations (EU) No 1024/2013 and (EU) No 909/2014 and of Directives 2003/41/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU and, 2014/65/EU, and supervisory authorities within the meaning of Directive 2009/138/EC;
- (p) the competent authorities designated in accordance with Article 10(5) of this Regulation”.

With the entry into force of the Regulation (EU) 2019/834, the following point was added to Article 81(3) of the Regulation, as amended by Regulation (EU) 2015/2365: “(q) the relevant authorities of a third country in respect of which an implementing act pursuant to Article 76a has been adopted”.

trade repositories. As a result, information on the risks inherent in derivatives markets will be centrally stored and easily accessible, inter alia, to ESMA, the relevant competent authorities, the European Systemic Risk Board (ESRB) and the relevant central banks of the ESCB.”

150. Recital 45 of the Regulation states: “Counterparties and CCPs that conclude, modify, or terminate a derivative contract should ensure that the details of that contract are reported to a trade repository. [...]”.

151. Recital 75 of the Regulation states: “Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict operational, record-keeping and data-management requirements.”

Relevant legal provisions regarding the type of information that TRs shall make available to the Regulators

152. Delegated Regulation (EU) No 151/2013³²³ details the type of information that TRs shall make available to the Regulators, depending on the nature of the mandates and responsibilities of the Regulator.

153. Article 2 of the Delegated Regulation (EU) No 151/2013 stipulates³²⁴:

“1. A trade repository shall provide access to all transaction data to the European Securities and Markets Authority (ESMA) for the purpose of fulfilling its supervisory competences. [...]”

3. A trade repository shall provide the Authority for the Cooperation of Energy Regulators (ACER) with access to all transaction data regarding derivatives where the underlying is energy or emission allowances.

4. A trade repository shall provide a competent authority supervising a CCP and the relevant member of the European System of Central Banks (ESCB) overseeing the CCP, where applicable, with access to all the transaction data cleared or reported by the CCP.

5. A trade repository shall provide a competent authority supervising the venues of execution of the reported contracts with access to all the transaction data on contracts executed on those venues.

6. A trade repository shall provide a supervisory authority appointed under Article 4 of Directive 2004/25/EC with access to all the transaction data on derivatives where the underlying is a security issued by a company which meets one of the following conditions:

(a) it is admitted to trading on a regulated market within their jurisdiction;

(b) it has its registered office or, where it has no registered office, its head office, in their jurisdiction;

(c) it is an offeror for the entities provided for in points (a) or (b) and the consideration it offers includes securities.

³²³ Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data, OJ L 52, 23.2.2013, p. 33.

³²⁴ Article 2 of the Delegated Regulation (EU) No 151/2013 has been amended by the Delegated Regulation (EU) 2019/361.

7. The data to be provided in accordance with paragraph 6 shall include information on:

- (a) the underlying securities;
- (b) the derivative class;
- (c) the sign of the position;
- (d) the number of reference securities;
- (e) the counterparties to the derivative.

8. A trade repository shall provide the relevant Union securities and markets authorities referred to in Article 81(3)(h) of Regulation (EU) No 648/2012 with access to all transaction data on markets, participants, contracts and underlyings that fall within the scope of that authority according to its respective supervisory responsibilities and mandates.

9. A trade repository shall provide the European Systemic Risk Board, ESMA and the relevant members of the ESCB with transaction level data:

- (a) for all counterparties within their respective jurisdictions;
- (b) for derivatives contracts where the reference entity of the derivative contract is located within their respective jurisdiction or where the reference obligation is sovereign debt of the respective jurisdiction.

10. A trade repository shall provide a relevant ESCB member with access to position data for derivatives contracts in the currency issued by that member.

11. A trade repository shall provide, for the prudential supervision of counterparties subject to the reporting obligation, the relevant entities listed in Article 81(3) of Regulation (EU) No 648/2012 with access to all transaction data of such counterparties.”

154. Recital 1 of the Delegated Regulation (EU) No 151/2013 states that: “it is essential to clearly identify relevant contracts and their respective counterparties. Following a functional approach, entities accessing data held by TRs should be considered according to the competences they have and the functions they perform”.

155. Recital 5 of the Delegated Regulation (EU) No 151/2013 specifies that: “Supervisors and overseers of central counterparties (CCPs) need access to enable the effective exercise of their duties over of such entities, and should therefore have access to all the information necessary for such mandate”.

156. Recital 7 of the Delegated Regulation (EU) No 151/2013 states that: “the relevant Union securities and market authorities have as a main duty investor protection in their respective jurisdictions and should be granted access to transaction data on markets, participants, products and underlyings covered under by their surveillance and enforcement mandates”.

157. Recital 13 of the Delegated Regulation (EU) No 151/2013 provide additional context: “The access to data should be considered within three aggregation levels. Transaction data should include individual trade details; position data should regard aggregate position data by underlying/product for individual counterparties; and aggregate notional data should correspond to overall positions by underlying/product with no counterparty details. Access to transaction data would also grant access to position level and aggregate data. Access to position data would also grant access to aggregate data, but not transaction level data. Conversely, access to aggregate

notional data should be the less granular category and should not enable access to position or transaction level data.”

158. Recital 11 of the Delegated Regulation (EU) No 151/2013 provides that: “under a functional approach for accessing data held by TRs, prudential supervision is an essential component. Similarly, different authorities might have a prudential supervisory mandate. Therefore, access to the transaction data on the relevant entities should be ensured to all authorities listed under Article 81(3) of Regulation (EU) No 648/2012”.

Relevant legal provisions regarding the details of the data to be reported to TRs

159. In addition to Article 9(1) of the Regulation set out above, Article 1(1) of the Delegated Regulation (EU) No 148/2013³²⁵ sets out that:

“Reports to a trade repository shall include:

(a) the details set out in Table 1 of the Annex which contains information relating to the counterparties to a contract;

(b) the information set out in Table 2 of the Annex which contains details pertaining to the derivative contract concluded between the two counterparties”.

Data to be reported regarding the side of the reporting counterparty

160. With regards to the counterparty side data, Table 1 of the Annex to the Delegated Regulation (EU) No 148/2013 indicated that counterparties had to report the following:

	Field	Details to be reported
13	Counterparty side	Identifies whether the contract was a buy or a sell. In the case of an interest rate derivative contract, the buy side will represent the payer of leg 1 and the sell side will be the payer of leg 2.

161. Following the adoption of the Delegated Regulation (EU) 2017/104 on 19 October 2016, the counterparty side field (field 13) became the field 14 and the details to be reported were described as follows:

	Field	Details to be reported
14	Counterparty side	Identifies whether the reporting counterparty is a buyer or a seller

³²⁵ Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, OJ L 52, 23.2.2013, p. 1.

162. Article 1 of the Implementing Regulation (EU) 1247/2012 indicates that “the information contained in a report under Article 9 of the Regulation (EU) 648/2012 shall be provided in the format specified in the Annex to this Regulation”.

163. According to the Recital 1 of the Implementing Regulation (EU) 1247/2012, “to avoid inconsistencies, all data sent to TRs under Article 9 of Regulation (EU) 648/2012 should follow the same rules, standards and formats for all TRs, all counterparties and all type of derivatives. A unique data set should therefore be used for describing a derivative trade”.

164. With regards to the counterparty side field, Table 1 of the Annex to the Implementing Regulation (EU) 1247/2012 indicated the following:

	Field	Format
13	Counterparty side	B=Buyer, S=Seller.

165. According to the Recital 2 of the Implementing Regulation (EU) 2017/105 (amending the Implementing Regulation (EU) 1247/2012), “Determining whether the reporting counterparty is a buyer or a seller in a contract is particularly complex in the case of swap derivative contracts as such contracts involve the exchange of financial instruments between the parties. Therefore, specific rules should be established in order to ensure the accurate and consistent determination of who are the buyers and who are the sellers in swap derivative contracts.”

166. The Implementing Regulation (EU) 2017/105 thus added a new Article 3a to the Implementing Regulation (EU) 1247/2012 regarding the counterparty side field, which reads as follows:

“1. The counterparty side to the derivative contract referred to in field 14 of Table 1 of the Annex shall be determined in accordance with paragraphs 2 to 10.

2. In the case of options and swaptions, the counterparty that holds the right to exercise the option shall be identified as the buyer and the counterparty that sells the option and receives a premium shall be identified as the seller.

3. In the case of futures and forwards other than futures and forwards relating to currencies, the counterparty buying the instrument shall be identified as the buyer and the counterparty selling the instrument shall be identified as the seller.

4. In the case of swaps related to securities, the counterparty that bears the risk of price movement of the underlying security and receives the security amount shall be identified as the buyer and the counterparty that pays the security amount shall be identified as the seller.

5. In the case of swaps related to interest rates or inflation indices, the counterparty paying the fixed rate shall be identified as the buyer and the counterparty receiving the fixed rate shall be identified as the seller. In the case of basis swaps, the

counterparty that pays the spread shall be identified as the buyer and the counterparty that receives the spread shall be identified as the seller.

6. In the case of cross-currency swaps and swaps and forwards related to currencies, the counterparty receiving the currency which appears first when sorted alphabetically by International Organization for Standardization (ISO 4217) standard shall be identified as the buyer and the counterparty delivering that currency shall be identified as the seller.

7. In the case of swaps related to dividends, the counterparty receiving the equivalent actual dividend payments shall be identified as the buyer and the counterparty paying the dividend and receiving the fixed rate shall be identified as the seller.

8. With the exception of options and swaptions, in the case of derivative instruments for the transfer of credit risk, the counterparty buying the protection shall be identified as the buyer and the counterparty selling the protection shall be identified as the seller.

9. In the case of derivative contracts relating to commodities, the counterparty that receives the commodity specified in the report shall be identified as the buyer and the counterparty that delivers the commodity shall be identified as the seller.

10. In the case of forward-rate agreements, the counterparty paying the fixed rate shall be identified as the buyer and the counterparty receiving the fixed rate shall be identified as the seller.”

167. Field 13 in the Table 1 of the Annex to the Implementing Regulation (EU) 1247/2012 is now Field 14 and the following is indicated:

	Field	Format
14	Counterparty side	B = Buyer S = Seller Populated in accordance with Article 3a

Data to be reported regarding the details of cleared trades

168. Delegated Regulation (EU) No 148/2013³²⁶, Articles 2(1) and 2(2) provided that:

“1. Where an existing contract is subsequently cleared by a CCP, clearing should be reported as a modification of the existing contract.

2. Where a contract is concluded in a trading venue and cleared by a CCP such that a

³²⁶ Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, OJ L 52, 23.2.2013, p. 1.

counterparty is not aware of the identity of the other counterparty, the reporting counterparty shall identify that CCP as its counterparty”.

169. With the entry into force of the Delegated Regulation (EU) 2017/104, Articles 2(1) and 2(2) of the Delegated Regulation (EU) No 148/2013 were replaced by the following:

“1. Where a derivative contract whose details have already been reported pursuant to Article 9 of Regulation (EU) No 648/2012 is subsequently cleared by a CCP, that contract shall be reported as terminated by specifying in field 93 in Table 2 of the Annex the action type “Early Termination”, and new contracts resulting from clearing shall be reported.

2. Where a contract is both concluded on a trading venue and cleared on the same day, only the contract resulting from clearing shall be reported”.

170. Recital 1 of the Delegated Regulation (EU) No 148/2013 states that: “In order to allow flexibility, a counterparty should be able to delegate the reporting of a contract to the other counterparty or to a third party. Counterparties should also be able to agree to delegate reporting to a common third entity including a central counterparty (CCP), the latter submitting one report, including the relevant table of fields, to the trade repository. In these circumstances and in order to ensure data quality, the report should indicate that it is made on behalf of both counterparties and contain the full set of details that would have been reported had the contract been reported separately”.

171. Recital 3 of the Delegated Regulation (EU) No 148/2013 provides that: “to avoid duplicate reporting and to reduce the reporting burden, where one counterparty or CCP reports on behalf of both counterparties, the counterparty or CCP should be able to send one report to the trade repository containing the relevant information”.

172. Recital 2 of the Delegated Regulation (EU) 2017/104 states that: “It is important to also acknowledge that a central counterparty (CCP) acts as a party to a derivative contract. Accordingly, where an existing contract is subsequently cleared by a CCP, it should be reported as terminated and the new contract resulting from clearing should be reported.”

173. Recital 3 of the Delegated Regulation (EU) 2017/104 provides that: “where a derivative contract is composed of a combination of derivative contracts, the competent authorities need to understand the characteristics of each of the derivative contracts concerned. Since competent authorities also need to be able to understand the overall context, it should be also apparent from the transaction report that the transaction is part of an overall strategy. Therefore, derivative contracts relating to a combination of derivative contracts should be reported in separate legs for each derivative contract with an internal identifier to provide a linkage between the legs”.

174. According to the Table 2 of the Annex to the Delegated Regulation (EU) No 148/2013, the following details should be reported regarding clearing:

Section 2d — Clearing		All contracts
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28	Clearing obligation	Indicates, whether the reported contract is subject to the clearing obligation under Regulation (EU) No 648/2012.	
29	Cleared	Indicates, whether clearing has taken place.	
30	Clearing timestamp	Time and date when clearing took place	
31	CCP	In case of a contract that has been cleared, the unique code for the CCP that has cleared the contract.	
32	Intragroup	Indicates whether the contract was entered into as an intragroup transaction, defined in Article 3 of Regulation (EU) No 648/2012.	

175. With the adoption of the Delegated Regulation (EU) 2017/104, Section 2d (clearing) has become Section 2e. The details to be reported regarding the clearing are the same. However, the explanation given as regards the “clearing obligation” field has been amended:

	Section 2e — Clearing		All contracts
28	Clearing obligation	Indicates, whether the reported contract belongs to a class of OTC derivatives that has been declared subject to the clearing obligation and both counterparties to the contract are subject to the clearing obligation under Regulation (EU) No 648/2012, as of the time of execution of the contract.	
29	Cleared	Indicates, whether clearing has taken place.	
30	Clearing timestamp	Time and date when clearing took place	
31	CCP	In case of a contract that has been cleared, the unique code for the CCP that has cleared the contract.	
32	Intragroup	Indicates whether the contract was entered into as an intragroup transaction, defined in Article 3 of Regulation (EU) No 648/2012.	

176. With regards to the format in which the information regarding this field has to be provided, Table 2 of the Annex to the Implementing Regulation (EU) 1247/2012 indicated the following:

	Section 2d — Clearing		All contracts
28	Clearing obligation	Y = Yes, N = No	
29	Cleared	Y = Yes, N = No	
30	Clearing timestamp	ISO 8601 date format / UTC time format.	

31	CCP	Legal Entity Identifier (LEI) (20 alphanumerical digits) or, if not available, interim entity identifier (20 alphanumerical digits) or, if not available, BIC (11 alphanumerical digits)	
32	Intragroup	Y = Yes, N = No	

177. With the adoption of the Implementing Regulation (EU) 2017/105, the following is now indicated:

	Section 2e — Clearing		All contracts
34	Clearing obligation	Y = Yes N = No	
35	Cleared	Y = Yes N = No	
36	Clearing timestamp	ISO 8601 date in the UTC time format YYYY-MM-DDThh:mm:ssZ	
37	CCP	ISO 17442 Legal Entity Identifier (LEI) 20 alphanumerical character code	
38	Intragroup	Y = Yes N = No	

Modifications to the data registered in TRs

178. Article 4 of the Delegated Regulation (EU) No 148/2013 reads as follows: “Modifications to the data registered in trade repositories shall be kept in a log identifying the person or persons that requested the modification, including the trade repository itself if applicable, the reason or reasons for such modification, a date and timestamp and a clear description of the changes, including the old and new contents of the relevant data as set out in fields 58 and 59 of Table 2 of the Annex”.

179. Fields 58 and 59 of Table 2 of the Annex to the Delegated Regulation (EU) No 148/2013 are set out below:

	Section 2i — Modifications to the report		All contracts
58	Action type	Whether the report contains: <ul style="list-style-type: none"> — a derivative contract or post-trade event for the first time, in which case it will be identified as ‘new’; — a modification of details of a previously reported derivative contract, in which case it will be identified as ‘modify’; — a cancellation of a wrongly submitted report, in which case, it will be identified as ‘error’; 	

		<ul style="list-style-type: none"> —a termination of an existing contract, in which case it will be identified as ‘cancel’; —a compression of the reported contract, in which case it will be identified as ‘compression’; —an update of a contract valuation, in which case it will be identified as ‘valuation update’; —any other amendment to the report, in which case it will be identified as ‘other’. 	
59	Details of action type	Where field 58 is reported as ‘other’ the details of such amendment should be specified here.	

180. With the entry into force of the Delegated Regulation (EU) 2017/104 on 10 February 2017, fields 58 and 59 become field 93 of Table 2 of the Annex to the Delegated Regulation (EU) No 148/2013 (as amended by the Delegated Regulation (EU) 2017/104) and read as follows:

	Section 2i — Modifications to the report		All contracts
93	Action type	Whether the report contains: <ul style="list-style-type: none"> — a derivative contract for the first time, in which case it will be identified as “new”, —a modification to the terms or details of a previously reported derivative contract, but not a correction of a report, in which case it will be identified as “modify”. This includes an update to a previous report that is showing a position in order to reflect new trades included in that position, —a cancellation of a wrongly submitted entire report in case the contract never came into existence or was not subject to Regulation (EU) No 648/2012 reporting requirements but was reported to a trade repository by mistake, in which case, it will be identified as “error”, —an early termination of an existing contract, in which case it will be identified as “early termination”, —a previously submitted report contains erroneous data fields, in which case the report correcting the erroneous data fields of the previous report shall be identified as “correction”, —a compression of the reported contract, in which case it will be identified as “compression”, —an update of a contract valuation or collateral, in which case it will be identified as “valuation update”; 	

		<p>—a derivative contract that is to be reported as a new trade and also included in a separate position report on the same day, in which case it will be identified as a “position component”. This value will be equivalent to reporting a new trade followed by an update to that report showing it as compressed.</p>	
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4 Findings of the Board with regard to the PSI incorrectly granting asset managers access to all the data reported by (or on behalf of) certain investment funds

181. This section of the decision analyses whether the PSI breached the following requirement regarding the safeguarding and recording of the data received from counterparties and CCPs:

“a trade repository shall ensure the [...] confidentiality [...] of the information received under Article 9” (Article 80(1) of the Regulation).

182. If this requirement is not met, the infringement set out at Point (c) of Section II of Annex I of the Regulation is established.

Analysis of the relevant provisions of the Regulation

183. The issue at stake is whether the PSI has breached its obligation under Article 80(1) of the Regulation to ensure the confidentiality of the information that it received from (or on behalf of) investment funds under Article 9 of the Regulation.

184. The Board takes into account the wording and the context of Article 80(1) of the Regulation.

185. First, the wording of Article 80(1) is clear. TRs have an obligation to ensure the confidentiality of the information that they receive under Article 9 of the Regulation. According to Article 9(1), counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a TR. They can do the reporting by themselves or delegate it.

186. Therefore, according to Article 80(1) of the Regulation, read in conjunction with Article 9(1), the PSI cannot disclose the details of any derivative contract that have been reported to it, unless such disclosure is authorised by the Regulation.

187. Second, the Board notes that there are certain situations under which TRs are required by the Regulation to provide third parties with access to the data that they hold.
188. Pursuant to Article 80(5) of the Regulation, TRs shall allow the parties to a contract to access and correct the information on that contract in a timely manner.
189. Pursuant to Article 81(2) of the Regulation, TRs have an obligation to give Regulators direct and immediate access to the details of the derivative contracts they need to fulfil their respective responsibilities and mandates.
190. Pursuant to Article 78(7) of the Regulation, TRs must provide third parties providing ancillary services such as trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression (service providers) with non-discriminatory access to the information they maintain.
191. In addition, since 17 June 2019, pursuant to the new Article 80(5a) of the Regulation, upon request TRs shall also provide (i) counterparties that are not required to report the details of their OTC derivative contracts and (ii) counterparties and CCPs which have delegated their reporting obligations with access to the information reported on their behalf.
192. When granting access to the data under Articles 80(5), 80(5a) or 81(2) of the Regulation, TRs do not need to seek consent from the parties to the contracts because the transmission of the data is necessary for compliance with a legal obligation to which TRs are subject, whereas, under Article 78(7) of the Regulation, the legal obligation to give access to the data is conditional on the consent of the relevant counterparties. Therefore, in the last case, TRs should only give access to the data if the parties to the contracts have consented to it.
193. Third, the Board notes that other third parties might also have an interest in having access to the data that TRs hold. In such cases, since TRs are under no legal obligation to provide the data, they should at least obtain the prior consent of the relevant counterparties before disclosing any data.
194. Overall, on the basis of the elements above, the Board considers that, in order for the transmission of data to be lawful, the access should be granted on the basis of the prior consent of the parties to the contracts or on the basis of a legal obligation to which the TRs are subject.
195. The Board also considers that where the transmission of data is based on consent, TRs should be able to demonstrate that the relevant counterparties have clearly and unambiguously consented to the transmission of their data to specified third parties. Otherwise, Article 80(1) of the Regulation could be circumvented.

Analysis of the Exclusive Access Functionality and the Exclusivity Incidents

196. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the exclusive data access rights granted to certain asset managers (“Exclusive Access Rights”) and the Exclusivity Incidents, the Board notes the following.
197. First, the PSI was under no legal obligation to provide asset managers with access to the data of the contracts in which the funds that they managed were a counterparty, because the data reported to TRs by (or on behalf of) investment funds is the property of the counterparties to the derivative contract and not of the asset managers.
198. Nonetheless, as set out above³²⁷, after discussing with its asset manager clients, the PSI decided to create a functionality whereby asset managers could request to have access to all the data of the funds that were exclusively managed by them (the “Exclusivity Access Functionality”).
199. Second, the Exclusivity Access Functionality was built on the assumption that when a fund was exclusively managed by the asset manager that was requesting the onboarding, a parent-child relationship could be established and therefore the accounts could be set up in SDO as if the asset manager and the fund were part of the same corporate family.³²⁸
200. Until 6 September 2018, the PSI relied on the self-declaration made by the asset managers (by which they manifested to be entitled to have access to all the data of the investment funds listed in their onboarding documentation) to grant them Exclusive Access Rights. Whether there was an actual relationship of exclusivity was never confirmed with the impacted funds. As a result, as indicated by the PSI itself, “asset managers that only manage a portion of a fund have been granted access to view all positions within the fund. [...]”.³²⁹
201. In light of the above, the Board agrees with the IIO and finds that, by granting asset managers access to data that they were not entitled to receive, the PSI failed to ensure the confidentiality of the data regarding the derivatives trades reported to it under Article 9 of the Regulation, in contravention of Article 80(1) of the Regulation.
202. This constitutes the infringement set out at Point (c) of Section II of Annex I of the Regulation.
203. The infringement has been committed each time that, by relying on the information provided by the asset managers or due to errors committed during or after onboarding, the PSI has incorrectly set up the accounts of investment funds as

³²⁷ See paragraphs 10 to 33 of this Decision.

³²⁸ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 11 para. 38; Exhibit 40, Document 19.10, p.3.

³²⁹ Supervisory Report, Exhibit 039, Internal Audit report ‘2015 GTR – Client Set-Ups and Static Data Operations (SDO)’, p. 2.

“exclusive” to an asset manager in SDO, unduly allowing the asset manager to see all the data that had been reported to the PSI by (or on behalf of) those funds.

204. Between the start of the reporting obligation under the Regulation and the permanent disabling of the Exclusive Access Functionality on 1 October 2018, there were a total of 35 instances in which a total of 32 asset managers were incorrectly granted Exclusive Access Rights over investment funds (“Exclusivity Incidents”).

Conclusion

205. The Board thus finds that the PSI committed the infringement set out at Point (c) of Section II of Annex I of the Regulation 35 times.

Intent or negligence

206. Article 65(1) of the Regulation provides as follows: “Where, in accordance with Article 64(5), ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article. An infringement by a trade repository shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the trade repository or its senior management acted deliberately to commit the infringement.”

207. In accordance with Article 65(1) of the Regulation, a finding that an infringement has been committed by a TR with intention or negligence will lead to the imposition of a fine by the Board. Moreover, a finding that an infringement has been committed intentionally requires a finding of “objective factors which demonstrate that the trade repository or its senior management acted deliberately to commit the infringement”.

208. Taking into account the above, the Board in agreement with the IIO considers that, overall, the factual background as set out in this decision does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

209. It should therefore be assessed whether the PSI acted with negligence.

Preliminary remarks regarding negligence

210. The Regulation provides no explicit guidance as regards the concept of “negligence”. However, it follows from the provisions of Articles 73 and 65 of the Regulation that the term “negligence” as referred to in the Regulation requires more than a determination that there has been the commission of an infringement.

211. In addition, it is clear from the second subparagraph of Article 65(1) of the Regulation that a negligent infringement is not one which was committed deliberately or intentionally. This position is further supported by the case-law of the CJEU which

ruled that negligence may be understood as entailing an unintentional act or omission.³³⁰

212. It should be added that “negligence” in the context of the Regulation is an EU law concept – albeit one which is familiar to and an inherent part of the 27 Member States’ and the UK’s legal systems – which must be given an autonomous, uniform interpretation.
213. Having regard to the CJEU jurisprudence³³¹, the concept of a negligent infringement of the Regulation is to be understood to denote a lack of care on the part of a TR when it fails to comply with this Regulation.
214. Based on this the Board will consider negligence to be established in circumstances where the TR, as a professional firm in the financial services sector subject to stringent regulatory requirements, is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as result of that failure, the TR has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.
215. Regarding the standard of care to be expected of a TR, the following considerations should be taken into consideration.
216. First, one should take into consideration the position taken by the General Court in the Telefonica case, where the General Court spoke of persons “carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such an activity entails”.³³² Similarly, it is considered that, operating within the framework of a regulated industry, a TR which holds itself out as a professional entity and carries out regulated activities should be expected to exercise special care in assessing the risks that its acts and omissions may entail.
217. Second, regard should be given to the nature and significance of the objects and provisions of the Regulation. Of particular note, Recitals 4, 5³³³ and 75 of the

³³⁰ See for instance Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I- 4057, where the CJEU noted at para. 75 of its judgment that all of the Member States’ legal systems “have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care.”

³³¹ See for instance Case C-48/98, *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] ECR I-7877, para. 58; Case C-64/89, *Deutscher Fernsprecher* [1990] ECR I-2535, para. 19.

³³² Case T-336/07, *Telefónica, SA and Telefónica de España, SA v Commission* [2012] ECLI:EU:T:2012:172, para. 323.

³³³ See Recitals 4 and 5 of the Regulation: “(4) Over-the-counter derivatives (‘OTC derivative contracts’) lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved. The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and, accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.

(5) At the 26 September 2009 summit in Pittsburgh, G20 leaders agreed [...] that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of OTC derivative contracts in an internationally consistent and non-discriminatory way.”

Regulation emphasise the important role and impact of TRs in global securities and banking markets, the consequentially essential need for the data processing of TRs to be conducted in accordance with principles of integrity, transparency, responsibility and good governance, and the resulting intention of the legislator to provide stringent requirements in relation to the conduct of TRs. Further, the weight given to these considerations by the legislator is reflected by the nature and extent of the requirements imposed on TRs under Title VII of the Regulation and by the corresponding infringement provisions under Annex I of the Regulation. Moreover, of more particular note, the Regulation envisages that an important function of a TR is to ensure that it identifies instances in which its present practices carry the risk of non-compliance with the Regulation. The importance of this function is reflected, for instance, by the requirement for a TR to have sound procedures and internal control mechanisms.

218. Therefore, on this basis, the standard of care to be expected of a TR is high.

219. This high standard of care has been confirmed by the Joint Board of Appeal (“BoA”) of the European Supervisory Authorities, which has stated that “ESMA rightly emphasises that financial services providers [...] play an important role in the economy of the EU, as well as in the financial stability and integrity of the financial markets” and that “[a] high standard of care is to be expected of such persons”.³³⁴ In addition, this was recently confirmed again by the BoA in its Decision of 28 December 2020, where it re-emphasised the high standard of care applicable to financial service providers and referred to the requirement to exercise special care in assessing the risks that its acts or omissions entailed.³³⁵

220. The Board notes that in its Response to the IIO’s initial Statement of Findings, the PSI contended that “[...] the correct standard to apply in assessing negligence within the meaning of the Regulation is whether DDRL acted with reasonable care”³³⁶ and argued that “the CJEU cases identified by the IIO are distinguishable from the type of negligence described in the Regulation because: (i)[...] the CJEU cases deal with “serious” negligence or “obvious” negligence; and (ii) there are no references to “serious” negligence or “obvious” negligence in the Regulation. There is only a reference to “negligence”. Accordingly, DDRL’s position is that the “high standard of care” identified in the CJEU cases which deal with “serious” negligence and “obvious” negligence should not be applied to the plain and ordinary type of negligence described in the Regulation. Rather, DDRL’s position is that an entity is only required to exercise reasonable care in order to discharge its duty in cases where ordinary negligence is being assessed. What is reasonable will depend upon the particular facts and circumstances of the case.”³³⁷

³³⁴ See paragraph 285 of the decisions of the Board of Appeal in the Appeals of Svenka Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB and Nordea Bank Abp against ESMA’s decision in the Nordic Banks case (ref. BoA D 2019 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at https://www.eiopa.europa.eu/content/board-appeal-publishes-its-decision-nordic-banks%E2%80%99-appeals-decisions-esma-%E2%80%9Cshadow-ratings%E2%80%9D_en

³³⁵ See for example paragraphs 156 and 158 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020-D-03), available at https://www.eba.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

³³⁶ Exhibit 124, PSI’s Response to the IIO’s initial Statement of Findings, p. 7, para. 3.1, lit. (d).

³³⁷ Exhibit 124, PSI’s Response to the IIO’s initial Statement of Findings, p.14, para. 4.16.

221. The Board agrees with the IIO's dismissal of the PSI's argumentation and notes that the high standard of care applied by ESMA is the same standard that the Commission applies in competition law cases, in which context the CJEU has long established that a high degree of caution in pursuing their occupation and care is expected from persons carrying on a professional activity.³³⁸ The Board further notes that Council Regulation (EC) No 1/2003 uses "intentionally or negligently" in the same way as the Regulation, i.e. it refers generally to negligence (and not just to "serious" or "obvious" negligence).³³⁹ Therefore, it is pertinent to use the same standard.
222. Moreover, ESMA has always applied the same standard to establish the existence of negligence. Therefore, the Board agrees with the IIO, that the PSI was or ought to have been aware of the high standard of care expected from it.
223. Lastly, as already indicated above, the high standard of care to be expected from professional firms in the financial services sector, as consistently applied by ESMA, has been confirmed by the BoA³⁴⁰. Therefore, the Board applies the high standard of care in the assessment of whether there is negligence in the present case.

Assessment of whether there is negligence in the present case

224. Regarding the facts at hand in the present case, the Board considers that the following should be taken into consideration to assess whether the PSI has been negligent.
225. First, the Board notes that, as explained above³⁴¹, the provision of Article 80(1) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI's position could not have failed to foresee that Article 80(1) requires the protection of the confidentiality of the data received.
226. Second, the PSI developed the Exclusivity Access Functionality to respond to a request from its asset manager clients after realising that they did not or could not use the Execution Agent Functionality that the PSI had previously set up. However, before developing and implementing such functionality, the PSI did not perform any internal or external assessment of its legality. In this respect, the Board notes that in response

³³⁸ See for example Case T-336/07, Telefónica, SA and Telefónica de España, SA v Commission [2012] ECLI:EU:T:2012:172, para. 323.

³³⁹ Pursuant to Article 65(1) of the Regulation: "Where, in accordance with Article 64(5), ESMA finds that a trade repository has, intentionally or **negligently**, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article. [...]" [emphasis added]. Pursuant to Article 23(2) of the Council Regulation (EC) No 1/2003: "The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or **negligently** [...]" [emphasis added].

³⁴⁰ See paragraph 285 of the decisions of the Board of Appeal in the Appeals of Svenka Handelsbanken AB, Skandinaviska Enskilda Banken AB, Swedbank AB and Nordea Bank Abp against ESMA's decision in the Nordic Banks case (ref. BoA D 2019 01, BoA D 2019 02, BoA D 2019 03 and BoA D 2019 01), available at https://www.eiopa.europa.eu/content/board-appeal-publishes-its-decision-nordic-banks%E2%80%99-appeals-decisions-esma-%E2%80%9Cshadow-ratings%E2%80%9D_en, as well as for example paragraphs 156 and 158 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020-D-03), available at https://www.eba.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

³⁴¹ See paragraph 185 of this Decision.

to the IIO's First RFI, the PSI indicated that "DDRL has not identified any documents which expressly record the assessment described in [the request]".³⁴²

227. Third, in response to a request from ESMA's Supervisors, the PSI stated that "in most instances where an Exclusivity Incident occurred, asset managers had incorrectly requested Exclusivity Access Rights upon onboarding to DDRL having erroneously selected the option of exclusive manager. In other cases, asset managers who had exclusive management responsibility for a fund did not update DDRL when they ceased to have exclusive management responsibility for that fund (which they were required to do) [...]".³⁴³

228. Regarding this statement of the PSI, the Board notes the following.

229. The IIO requested the PSI to "indicate whether, when DDRL developed the "Exclusive Access" functionality, it sent a notification to its asset managers clients explaining how the new functionality would work", to which the PSI responded that "DDRL has not identified any document responsive to [the request]".³⁴⁴ However, as the PSI has itself recognized³⁴⁵, at the beginning, the documentation that its clients had to fill out to be onboarded was not clear as regards what it meant to have a "exclusive" relationship with an investment fund and, as a result, many asset manager clients incorrectly populated the "exclusive" checkbox embedded in the Annex I to the User Agreement and the PSI granted them Exclusive Access Rights over the investment funds.

230. In addition, based on the IIO's file, by 1 May 2015, the PSI had already identified at least five instances in which the asset manager clients had erroneously claimed to have exclusive rights over an investment fund. Moreover, some statements in the file point to the fact that there might have been other Exclusivity Incidents where this could also have been an issue. For instance, on 11 April 2014, in response to a request from ESMA's Supervisors to provide further information as regards the exclusivity incident discovered by the PSI on 17 February 2014, the PSI indicated that: "as a result of our ongoing outreach to the Asset Manager community we have identified a number of funds that have been incorrectly set-up on the system. [...]", "[... redacted: A] Asset Limited was one of the firms that were part of the initial EMIR setup issue caused by incorrectly specifying fund exclusivity on their account setup form [...]".³⁴⁶

231. However, when the Onboarding Implementation Procedure was adopted on 1 May 2015, the PSI decided not to amend the setup of those asset manager clients who had already been granted Exclusive Access Rights over their investment funds.³⁴⁷ Between 1 May 2015 and 27 September 2016, the PSI discovered 15 new Exclusivity Incidents, some of them due to the clients incorrectly instructing the PSI to onboard the

³⁴² Exhibit 10, PSI's Response to the IIO's First RFI, p. 7, para. 22.

³⁴³ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, pp. 11-12, paras. 39-40.

³⁴⁴ Exhibit 10, PSI's response to IIO's First RFI, p. 7, para. 23.

³⁴⁵ See, for instance, Exhibit 39, Document 19.2, pp.17, 27 and 32; See also Exhibit 10, PSI's response to IIO's First RFI, p. 29, second and fifth row.

³⁴⁶ Exhibit 83, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q15 folder, "ESMA RFI Confidentiality – Narrative Response", p. 12.

³⁴⁷ Supervisory Report, Exhibit 036, Standard operating procedure dated 10 April 2015, p. 67.

investment funds as exclusive to them and yet the PSI decided that the changes introduced by the Onboarding SOP Procedure to the setup of asset managers would not apply to existing clients but only to new clients. The PSI held its decision until 1 October 2018, when the Exclusive Access Functionality was permanently disabled, and the Exclusive Access Rights removed from all the asset manager accounts.

232. In light of the above, the Board considers that even in those cases where the instructions from the PSI's asset manager clients were at the origin of the incident, it was the responsibility of the PSI to clearly explain to them, before onboarding, what an "exclusive" relationship with an investment fund meant and what the consequences were. In particular, considering that as soon as March 2014 it had already realised that some asset manager clients did not understand the Exclusivity Access Functionality and that there might be others that had not understood it either. Likewise, being aware as it was of this fact, the PSI should have carried out a more thorough examination of all the accounts of the asset manager clients that already benefitted from Exclusive Access Rights and ensured that similar incidents did not occur in the future.
233. Fourth, the Board notes that until 6 September 2018, the PSI relied on the self-declaration made by the asset managers (by which they manifested to be entitled to have access to all the data of the investment funds listed in their onboarding documentation) to grant them Exclusive Access Rights.
234. Between 12 February 2014 and 1 May 2015, the self-declaration consisted merely on selecting the checkbox "Exclusive" embedded in the Annex I of the User Agreement.
235. In addition, the information contained in the Annex I of the User Agreement only underwent a cursory check. According to the information provided by the PSI on 11 April 2014, "With respect to the set up of the underlying funds, DDRL is reliant on the representations made by the asset managers that they act on behalf of the fund and have authority to bind the fund to the terms of the operating procedures. The Asset Manager is required to attest to the accuracy of the information that they submit. This approach is consistent with the principals of agency under both UK and New York law (which govern our agreements) and places reliance on the fact that the parties making these representations are themselves regulated financial services firms with fiduciary obligations to the underlying funds", "DDRL relies on the same representations and procedures regardless of the structure of the setup being requested by the Asset Manager [...]".³⁴⁸ Likewise, the PSI's Management proposal indicated that, "following a client representation in addition to Annex I of the DDRL User Agreement and after appropriate due diligence, DDRL will grant a client "Exclusive Access" to all transactions reported to DDRL on behalf of a specific counterparty to a trade [...] If DDRL is unable to obtain external validation, e.g. counterparty is located in a jurisdiction with limited transparency, DDRL relies only on the requesting client to warrant their entitlement to exclusive access."³⁴⁹

³⁴⁸ Exhibit 83, ESMA RFI Confidentiality – Narrative Response, pp. 2 and 3.

³⁴⁹ Exhibit 40, Document 19.10, p.3.

236. Between 1 May 2015 and 1 February 2017, the self-declaration consisted on filling out and submitting a Full User Access Agreement, in which the asset managers had to indicate the entity name and LEI of the funds to which they requested to be granted Exclusive Access Rights.
237. In response to the IIO's request to explain what checks were carried out by the PSI before approving a Full User Access Agreement, the PSI indicated that "DDRL's onboarding team carried out the checks described at section 5.2 of the DerivSERV Onboarding Standard Operating Procedure (September 2016) [...] Following completion of the checks by the onboarding team, the Full User Access Agreement was submitted to DDRL's Legal team for approval. Upon receipt of these submissions, Legal would analyse public sources to seek to establish the link between the fund for which exclusive access was requested and the asset manager in question. These public sources included prospectuses, regulator filings, press announcements by authorised firms and annual reports. On occasions where the Legal team could only identify out of date sources, evidence in public sources which was contrary to the information provided by the asset manager or no evidence at all, the Legal team would contact the asset manager client to request further documents and information. The recommendations of the Legal team were then validated by the CEO".³⁵⁰
238. In this regard, the Board notes that, while the Full User Access Agreement was part of the onboarding documentation since 1 May 2015, the checks that the PSI described in its response to the IIO only started to apply on 27 September 2016 (i.e. when the Onboarding SOP Procedure was adopted) and that the new setup rules only applied to new asset manager clients³⁵¹. In addition, the Board notes that on 1 September 2016, the PSI discovered an Exclusivity Incident that started on 29 April 2015 and in the description of the root cause, the PSI indicated that "there is currently no validation of exclusivity when such functionality is requested by a firm".³⁵² Despite its initial decision to dismantle the Exclusive Access Functionality on 1 February 2017, the PSI decided on 25 April 2017 to allow that certain asset manager clients maintain their Exclusive Access Rights over their investment funds and to allow them to request to have these rights also with regards to new investment funds.³⁵³ As a result, while new clients were no longer allowed to request to be granted Exclusive Access Rights, existing asset manager clients continued to be able to do so up until April 2018³⁵⁴ and to keep the Exclusive Access Rights that had been granted to them until 1 October 2018 when the Exclusive Access Functionality was permanently dismantled.³⁵⁵ Within this context, the PSI started requesting its clients to attest by means of an e-mail from the fund administrator that they had exclusive rights over the investment fund in question if they wanted to set it up as exclusive in SDO.³⁵⁶ However, existing clients

³⁵⁰ Exhibit 10, PSI's response to the IIO's First RFI, p. 8, para. 26.

³⁵¹ In this regard, the Board observes that the Onboarding Implementation Procedure only made reference to the need to confirm with the regional CEO that an account could be setup as exclusive before proceeding with the onboarding but it did not require to submit the Full User Access Agreement to the Legal team for its verification and approval (see Supervisory Report, Exhibit 036, Standard operating procedure dated 10 April 2015, p. 67).

³⁵² Exhibit 10, PSI's Response to the IIO's First RFI, p. 29, third row.

³⁵³ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, .

³⁵⁴ Exhibit 38, Document 18.7, p. 5.

³⁵⁵ Exhibit 37, Document 08.3, p. 23.

³⁵⁶ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017, p. 3, point 6, seventh bullet.

which already had funds set up as exclusive in SDO and who wished to keep their Exclusive Access Rights over those funds were not concerned by this measure.³⁵⁷ On the contrary, the monthly recertification process put in place by the PSI continued to rely on the self-declaration of the asset managers. In addition, the absence of response from the asset managers during the recertification process was at first considered to amount to their confirmation that the accounts were correctly configured and, therefore, the PSI did not consider necessary to remove the Exclusive Access Rights in those instances. Under the Exclusivity Recertification Process adopted on 21 September 2017, the PSI reserved itself the right to revert the setup of the accounts, but it was not done systematically.

239. Therefore, the Board finds that since the entry into force of the reporting obligation on 12 February 2014 until April 2018, the controls and checks implemented by the PSI when asset manager clients requested to be granted Exclusive Access Rights over investments funds were insufficient to ensure that they were not granted incorrect access to the data reported by or on behalf of those funds. Similarly, the Board considers that between 12 February 2014 and 1 October 2018 (when the Exclusive Access Functionality was permanently dismantled), the controls and checks put in place by the PSI to ensure that asset manager clients that had been granted Exclusive Access Rights over investment funds continued to be entitled to have those rights were also insufficient.

240. Fifth, the Board considers that, since the start of the reporting obligation under the Regulation, the account verification and approval processes put in place by the PSI had shortcomings that affected the PSI's ability to detect incorrect account setups in SDO.

241. For instance, under the Client Onboarding Procedure, the Onboarding Agent only had to check that the forms had been completed correctly before proceeding with the account setup.³⁵⁸ During the verification of the account setup, only four fields were mandatory fields for dual verification. The PSI's staff in charge of verifying the accounts ("Verifying Agent") leveraged the SRF to input content on those fields. Once the content for the dual verification fields had been completed, the record could be sent for approval.

242. In addition, under the Onboarding Implementation Procedure, the Onboarding Agent had to carry out several checks on the documentation submitted by prospective clients before proceeding with the account setup. However, the Full User Access Agreement was not included among the documents that needed to be checked. In addition, during the verification and approval of the account setup, the information entered in SDO by the Onboarding Agent was only validated against the information provided by the client. No other verifications were performed. The procedure did not,

³⁵⁷ Exhibit 10, PSI's Response to the IIO's First RFI, p. 9, para. 29: "The requirement described in request 17 was a requirement which only applied under the Exception Process to new users. [...]".

³⁵⁸ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, p. 18.

for instance, require checking whether the PSI's CEO had confirmed that the account could be set up as exclusive.

243. These shortcomings were confirmed by the PSI's Audit team on 29 May 2015. [...]

244. In order to solve the issue, the PSI's Management initially agreed, among others, to design and implement controls to validate the accuracy of the information used to set-up clients by 1 July 2015 and to implemented automated SDO system edit and validation controls by 1 September 2016.³⁵⁹ However, the PSI's onboarding procedure was not amended until 27 September 2016, when the Onboarding SOP Procedure was adopted.

245. The Onboarding SOP Procedure formalised the "six eyes" principle implemented by the Onboarding team and according to which the account was set up, verified and approved by three different Onboarding Agents, working in three different regions. However, the verification and approval processes were still limited to the validation of the account setup against the data provided by the client on the SRF. The Full User Access Agreement (which now had to be approved by the Legal/Compliance function) was now part of the documentation that the Onboarding Agent needed to check when existing clients requested to have a fund set up as exclusive but the Onboarding Agent was only requested to check that the Legal name and the LEI of the entities included in the Full User Access Agreement matched the legal name and the LEI of the entities indicated in the SRF. Like the Onboarding Implementation Procedure, the Onboarding SOP Procedure did not require to check whether the Legal team and the CEO had confirmed that the account could be set up as exclusive either. As a result, an asset manager account could have been set up as exclusive in SDO without seeking the prior approval of the Legal team /CEO and this could have passed by unnoticed.

246. Sixth, the Board notes that, even before 29 May 2015, the PSI was aware about the fact that SDO did not supported the Exclusive Access Functionality and that using it could lead to onboarding errors. The internal Audit Report of 29 May 2015 indicated that "as self-identified by the Onboarding Team prior to the start of the Audit, the current onboarding process does not support certain complex client types. As a result, asset managers that only manage a portion of the fund have been granted access to view all positions within the fund".³⁶⁰ However, it decided to continue using the functionality until 1 October 2018 allowing more Exclusivity Incidents to happen.³⁶¹

³⁵⁹ Supervisory Report, Exhibit 039, Internal Audit report '2015 GTR – Client Set-Ups and Static Data Operations (SDO)', pp. 6- 7.

³⁶⁰ Supervisory Report, Exhibit 039, Internal Audit report '2015 GTR – Client Set-Ups and Static Data Operations (SDO)', p. 2; See also Exhibit 10, PSI's Response to the IIO's First RFI, p. 8, para. 27.

³⁶¹ See table in Section 2 of this Decision.

247. Seventh, the Board notes that in several instances two asset managers were mapped as “exclusive” to the same investment fund³⁶² and that this went unnoticed for several months and even years³⁶³.
248. Eighth, the Board notes that until 27 September 2016, the PSI did not have a procedure to escalate confidentiality issues such as Exclusivity Incidents in place.
249. The Client Onboarding Procedure recognised that errors during onboarding could result with incorrect data sent to regulators and/or privacy incidents.³⁶⁴ However, it did not include any escalation procedure. In addition, the Onboarding Implementation Procedure stated that “as a data-driven organization, our clients entrust us with their information and have an expectation of privacy and confidentiality. [...]”.³⁶⁵ However, the role of the privacy task force implemented by the PSI to tackle privacy issues was limited to approving e-mails and communications to be sent by the PSI to its clients. The Onboarding Implementation Procedure did not include any escalation procedure either. As a result, there were Exclusivity Incidents that occurred before 27 September 2016 that were never escalated to the privacy team and that were only discovered as a result of the SDO Scrubbing exercise.³⁶⁶
250. Ninth, the Board notes that despite the numerous incidents that occurred almost from the start of the reporting obligation under the Regulation and the gaps identified by the internal Audit Report of 29 May 2015 and the SDO scrubbing exercise, it took the PSI years to decommission the Exclusive Access Functionality.
251. In fact, the Board notes that until 30 March 2018, upon adoption, the different proposals to remove the Exclusivity Access Functionality were either reduced in scope, disregarded or postponed, which allowed not only that some existing Exclusivity Incidents continued for several months or years, but also that new Exclusivity Incidents occurred.³⁶⁷
252. On 14 September 2016, the PSI’s Management presented a proposal to the Board of Directors to permanently remove the Exclusive Access Functionality. Notably, the proposal noted that “Exclusive Access (“EA”) is the root cause of a number of issues: Data confidentiality failures: Where clients erroneously represent either at on-boarding or if post on-boarding changes are not notified, that they are entitled to EA, they receive access to data to which they are not entitled / DDRL reputation damage: Both with clients where it is determined that their data has been revealed to an ineligible 3rd party and also with regulators, specifically ESMA which has raised concerns over our data confidentiality records. ESMA concerns: During the 2015 ESMA inspection particular attention was focussed on client confidentiality including EA. Whilst no findings have yet been delivered it is likely that ESMA will require revisions to this

³⁶² See, for instance, Exhibit 39, Document 19.2, pp. 28, 31 and 32.

³⁶³ See the table in Section 2 of this Decision.

³⁶⁴ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, p. 6.

³⁶⁵ Supervisory Report, Exhibit 036, Standard operating procedure dated 10 April 2015, p. 6.

³⁶⁶ See, for instance, Exhibit 39, Document 19.2, p. 29.

³⁶⁷ See the table in Section 2 of this Decision.

process. [...]”³⁶⁸ However, when the Onboarding SOP Procedure was adopted on 27 September 2016, existing asset manager clients were still granted the possibility to request Exclusive Access Rights over investment funds.

253. On 20 October 2016, Operational Risk Management (ORM) team informed the PSI’s Audit Committee that “Exclusivity functionality will be withdrawn (clients will be given 6 months notice). Alternative means of achieving similar functionality (alternative fields in the trade message) are available”.³⁶⁹ However, the Onboarding SOP Procedure was amended on 16 November 2016 and existing asset manager clients could still request the PSI to setup fund in SDO as “exclusive”.

254. On 5 December 2016, the Onboarding SOP Procedure was further amended and indicated that as of 1 February 2017, the PSI would no longer allow its asset manager clients to onboard investment funds as “exclusive”.³⁷⁰

255. In addition, on 14 December 2016, (i) during a business risk management remediation update, the action “remove exclusivity functionality for existing customers (New Action)” was presented as “on target” [...]

256. However, the PSI faced some resistance from some of its asset manager clients and, on 25 April 2017, decided to introduce an exception whereby asset manager clients, which either appeared on a list or voiced their discontent, could keep their Exclusive Access Rights (the GTR Exclusivity-Exception Process).³⁷¹ In April 2018, the PSI decided to no longer accept exclusive access requests from new and existing clients.³⁷² The DDRL Exclusivity Recertification Process (adopted on 21 September 2017) was updated on 29 May 2018 to reflect this change. However, if the existing asset manager clients appeared on a list (which was last amended in June 2018), they were allowed to keep the Exclusive Access Rights that had already been granted to them, until the Exclusive Access Functionality was permanently disabled on 1 October 2018.

257. Lastly, the Board notes that, when the PSI identified Exclusivity Incidents, its reaction was not always as quick as one would have expected. As an example, one of the Exclusivity Incidents mentioned in the SDO Scrubbing Report was identified on 10 September 2015. However, the relevant O-codes were not removed until 15 December 2015.³⁷³ Another example relates to the Exclusivity Incident discovered on 3 December 2015 for which the PSI stated that “no documentation for client present and after further correspondence the client indicated that the setup should be non exclusive, no action was taken until the discovery was made by the SDO client set up task force”.³⁷⁴

³⁶⁸ Exhibit 40, Document 19.10, p. 2.

³⁶⁹ Exhibit 84, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 19.7”, p. 3.

³⁷⁰ Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1, p. 19 and p. 107.

³⁷¹ Supervisory Report, Exhibit 040, GTR Exclusivity-Exception process, dated 25 April 2017.

³⁷² Exhibit 38, Document 18.7, p. 5.

³⁷³ Exhibit 39, Document 19.2, p. 28.

³⁷⁴ Exhibit 39, Document 19.2, p. 19.

Similarly, with regards to the Exclusivity Incident discovered on 24 April 2018, the PSI indicated that “the analyst did not action any account amendment in a timely fashion”.³⁷⁵

258. To conclude, overall, on the basis of the elements described above, considered individually and all together, the Board agrees with the IIO and finds that the PSI failed to take the special care expected of a TR. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

259. Therefore, it is considered that the PSI has been negligent when committing the infringement of Point (c) of Section I of Annex I of the Regulation.

Fines

260. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020³⁷⁶.

261. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

Determination of the basic amount

262. Article 65 of the Regulation provides in paragraph 2³⁷⁷ as follows:

“The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

³⁷⁵ Exhibit 10, PSI's Response to the IIO's First RFI, p. 30, fifth row.

³⁷⁶ See paragraphs 177- 178 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020-D-03), available at https://www.esma.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

³⁷⁷ In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 “in Article 65, paragraph 2 is amended as follows: [...] in point (a), ‘EUR 20 000’ is replaced by ‘EUR 200 000’;” However, this is not applicable to the present infringement because the facts occurred before the adoption and entry into force of Regulation (EU) 2019/834.

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.”

263. It has been established that the PSI negligently committed the infringement set out at Point (c) of Section II of Annex I of the Regulation, by providing its asset manager clients with access to data reported by (or on behalf of) investment funds that they were not entitled to receive.

264. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.

265. In 2020, the PSI had a turnover of USD 124 633 000³⁷⁸ (EUR 109 135 727).

266. Thus, the basic amount of the fine for the infringement listed in Point (c) of Section II of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

267. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(a): if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply.

268. The infringement was committed each time that the PSI provided its asset manager clients with access to data to which they were not entitled, i.e. 35 times. Therefore, putting aside the first time the PSI has committed the infringement, it has been repeated 34 times.

Annex II, Point I(c): if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

269. The Board notes that the Regulation does not provide guidance on what constitutes “systemic weaknesses in the organisation of the trade repository”. However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute “systemic weaknesses in the organisation of a TR”.

³⁷⁸ Figures provided in the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

270. The Board agrees with the IIO's analysis and considers the type and the level of seriousness of the PSI's failure that led to the infringement. With regards to this infringement, the Board notes the following.
271. First, since the start of the reporting obligation under the Regulation, the processes that the PSI put in place to set up, verify and validate the set-up of the client accounts in SDO had significant shortcomings. For instance, under the Client Onboarding Procedure only four fields in SDO required verification and none of them was related to the data access rights granted to the clients.³⁷⁹ Under the Onboarding Implementation Procedure and Onboarding SOP Procedure, the checks to be performed by the PSI's staff in charge of onboarding had to perform were also limited and, in particular, did not include checking that the investment funds to which the asset manager client was requesting to be granted Exclusive Access Rights was actually exclusive to it and the verification and validation processes consisted only in checking that the setup of the account in SDO matched the data provided by the client on the Service Request Form (SRF).³⁸⁰ They did not, for instance, require to check whether Legal (and later on the CEO) had actually confirmed that the client could be granted Exclusive Access Rights over one or more of its funds. Some of the shortcomings were also identified in the Internal Audit Report of 29 May 2015³⁸¹, [...]
272. In addition, the Internal Audit Report identified other shortcomings in the organisation of the PSI, which contributed to the occurrence of some of the incidents: [...]
273. Second, some of the Exclusivity Incidents³⁸² were due to the fact that the PSI did not have an appropriate document management system in place, as recognised by the PSI itself: "an ongoing trade scrubbing exercise linked to client set ups for the Exclusive / Non Exclusive service has identified additional cases where client information had been shared with the wrong counterparties. Incorrect requests received from clients and manual processing errors due to a lack of document management systems being the key causes".³⁸³
274. In addition, some of the Exclusivity Incidents identified by the PSI throughout the years revealed problems that went beyond mere onboarding errors and that affected the PSI's reporting and billing system.³⁸⁴
275. Lastly, when implementing remedial actions, the PSI was not consistent, which resulted in the occurrence of another Exclusivity Incident. On 14 September 2016, as part of the "Deriv/SERV Business Risk Management Remediation Update", the

³⁷⁹ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, p. 43.

³⁸⁰ See, for instance, Supervisory Report, Exhibit 036, Standard operating procedure dated 10 April 2015, p. 22; Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016, pp.19, 65 and 66; Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0, pp. 20, 66 and 67.

³⁸¹ Supervisory Report, Exhibit 039, Internal Audit report '2015 GTR – Client Set-Ups and Static Data Operations (SDO)', pp. 6, 7 and 9.

³⁸² See for instance, Exhibit 83, ESMA RFI Confidentiality – Narrative Response, p. 12; Exhibit 39, Document 19.2, pp. 25 and 27.

³⁸³ Exhibit 85, Document 19.8, p. 5.

³⁸⁴ See, for instance, Exhibit 83, ESMA RFI Confidentiality – Narrative Response, p. 10; and Exhibit 10, PSI's Response to the IIO's First RFI, p. 28, second row.

following was noted: “The failed action plan item called to review the existing Asset Managers and correct per new requirements. The Global Service Delivery (GSD) team completed the exercise manually, scrubbing 19k+ accounts. Action failed Internal Audit validation as Internal Audit determined remediation effort was inconsistently applied to the asset manager account clean-up process which resulted in a confidentiality incident”.³⁸⁵

276. Based on this, the Board finds significant weaknesses regarding the PSI’s reporting and document management systems as well as in the remediation following internal control mechanisms. Therefore, these defects constitute “systemic weaknesses in the organisation” of the PSI.

277. Thus, the Board finds that the aggravating factor is applicable.

Applicable mitigating factors

278. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers that no mitigating factors are applicable.

Determination of the adjusted fine

279. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

280. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Annex II, Point I(a) and Point I(c) is added to the basic amount:

Aggravating factor set out in Annex II, Point I(a):

EUR 20 000 x 1,1 = EUR 22 000

EUR 22 000 – EUR 20 000 = EUR 2 000

EUR 2 000 x 34 = 68 000

Aggravating factor set out in Annex II, Point I(c):

EUR 20 000 x 2,2 = EUR 44 000

EUR 44 000 – EUR 20 000 = EUR 24 000

³⁸⁵ Exhibit 86, Correspondence with ESMA’s Supervisors folder, Supervisors’ Response to the IIO’s Request folder, Q6 folder, “Document 19.6”, p. 2.

Adjusted fine taking into account applicable aggravating factors:

EUR 20 000 + 68 000 + EUR 24 000 = EUR 112 000

281. Consequently, following adjustment by taking into account the applicable aggravating factors, the amount of the fine to be imposed on the PSI amounts to EUR 112 000.

Supervisory measures

282. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.

283. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue on 1 October 2018, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

5 Findings of the Board with regard to the PSI’s mapping rules related to the “counterparty side” field that altered the substance of the data reported to it

284. The Board deems that in the case under consideration the mapping rules related to the “counterparty side” field led to two different outcomes: (i) the alteration of the substance of the data and (ii) the provision of incorrect reports to the Regulators.

285. With regards to the outcome of the alteration of the substance of the data, this section of the decision analyses whether the PSI breached the following requirement regarding the safeguarding and recording of the data received from counterparties and CCPs:

“a trade repository shall ensure the [...] integrity [...] of the information received under Article 9” (Article 80(1) of the Regulation).

286. If this requirement is not met, the infringement set out at Point (c) of Section II of Annex I of the Regulation is established.

Analysis of the relevant provisions of the Regulation

287. The issue at stake in this case is whether the PSI has breached its obligation under Article 80(1) of the Regulation to ensure the integrity of the information that it received under Article 9 of the Regulation.

288. As set out above, from 12 February 2014 to 21 August 2014, due to “[...] incorrect logic behind the BUY and SELL indicator decision making [...]”³⁸⁶ regarding the “counterparty side” field, with respect to all OTC trades within the FX asset class, if the buyer value did not match the “Buyer LEI value” (e.g. because it had been reported

³⁸⁶ Exhibit 52, Document 33.1, p. 2.

blank), the seller value was populated in the “counterparty side” field, instead of leaving it blank.

289. Similarly, from 12 February 2014 to 27 April 2017, due to an incorrect mapping logic, with respect to all OTC trades within the equity asset class, if the buyer value did not match the “Buyer LEI value” (e.g. because it had been reported blank), the seller value was then populated in the “counterparty side” field, instead of leaving it blank.
290. The Board takes into account the wording and the context of Article 80(1) of the Regulation.
291. First, the wording of Article 80(1) is clear. TRs have an obligation to ensure the integrity of the data received under Article 9 of the Regulation.
292. Therefore, according to Article 80(1) of the Regulation read in conjunction with Article 9(1), the PSI has an obligation ensure the integrity of all the details of derivative contracts reported to it.
293. According to Article 1(1) of the Delegated Regulation (EU) No 148/2013, the reports to a TR under Article 9(1) of the Regulation must include the details set out in Table 1 of the Annex to that Delegated Regulation, which inter alia include the counterparty side of the trade that is being reported, i.e. the reporting party must identify whether the contract is a buy or a sell.
294. In addition, in order to avoid inconsistencies, the Implementing Regulation (EU) 1247/2012 mandates that all data sent to TRs follows the same rules, standards and formats for all TRs, all counterparties and all types of derivatives and that a unique data set be used for describing a derivatives trade.
295. The format of the details to be reported to TRs under Article 9 of the Regulation is specified in the Annex to the Implementing Regulation (EU) 1247/2012. With regards to the counterparty side of the trade, the reporting party must indicate “B” in the “counterparty side” field if the reporting party is the buyer and “S” if it is the seller.
296. Second, taking into account the objectives of the Regulation, the Board notes that ensuring the integrity of all the reported details of any derivative contracts that counterparties and CCPs have concluded and of any modifications or terminations of those contracts is of utmost importance to allow correct reporting to Regulators, for them to fulfil their respective mandates properly. This is achieved by ensuring the integrity of the information received through among others the correct processing of data.
297. For instance, as stated in Recital 2 of the Implementing Regulation (EU) 2017/105, “Determining whether the reporting counterparty is a buyer or a seller in a contract is particularly complex in the case of swap derivative contracts as such contracts involve the exchange of financial instruments between the parties. Therefore, specific rules should be established in order to ensure the accurate and consistent

determination of who are the buyers and who are the sellers in swap derivative contracts.”

298. Finally, the Board notes that, within the context of information technology, data integrity is a familiar concept which refers to the maintenance of the accuracy and consistency of the data over its entire lifecycle and that, in order to ensure data integrity, the data should be stored and processed in a way that it is not altered.³⁸⁷

299. Thus, the Board concludes that to comply with the obligation under Article 80(1) of the Regulation to ensure the integrity of the data reported under Article 9 of the Regulation, the PSI must not alter the substance of the data that it receives from counterparties and CCPs.

Analysis of the mapping rule used by the PSI to build in the information to be reported in the “counterparty side” field

300. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the mapping rule used by the PSI to build in the information to be reported in the “counterparty side” field, the Board notes the following.

301. Between 12 February 2014 and 21 August 2014 (for FX derivatives trades) and between 12 February 2014 and 27 April 2017 (for equity derivatives trades), the PSI’s mapping rules led to incorrect data being stored in the PSI’s system in relation to the “counterparty side” of the trade, which was indicated to be the seller when in reality the information regarding whether the contract was a sell or a buy was not available to the PSI in the data reported by the counterparties and CCPs and, therefore, if anything, the “counterparty side” field should have been left blank. This was recognised by the PSI itself on 29 September 2018: “[t]here were no controls on the correctness of the reported values for counterparty side (buyer value is not included in any reports); DDRL was incorrectly reporting values that had not been submitted by clients”.³⁸⁸ In light of the above, the Board considers that by applying mapping rules which led to data that was not consistent with the data reported by the reporting parties, the PSI failed to ensure the integrity of the details of derivative contracts reported to it under Article 9, in contravention of Article 80(1) of the Regulation.

302. This constitutes the infringement set out at Point (c) of Section II of Annex I of the Regulation.

303. The infringement has been committed each time that the PSI implemented a mapping rule that altered the substance of the information reported to it by the reporting parties.

³⁸⁷ See e.g., Exhibit 102, Public information folder, “What is Data Integrity - Database.guide”.

³⁸⁸ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 26, para. 125.

Conclusion

304. The Board thus finds that the infringement set out at Point (c) of Section II of Annex I of the Regulation was committed 2 times, i.e. when the PSI implemented the “counterparty side” mapping rule for the FX derivatives and when it implemented the “counterparty side” mapping” rule for equity derivatives.

Intent or negligence

305. The factual background of the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

306. It should therefore be assessed whether the PSI acted with negligence.

Assessment of whether there is negligence in the present case

307. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the reasoning developed above in Section 4.

308. Regarding the application to the infringement set out at Point (c) of Section II of Annex I of the Regulation, the Board notes the following.

309. First, the Board notes that, as explained above³⁸⁹, the provision of Article 80(1) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI’s position could not have failed to foresee that Article 80(1) requires the protection of the integrity of the data received.

310. Second, the Board agrees with the IIO’s view that, before going live but also afterwards, the PSI should have checked that the mapping rules that the PSI had put in place to populate the mandatory EMIR reporting data field (in this case, the “counterparty side” field) worked properly, i.e. that the information stored regarding that field was always consistent with the information that the reporting parties had reported to the PSI under the relevant input data fields. A normally informed TR would have foreseen the consequences of not doing so.

311. Second, the Board notes that while the mapping rules created by the product leads (in consultation with the industry working groups) were internally reviewed by the PSI’s business managers before the PSI started using them³⁹⁰, their implementation (or at least the implementation of the “counterparty side” mapping rules) was not the subject of control and monitoring by the PSI. For instance, in response to a request from ESMA’s Supervisors to inter alia provide a description of the process, mechanisms and additional controls that the PSI had implemented to ensure the correct mapping between the buyer value and the counterparty side field, the PSI only referred to

³⁸⁹ See paragraph 291 of this Decision.

³⁹⁰ See Exhibit 10, PSI’s Response to the IIO’s First RFI, pp.12-13, paras. 41-44.

controls regarding the design of the mapping rules and to the Lesson Learned analysis conducted after the second incident.³⁹¹

312. Fourth, the Board notes that, even though the PSI used similar “counterparty side” mapping rules for all the asset classes, when the PSI discovered on 30 June 2014 that there was an issue with the mapping rule used for the FX derivative asset class, it did not assess whether similar issues arose with regards to the “counterparty side” mapping rules used for the other asset classes because it did not receive any incident report.³⁹² As a result, the issue regarding the Equity derivative asset class remained unresolved until 28 April 2017, when the PSI deployed a corrective code to fix it.
313. Lastly, the negligence of the PSI is even more striking if one takes into account that the PSI should have rejected all the reports where the “counterparty side” field had to be left blank.
314. In this regard, the Board notes that, on 27 April 2015, ESMA responded to a question regarding the validation of reports submitted under Article 9 of the Regulation in its EMIR Q&A. In the response, ESMA indicated that “TRs should apply validation rules to ensure that reporting is performed according to the EMIR regime, including the specifications of the Technical Standards. Accordingly, reporting counterparties or submitting entities should comply with the reporting requirements specified in the Validation table which can be found on ESMA’s website [...] The table includes two levels of validations which should be performed by TRs: The first level validation refer to determining which field are mandatory in all circumstances and under what conditions fields can be left blank or include the Not Available (NA) value, as clarified in TR Q&A 20a above. [...] The first level validation is already in place since 1 December 2014. [...] In order to be compliant with the requirements of Article 19 of the Commission Delegated Regulation (EU) No 150/2013, TRs should reject the reports which are not submitted in line with the reporting requirements specified in the Validations table.”³⁹³ According to the information provided in the Validation table, the “counterparty side” field could not be left blank or include a NA value.³⁹⁴
315. Therefore, the Board agrees with the IIO’s view that, since 1 December 2014, the PSI should have also ensured that the reporting fields from which the information was input to fill the “counterparty side” field in the reports to Regulators could not be left blank and rejected those reports in which the relevant data was missing.
316. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a TR. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the

³⁹¹ See Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 25, paras. 121-123.

³⁹² See Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 13, para. 47.

³⁹³ Exhibit 103, Public Information folder, “2015_775_qa_xii_on_emir_implementation_april_2015”, pp. 78-79.

³⁹⁴ Exhibit 104, Public Information folder, “emir_validation_table”, p. 2.

Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

317. Therefore, the Board considers that the PSI has been negligent when committing the infringement of Point (c) of Section II of Annex I of the Regulation.

Fines

318. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020³⁹⁵.

319. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

Determination of the basic amount

320. Article 65 of the Regulation provides in paragraph 2³⁹⁶ as follows:

"The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million."

321. It has been established that the PSI negligently committed the infringement set out at Point (c) of Section II of Annex I of the Regulation, by not ensuring the integrity of the information received under Article 9.

³⁹⁵ See paragraphs 177- 178 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020-D-03), available at https://www.esa.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

³⁹⁶ In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 "in Article 65, paragraph 2 is amended as follows: [...] in point (a), 'EUR 20 000' is replaced by 'EUR 200 000';" However, this is not applicable to the present infringement because the facts occurred before the adoption and entry into force of Regulation (EU) 2019/834.

322. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.

323. In 2020, the PSI had a turnover of USD 124 633 000³⁹⁷ (EUR 109 135 727).

324. Thus, the basic amount of the fine for the infringement listed in Point (c) of Section II of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

325. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(a): if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply

326. The infringement was been committed each time that the PSI implemented a "counterparty side" mapping rule for an asset class which altered the substance of the data reported by the reporting parties. The "counterparty side" mapping rules implemented by the PSI with regards to the Equity and FX derivative asset classes were both concerned by this infringement. Therefore, the infringement is considered to have been committed twice. Putting aside the first time the PSI has committed the infringement, it has thus been repeated once.

Annex II, Point I(b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply

327. For both the equity and FX derivative asset classes, the infringement lasted more than six months (i.e. from 12 February to 21 August 2014 for FX derivatives trades and from 12 February 2014 to 27 April 2017 for equity derivatives trades). Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

328. The Board notes that the Regulation does not provide guidance on what constitutes "systemic weaknesses in the organisation of the trade repository". However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute "systemic weaknesses in the organisation of a TR".

329. The Board agrees with the IIO's analysis and considers the type and the level of seriousness of the PSI's failure that led to the infringement.

³⁹⁷ Figures provided in the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

330. The FX and Equity mapping incidents were the result of several malfunctions or defects regarding the design of the mapping rules themselves. First, in spite of being used to populate a mandatory EMIR data field, the data submitted by the reporting parties under the “Buyer LEI” field was not subject to validations or controls and could thus be left blank.³⁹⁸ Second, the logic behind the “counterparty side” mapping rules put in place by the PSI was faulty as, in particular, it inferred that if the reporting party had left the “Buyer LEI” field blank it was because the trade was a sell³⁹⁹ and the “counterparty side” field was thus populated with an “S” and reported as a sell to the Regulators. This was, for instance, confirmed in the [...] incident report ([...]), regarding the mapping rule for FX derivatives,⁴⁰⁰ and in the [...] incident report ([...]), regarding the mapping rule for Equity derivatives⁴⁰¹.

331. Based on this, the Board identifies significant weaknesses regarding the PSI’s design of the mapping rules that it used to identify the data received from the reporting parties and populate the different EMIR data fields. Given the importance of ensuring the integrity of the data reported to TRs at all stages, these defects constitute “systemic weaknesses in the organisation” of the PSI.

332. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply

333. As indicated above, the mapping rules (thus including the “counterparty side” mapping rules) were implemented in the PSI’s system to transform the data before storing it in the ITR table, which was the data source used by the PSI to report data to Regulators under the Regulation.⁴⁰²

334. As a result, when the “Buyer Value” and the “Trade Party 1 Value” did not match, the data included in the ITR table was no longer consistent with the data that had been reported by counterparties and CCPs and, therefore, impacted the quality of the data that the TR maintains in its system.

335. With regards to FX derivatives trades, the issue had an impact on six types of reports (i.e. 4 Regulator reports and 2 participant reports) and affected approximately 2.15 million (i.e. more than 40%) of the FX records within the PSI’s system. With regards to equity derivatives asset class, the issue had an impact on 13 types of reports (i.e. 2 Regulator reports, 5 TRACE reports and 6 participant reports) and impacted approximately 300,000 trades per day between November 2015 to 28 April 2017. In both cases, the TR reconciliation was also impacted.⁴⁰³

³⁹⁸ See Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, pp. 25-26, paras. 124-126.

³⁹⁹ Exhibit 61, Document 30.2, pp. 2 and 4.

⁴⁰⁰ Exhibit 52, Document 33.1.

⁴⁰¹ Exhibit 56, Document 33.3.

⁴⁰² Exhibit 10, PSI’s Response to the IIO’s First RFI, p.11, para. 40.

⁴⁰³ See Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, pp. 23-24, paras.111-118.

336. Based on the above, the Board considers that the infringement has had a negative impact on the quality of the data that the PSI maintained and, therefore, the aggravating factor is applicable.

Applicable mitigating factors

337. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers that no mitigating factors are applicable.

Determination of the adjusted fine

338. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

339. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Point I(a), Point I(b), Point I(c) and Point I(d) of Annex II is added to the basic amount:

Aggravating factor set out in Annex II, Point I(a):

$$\text{EUR } 20\,000 \times 1,1 = \text{EUR } 22\,000$$

$$\text{EUR } 22\,000 - \text{EUR } 20\,000 = \text{EUR } 2\,000$$

$$1 \text{ repetition: } 1 \times 2\,000 = 2\,000$$

Aggravating factor set out in Annex II, Point I(b):

$$\text{EUR } 20\,000 \times 1,5 = \text{EUR } 30\,000$$

$$\text{EUR } 30\,000 - \text{EUR } 20\,000 = \text{EUR } 10\,000$$

Aggravating factor set out in Annex II, Point I(c):

$$\text{EUR } 20\,000 \times 2,2 = \text{EUR } 44\,000$$

$$\text{EUR } 44\,000 - \text{EUR } 20\,000 = \text{EUR } 24\,000$$

Aggravating factor set out in Annex II, Point I(d):

$$\text{EUR } 20\,000 \times 1,5 = \text{EUR } 30\,000$$

$$\text{EUR } 30\,000 - \text{EUR } 20\,000 = \text{EUR } 10\,000$$

Adjusted fine taking into account applicable aggravating factors:

EUR 20 000 + EUR 2 000 + EUR 10 000 + EUR 24 000 + EUR 10 000 = EUR 66 000

340. Consequently, following adjustment by taking into account the applicable aggravating factors, the amount of the fine to be imposed on the PSI amounts to EUR 66 000.

Supervisory measures

341. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.

342. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue in 2017, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

6 Findings of the Board with regard to the PSI's mapping rules related to the "counterparty side" field generating incorrect reports for Regulators

343. As stated above⁴⁰⁴, the Board deems that in the case under consideration the mapping rules related to the "counterparty side" field led to two different outcomes: (i) the alteration of the substance of the data and (ii) the provision of incorrect reports to the Regulators.

344. With regards to the outcome of the provision of incorrect reports to the Regulators, this section of the decision analyses whether the PSI breached the following requirement:

"A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates" (Article 81(2) of the Regulation).

345. If this requirement is not met, the infringement set out at Point (b) of Section III of Annex I of the Regulation is established.

Analysis of the relevant provisions of the Regulation

346. The issue at stake in this case is whether the PSI has breached its obligation under Articles 81(2) to give Regulators direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

347. As set out above, from 12 February 2014 to 21 August 2014, the PSI issued Regulator reports where, with respect to all OTC trades within the FX asset class, if the

⁴⁰⁴ See paragraph 284 of this Decision.

buyer value did not match the “Buyer LEI value” (e.g. because it had been reported blank), the seller value was populated in the “counterparty side” field, instead of leaving it blank.

348. Similarly, from 12 February 2014 to 27 April 2017, the PSI issued Regulator reports where, with respect to all OTC trades within the equity asset class, if the buyer value did not match the “Buyer LEI value” (e.g. because it had been reported blank), the seller value was then populated in the “counterparty side” field, instead of leaving it blank.

349. The Board takes into account the wording and the context of Articles 81(2) of the Regulation.

350. First, the wording of Article 81(2) is clear. The PSI has an obligation to provide Regulators with “direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates”. The only limiting factor, as set out in Article 81(2), to a Regulator’s access is the Regulator’s “responsibilities and mandates”.

351. This means TRs should provide Regulators with the same details as counterparties and CCPs submit to them. Specifically, Delegated Regulation (EU) No 148/2013 sets out the details that counterparties and CCPs have to report to a TR. According to Article 1(1) of the Delegated Regulation (EU) No 148/2013, the reports to a TR under Article 9(1) of the Regulation must include the details set out in Table 1 of the Annex to that Delegated Regulation, which inter alia include the counterparty side of the trade that is being reported, i.e. the reporting party must identify whether the contract is a buy or a sell.

352. Second, the drafting of Article 81(2) makes it clear that the details to be transmitted to the Regulators are those that help them fulfil their responsibilities and mandates. The Board notes that the provision operates in the context of the principal objective of introducing the reporting requirement under the Regulation, which is to ensure that Regulators have timely and complete access to the correct data in order to be able to perform their mandates and ensure financial stability. Indeed, providing Regulators with access to incorrect data prevents them from fulfilling their mandates. In this context, it cannot have been the intention of the co-legislators to have created a reporting obligation that could be at best useless, if not misleading.

353. For instance, as stated in the Recital 3 of the Implementing Regulation (EU) 2017/105, “in order to determine the real exposure of counterparties, competent authorities require complete and accurate information on the collateral exchanged between those counterparties [...]”.

354. Similarly, the Board finds that where the information provided to the Regulators regarding whether the reported data was about a buy or a sell is incorrect, their capacity to determine the real exposure of counterparties would also be affected.

355. Thus, the Board concludes that to comply with the obligation under Article 81(2) the details of derivatives contracts, to which the Regulators must be provided access, must also be correct and reliable, for the Regulators to fulfil their responsibilities and mandates.

Analysis of the reports sent to Regulators by the PSI containing incorrect information in the “counterparty side” field

356. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the reports sent to Regulators by the PSI containing incorrect information in the “counterparty side” field, the Board notes the following.

357. The Board notes that, after the entry into force of the EMIR reporting obligations, the PSI decided to maintain its original reporting system, which used non-EMIR data fields. To prepare Regulator reports, the PSI implemented a set of mapping rules to transform the field data received from counterparties and CCPs into a format compatible with the EMIR reporting purposes.

358. Under the mapping rules implemented in the PSI’s system, the data received was transformed before being stored in the ITR table, which was the data source used by the PSI to report the data to the Regulators.

359. Between 12 February 2014 and 21 August 2014 (for FX derivatives trades) and between 12 February 2014 and 27 April 2017 (for equity derivatives trades), the PSI provided the Regulators with access to trade data in which the “counterparty side” of the trade was indicated to be the seller when in reality the information regarding whether the contract was a sell or a buy was not available to the PSI in the data reported by the counterparties and CCPs and, therefore, if anything, the “counterparty side” field should have been left blank. This was recognised by the PSI itself on 29 September 2018: “[t]here were no controls on the correctness of the reported values for counterparty side (buyer value is not included in any reports); DDRL was incorrectly reporting values that had not been submitted by clients”.⁴⁰⁵

360. The Board notes that the incorrect “counterparty side” mapping rules for the FX derivatives asset class affected four Regulator reports⁴⁰⁶ and the incorrect “counterparty side” mapping rules for the equity derivatives asset class affected two types of Regulator reports and five types of TRACE reports⁴⁰⁷.

361. In light of the above, the Board considers that by generating reports for Regulators that contained data that was not consistent with the data reported by the reporting parties, the PSI failed to provide Regulators with direct and immediate access

⁴⁰⁵ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 26, para. 125.

⁴⁰⁶ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 23, para. 113.

⁴⁰⁷ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 24, para 117.

to the details of derivative contracts reported to it under Article 9, in contravention of Article 81(2) of the Regulation.

362. This constitutes the infringement set out at Point (b) of Section III of Annex I of the Regulation.

363. The infringement has been committed each time that the PSI implemented a mapping rule that generated Regulator reports which included information that was not consistent with the information reported by the reporting parties.

Conclusion

364. The Board thus finds that the infringement set out at Point (b) of Section III of Annex I of the Regulation was committed 2 times, i.e. when the PSI implemented the “counterparty side” mapping rule for the FX derivatives and when it implemented the “counterparty side” mapping” rule for equity derivatives.

Intent or negligence

365. The factual background of the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

366. It should therefore be assessed whether the PSI acted with negligence.

Assessment of whether there is negligence in the present case

367. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the developments provided above in Section 4.

368. Regarding the application to the infringement set out at Point (c) of Section II of Annex I of the Regulation, the Board notes the following.

369. First, the Board notes that, as explained above⁴⁰⁸, the provision of Article 81(2) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI’s position could not have failed to foresee that Article 81(2) requires correct and reliable reports to be provided to the Regulators.

370. Second, the Board finds that , the PSI should have monitored the proper functioning of the mapping rules put in place (in this case, the “counterparty side” field) worked properly, i.e. that the information provided to the Regulators in that field was always consistent with the information that the reporting parties had reported to the PSI under the relevant input data fields. A normally informed TR would have foreseen the consequences of not doing so.

⁴⁰⁸ See paragraph 350 of this Decision.

371. This was not the case, because the implementation of the mapping rules was not subject to any monitoring. In this regard, the PSI recognised that “there were no controls on the correctness of the reported values for counterparty side (buyer value is not included in any reports); DDRL was incorrectly reporting values that had not been submitted by clients”.⁴⁰⁹
372. Third, the Board further considers that the lack of care of the PSI in the implementation of the “counterparty side” mapping rules (see Section 5 above), that led to the negligent alteration of the substance of the data received as set out above, is relevant to establish the negligence in the provisions of incorrect reports to the Regulators. On this basis, the Board finds that the negligence in the moment of the provision of the reports constitutes the necessary consequence, due to a cascading effect, of the lack of care of the PSI in the process of implementation of the updated mapping rules.
373. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a TR. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.
374. Therefore, the Board considers that the PSI has been negligent when committing the infringement of Point (b) of Section III of Annex I of the Regulation.

Fines

375. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI’s annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020⁴¹⁰.
376. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

⁴⁰⁹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 26, para. 125.

⁴¹⁰ See paragraphs 177- 178 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020-D-03), available at https://www.esma.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf .

Determination of the basic amount

377. Article 65 of the Regulation provides in paragraph 2⁴¹¹ as follows:

“The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.”

378. It has been established that the PSI negligently committed the infringement set out at Point (b) of Section III of Annex I of the Regulation, by submitting reports to Regulators containing data that was inconsistent with the information received under Article 9.

379. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.

380. In 2020, the PSI had a turnover of USD 124 633 000⁴¹² (EUR 109 135 727).

381. Thus, the basic amount of the fine for the infringement listed in Point (c) of Section II of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

382. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(a): if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply

⁴¹¹ In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 “in Article 65, paragraph 2 is amended as follows: [...] in point (a), ‘EUR 20 000’ is replaced by ‘EUR 200 000’;” However, this is not applicable to the present infringement because the facts occurred before the adoption and entry into force of Regulation (EU) 2019/834.

⁴¹² Figures provided in the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

383. The infringement was been committed each time that the PSI implemented a “counterparty side” mapping rule for an asset class and generated reports to Regulators that included information which was not consistent with the data reported by the reporting parties. The “counterparty side” mapping rules implemented by the PSI with regards to the Equity and FX derivative asset classes were both concerned by this infringement. Therefore, the infringement is considered to have been committed twice. Putting aside the first time the PSI has committed the infringement, it has thus been repeated once.

Annex II, Point I(b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply

384. For both the equity and FX derivative asset classes, the infringement lasted more than six months (i.e. from 12 February to 21 August 2014 for FX derivatives trades and from 12 February 2014 to 27 April 2017 for equity derivatives trades). Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

385. The Board notes that the Regulation does not provide guidance on what constitutes “systemic weaknesses in the organisation of the trade repository”. However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute “systemic weaknesses in the organisation of a TR”.

386. The Board agrees with the IIO’s analysis and considers the type and the level of seriousness of the PSI’s failure that led to the infringement.

387. The incorrect Regulator reports regarding the FX and Equity derivative asset classes were the result of several malfunctions or defects regarding the design of the mapping rules in the PSI’s system. First, in spite of being used to populate a mandatory EMIR data field, the data submitted by the reporting parties under the “Buyer LEI” field was not subject to validations or controls and could thus be left blank.⁴¹³ Second, the logic behind the “counterparty side” mapping rules put in place by the PSI was faulty as, in particular, it inferred that if the reporting party had left the “Buyer LEI” field blank it was because the trade was a sell⁴¹⁴ and the “counterparty side” field was thus populated with an “S” and reported as a sell to the Regulators. In addition, the implementation of the mapping rules was not subject to any monitoring. In this regard, the PSI recognised that “there were no controls on the correctness of the reported values for counterparty side (buyer value is not included in any reports); DDRL was incorrectly reporting values that had not been submitted by clients”.⁴¹⁵

⁴¹³ See Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, pp. 25-26, paras. 124-126.

⁴¹⁴ Exhibit 61, Document 30.2, pp. 2 and 4.

⁴¹⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 26, para. 125.

388. Based on this, the Board identifies significant weaknesses regarding the PSI's design of the mapping rules that it used to identify the data received from the reporting parties and populate the different EMIR data fields and subsequently monitoring the correctness of reports sent to Regulators. Given the importance of ensuring that the Regulators have direct and immediate access to the data that they need to fulfil their mandates and to detect any under- or over-reporting at an early stage, these defects constitute "systemic weaknesses in the organisation" of the PSI.

389. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply

390. The Board considers that regarding the infringement at Point (b) of Section III of Annex I of the Regulation, "quality of data" operates within the context of the principal objective of introducing the reporting requirement under the Regulation, which is to ensure that Regulators have timely and complete access to the relevant data in order to be able to perform their mandates and responsibilities.

391. As indicated above, the mapping rules (thus including the "counterparty side" mapping rules) were implemented in the PSI's system to transform the data before storing it in the ITR table, which was the data source used by the PSI to report data to Regulators under the Regulation.⁴¹⁶

392. As a result, when the "Buyer Value" and the "Trade Party 1 Value" did not match, the data included in the ITR table was no longer consistent with the data that had been reported by counterparties and CCPs and, therefore, impacted the quality of the data that the TR maintains in its system.

393. With regards to FX derivatives trades, the issue had an impact on six types of reports (i.e. 4 Regulator reports and 2 participant reports) and affected approximately 2.15 million (i.e. more than 40%) of the FX records within the PSI's system. With regards to equity derivatives asset class, the issue had an impact on 13 types of reports (i.e. 2 Regulator reports, 5 TRACE reports and 6 participant reports) and impacted approximately 300,000 trades per day between November 2015 to 28 April 2017. In both cases, the TR reconciliation was also impacted.⁴¹⁷

394. Based on the above, the Board considers that the infringement has had a negative impact on the quality of the data that the PSI maintained and, therefore, the aggravating factor is applicable.

⁴¹⁶ Exhibit 10, PSI's Response to the IIO's First RFI, p.11, para. 40.

⁴¹⁷ See Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, pp. 23-24, paras.111-118.

Applicable mitigating factors

395. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board considers that no mitigating factors are applicable.

Determination of the adjusted fine

396. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

397. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Point I(a), Point I(b), Point I(c) and Point I(d) of Annex II is added to the basic amount:

Aggravating factor set out in Annex II, Point I(a):

EUR 20 000 x 1,1 = EUR 22 000

EUR 22 000 – EUR 20 000 = EUR 2 000

1 repetition: 1 x 2 000 = 2 000

Aggravating factor set out in Annex II, Point I(b):

EUR 20 000 x 1,5 = EUR 30 000

EUR 30 000 – EUR 20 000 = EUR 10 000

Aggravating factor set out in Annex II, Point I(c):

EUR 20 000 x 2,2= EUR 44 000

EUR 44 000 – EUR 20 000 = EUR 24 000

Aggravating factor set out in Annex II, Point I(d):

EUR 20 000 x 1,5 = EUR 30 0000

EUR 30 0000– EUR 20 000 = EUR 10 000

Adjusted fine taking into account applicable aggravating factors:

EUR 20 000 + EUR 2 000 + EUR 10 000 + EUR 24 000 + EUR 10 000 = EUR 66 000

398. Consequently, following adjustment by taking into account the applicable aggravating factors, the amount of the fine to be imposed on the PSI amounts to EUR 66 000.

Application of the fine

399. The Board notes that Article 65(4) of the Regulation, second paragraph, provides that “Where an act or omission of a trade repository constitutes more than one infringement listed in Annex I, only the higher fine calculated in accordance with paragraphs 2 and 3 and relating to one of those infringements shall apply”.
400. The Board considers that the infringement related to the PSI’s “counterparty side” mapping rules that altered the substance of the data reported (established by the Board above in Section 5) and the present infringement due to the PSI submitting reports to Regulators containing data that was inconsistent with the information received under Article 9 of the Regulation, despite being autonomous, are stemming from the same (incorrect) mapping rules related to the “counterparty side” field.
401. Article 65(4) of the Regulation, second paragraph, is applicable regarding the fines calculated for the infringements by the PSI related to the PSI’s mapping rules that altered the substance of the data reported and the PSI submitting reports to Regulators containing data that was inconsistent with the information received. Only the highest fine should be imposed, and since in this case the two fines are of the same amount, only one fine of EUR 66 000 should be imposed.

Supervisory measures

402. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.
403. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue in 2017, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

7 Findings of the Board with regard to the PSI not providing regulators having a CCP supervisory or oversight mandate with access to certain data

404. This section of the decision analyses whether the PSI breached the following requirement:
- “A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates” (Article 81(2) of the Regulation).
405. If this requirement is not met, the infringement set out at Point (b) of Section III of Annex I of the Regulation is established.

Analysis of the relevant provisions of the Regulation

406. The issue at stake in this case is whether the PSI has breached its obligation under Article 81(2), read in combination with Article 81(3)(e) and (g) of the Regulation⁴¹⁸, to give the competent authorities supervising CCPs ('CCP Supervisors') and the relevant ESCB members ('CCP Overseers') direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.
407. As set out above, from 12 February 2014 to 16 March 2018, the PSI did not provide regulators having a CCP supervisory or oversight mandate ('CCP Supervisors and Overseers' or 'CCP Regulators') with access to data regarding those transactions where a CCP located in their jurisdiction was reported in the 'CCP' field, unless the CCP was also a counterparty of the trade.
408. The issue was due to the PSI's interpretation of the relevant EMIR requirements.
409. The Board takes into account the wording of Articles 81(2) and 81(3) (e) and (g) of the Regulation as well as their context.

The wording of Articles 81(2) and 81(3) (e) and (g) of the Regulation

410. The wording of Article 81(2) is clear. The PSI has an obligation to provide Regulators with "direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates". The only limiting factor, as set out in Article 81(2), to a Regulator's access is the Regulator's "responsibilities and mandates".
411. Article 81(3)(e) and (g) of the Regulation provides that "A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibility and mandates: [...] (e) the competent authorities supervising CCPs accessing the trade repositories; [...] (e) the relevant members of the ESCB [...]".
412. Further specifications regarding the data to be provided to Regulators are included in Article 2(17) – formerly Article 2(4) - of the Delegated Regulation (EU) No 151/2013. According to this provision, "A trade repository shall provide an authority supervising a central counterparty (CCP), and the relevant members of the European

⁴¹⁸ Ex Articles 81(3)(c) and (e) of the Regulation.

Article 81 of the Regulation was amended by the Regulation (EU) 2015/2365, which entered into force on 12 January 2016. On that day, the former Article 81(3)(c) of the Regulation ("A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates: [...], the **competent authority supervising CCPs** accessing the trade repositories") became Article 81(3)(e). The former Article 81(3)(e) ("A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:[...] the **relevant members of the ESCB**") was replaced by Article 81(3)(g) ("A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:[...] the **relevant members of the ESCB**, including the ECB in carrying out its tasks within a single supervisory mechanism under Council Regulation (EU) No 1024/2013").

System of Central Banks (ESCB) overseeing that CCP, where applicable, with access to all transaction data on derivatives cleared by that CCP”.

413. In this regard, the Board notes that there is a slight difference in wording between the former Article 2(4) and the current Article 2(17). While the current Article 2(17) states that TRs shall provide CCP Supervisors and Overseers with access to all transaction data on derivatives “cleared” by CCPs under their jurisdiction, the former Article 2(4), applicable until 11 April 2019, provided that “A trade repository shall provide a competent authority supervising a CCP and the relevant members of the European System of Central Banks (ESCB) overseeing the CCP, where applicable, with access to all the transaction data cleared or reported by the CCP.”
414. The Board acknowledges that the IIO, on the basis of the above, considered and dismissed the argument that until 11 April 2019, TRs had the choice to provide CCP Supervisors and Overseers with either the transaction data cleared by a CCP (in which case, they would be provided with data regarding all the transactions in which a CCP under their jurisdiction was mentioned in the “CCP” field of the reports) or the data reported by a CCP (in which case, they would be provided with data regarding those transactions where the CCPs under their jurisdiction were mentioned in the “counterparty ID” or “ID of the other counterparty” fields and/or “Reporting entity ID” field of the reports). In agreement with the IIO, the Board considers that such reading of the former Article 2(4) of the Delegated Regulation (EU) No 151/2013 would not be in line with Article 81(3)(e) of the Regulation⁴¹⁹. The transactions reported by CCPs comprise only a small part of the transactions in which a CCP is involved. Therefore, by merely providing CCP Supervisors and Overseers with the transactional data reported by CCPs under their jurisdiction, TRs would not comply with their obligation under Article 81(3) of the Regulation as they would not be providing them with all the data that they need to fulfil their responsibilities and mandates.
415. The Board agrees with the IIO’s view that, the reference to “or reported” in the former Article 2(4) should be understood as a digression. The Board notes that the IIO’s interpretation is also supported by Recital 5 of the Delegated Regulation (EU) No 151/2013 according to which “Supervisors and overseers of central counterparties (CCPs) need access to enable the effective exercise of their duties over such entities, and should therefore have access to all the information necessary for such mandate”, and by the current wording of Article 2(17) of the Delegated Regulation (EU) No 151/2013.
416. It is thus clear in both versions of the Delegated Regulation (EU) No 151/2013, that CCP Supervisors should have access to all transaction data on derivatives cleared by a CCP under their jurisdiction, irrespective of whether this CCP is a counterparty to the trade or has reported it to the TR. It is also clear that, when they act as CCP Overseers, ESCB members should also have access to that data.

⁴¹⁹ Ex Article 81(3)(c) of the Regulation.

The context and purpose of Articles 81(3) (e) and (g) read in conjunction with Article 81(2) of the Regulation

417. While the Board agrees with the IIO that the wording of the provision is unambiguous, the PSI has submitted that “[...] DDRL seeks guidance from ESMA regarding cleared trades. DDRL believes that the filtering rules it has implemented comply with EMIR 81.3(c). DDRL has interpreted EMIR 81.3(c) to limit the provision of data to the regulators of CCPs to the transactions where the CCPs in their jurisdiction are acting as counterparties. DDRL illustrates its understanding below: (a) Dealer A has a customer X that wishes to enter into a derivatives transaction. Dealer A arranges a transaction with Dealer B. Dealer B has a customer Y that will hold the opposite position as customer X, Dealer B enters into a derivative transaction with customer Y, Dealers A and B novate their transactions to a CCP. The CCP reports the entire chain of transactions to the TR as a delegated reporting entity. It is DDRL’s interpretation that the transactions between Dealer A and Customer X and between Dealer B and Customer Y are reportable as uncleared transactions. Thus, only the novating transactions between Dealer A and the CCP and Dealer B and the CCP are cleared transactions which should be reported to the CCP’s regulator. The opening transactions, as well as any back-to-back transactions between dealers are of interest to the regulators overseeing market abuse in their jurisdiction whereas the novated transactions are of interest to the CCP’s regulator as the CCP has a risk position only in the novated transactions. DDRL believes there is confusion across the industry regarding the reporting of cleared trades and would welcome guidance from ESMA about which legs of the reporting flow should be reported as cleared trades and which trades should be reported to the regulators of CCPs. Some market participants only report transactions B and C [...] as cleared; some participants report A, B, C, D as cleared. (b) In the event that ESMA disagrees with DDRL’s interpretation of EMIR 81.3(c), DDRL will add functionality into the SDO to identify CCPs by regulator and implement this within DDRL’s technical solution”.⁴²⁰

418. Thus, for completeness, the Board assesses the context and the objectives pursued by the rule of which it is part in accordance with the settled case-law of the Court of Justice of the European Union (“CJEU”)⁴²¹.

419. Regarding the **context** of the requirement, the Board notes the following.

420. First, the Board notes the differences in wording between the paragraphs of Article 2 of the Delegated Regulation (EU) No 151/2013 and the associated recitals.

421. The former Article 2(9) of the Delegated Regulation (EU) No 151/2013⁴²², applicable until 11 April 2019, indicated that “a trade repository shall provide [...] the

⁴²⁰ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, pp. 3-4.

⁴²¹ See for example CJEU, Case C-33/11, A Oy, 19 July 2012, para. 27.

⁴²² The former Article 2(9) of the Delegated Regulation (EU) No 151/2013 has been replaced by Articles 2(9), regarding the ESCB members whose currency is the euro, and Article 2(11), regarding the ESCB members whose currency is not the Euro. According to the new Article 2(9) and 2(11), a TR shall provide the ESCB members with all transaction data on derivatives where the reference entity of the derivative is established within the Member State of that ESCB member and falls within the scope of the

relevant members of the ESCB with transaction level data (a) for all counterparties within their respective jurisdictions; (b) for derivatives contracts where the reference entity of the derivative contract is located within their respective jurisdiction or where the reference obligation is sovereign debt of the respective jurisdiction.”; whereas the former Article 2(4)⁴²³, indicated that “ a trade repository shall provide a competent authority supervising a CCP and the relevant member of the European System of Central Banks (ESCB) overseeing the CCP, where applicable, with access to all the transaction data cleared or reported by the CCP.”

422. Similarly, Recital 4 of the Delegated Regulation (EU) No 151/2013 indicates that “[...] the relevant members of the European System of Central Banks (ESCB) [...] have a mandate for monitoring and preserving financial stability in the Union, and should therefore have access to transaction data for all counterparties for the purpose of their respective task in that regard”; whereas Recital 5 states that “Supervision and overseers of central counterparties (CCPs) need access to enable the effective exercise of their duties over of such entities, and should therefore have access to all the information necessary for their mandate.”

423. By comparing and putting into context the wording of the two provisions and the recitals, it is clear that, when it comes to CCPs, the intention of the legislator was to provide CCP Supervisors and Overseers with access to data regarding all the transactions in which a CCP under supervision or oversight is involved and not to limit their access to transaction data regarding those trades where the CCP under their jurisdiction was acting as a counterparty to the trade.

424. Second, the Board notes that the former Article 2(4) and 2(9) of the Delegated Regulation (EU) No 151/2013 both referred to ESCB members. If, as suggested by the PSI, the former Article 2(4) was to be interpreted as limiting the provision of data to the records regarding those transactions where the CCPs under their jurisdiction are acting as counterparties, the reference to the ESCB members with an oversight mandate over CCPs in the former Article 2(4) of the Delegated Regulation (EU) No 151/2013 would have been redundant because the former Article 2(9)(a) already provided that ESCB members should receive transaction level for all counterparties within their respective jurisdictions.

425. However, as explained in the Recital 6 of the Delegated Regulation (EU) No 151/2013. “Access by the relevant ESCB members serves to fulfil their basic tasks, most notably the functions of a central bank of issue, their financial stability mandate, and in some cases prudential supervision over some counterparties. Since certain ESCB members have different mandates under national legislation, they should be

member according to that member's supervisory responsibilities and mandates, or where the reference obligation is sovereign debt of the Member State of that ESCB member. TRs shall also provide ESCB members whose currency is the Euro with all transaction level data on derivatives where the reference obligation is sovereign debt of any Member State whose currency is the Euro. In addition, according to the new Article 2(10) and 2(12) of the Delegated Regulation (EU) No 151/2013, a TR shall provide an authority listed in Article 81(3) of Regulation (EU) No 648/2012 that monitors systemic risks to financial stability with access to all transaction data on derivatives concluded on trading venues or by CCPs and counterparties that fall under the responsibilities and mandates of that authority when monitoring systemic risks to financial stability.

⁴²³ The former Article 2(4) of the Delegated Regulation (EU) No 151/2013 has now become Article 2(17).

granted access to data in accordance to the different mandates listed in Article 81(3) of Regulation (EU) No 648/2012". Therefore, mentioning the ESCB members overseeing CCPs in the former Article 2(4) of the Delegated Regulation (EU) No 151/2013 was deliberate. The same conclusion is reached when comparing and putting into context the wording of the current Articles 2(9), 2(10), 2(11), 2(12) and 2(17) of the Delegated Regulation (EU) No 151/2013.

426. It is thus also clear that by putting in place different rules for ESCB members, one of them applicable only when the ESCB members have an oversight mandate over CCPs, the legislator's intention was to make sure that there is no over- or under-reporting and that the access provided to each ESCB members is actually tailored to their specific mandate.

427. Turning to the **purpose** of the requirement, the Board notes the following.

428. First, the Board notes that according to Articles 2(1) and 2(3) of the Regulation "CCP' means a legal person that interposes itself between the counterparties to the contracts traded on one or more financial markets, becoming the buyer to every seller and the seller to every buyer" and "clearing' means the process of establishing positions, including the calculation of net obligations, and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions".

429. However, the clearing can be done through a direct or indirect clearing arrangement.⁴²⁴ As explained in the Recital 33 of the Regulation "As not all market participants that are subject to the clearing obligation are able to become clearing members of the CCP, they should have the possibility to access CCPs as clients or indirect clients subject to certain conditions."

430. This possibility is afforded in Article 4(3) of the Regulation, which provides that: "The OTC derivative contracts that are subject to the clearing obligation pursuant to paragraph 1 shall be cleared in a CCP [...] For that purpose a counterparty shall become a clearing member, a client, or shall establish indirect clearing arrangements with a clearing member, provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty benefit from protection with equivalent effect to that referred to in Articles 39 and 48".

431. Therefore, where market participants are not able to become themselves clearing members of the CCP, they must become either clients⁴²⁵ or indirect clients⁴²⁶ of a clearing member of a CCP and, the latter will enable them to clear its transactions with the CCP. The client thus enters into a transaction with the clearing member (i.e. a

⁴²⁴ According to Article 1(b) of the Delegated Regulation (EU) No 149/2013, an indirect clearing arrangement is "the set of contractual relationships between the central counterparty (CCP), the clearing member, the client of a clearing member and indirect client that allows the client of a clearing member to provide clearing services to an indirect client".

⁴²⁵ Under Article 2(15) of the Regulation, "client" means "an undertaking with a contractual relationship with a clearing member of a CCP which enables that undertaking to clear its transactions with that CCP".

⁴²⁶ Under Article 1(a) of the Delegated Regulation (EU) No 149/2013 an "indirect client" is defined as "client of a client of a clearing member".

back-to-back transaction), which in turn enters into a transaction with the CCP to clear the trade. If the market participant becomes an indirect client of a clearing member, there would be an additional layer, i.e. a back-to-back transaction between a client of the clearing member and the indirect client.

432. Second, the Board also notes that the responsibilities of CCP Supervisors and Overseers, among others, include reviewing the arrangements, strategies, processes and mechanisms implemented by CCPs to comply with the Regulation and evaluating the risks to which CCPs are, or might be, exposed (Article 21(1) of the Regulation).

433. In this regard, as explained in the Recital 4 of the Delegated Regulation (EU) No 149/2013, “an indirect clearing arrangement should not expose a CCP, clearing member, client or indirect client to additional counterparty risk and the assets and positions of the indirect client should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangements comply with minimum conditions for ensuring their safety. [...]”. Therefore, CCP Supervisors and Overseers should be able to supervise that, in accordance with Article 3(2) of the Delegated Regulation (EU) No 149/2013, the CCP is able “to identify, monitor and manage any material risks arising from indirect clearing arrangements that could affect the resilience of the CCP” at all times.

434. It is thus clear that in order to be able to adequately carry out their tasks under the Regulation (and in particular, under Article 21 of the Regulation), CCP Supervisors and Overseers need to have direct and immediate access to all the transaction data regarding all the trades linked to the clearing services provided by the CCP under their supervision or oversight (i.e. all the transactions, including the back-to-back transactions of a clearing arrangement, and not just to the specific transactions in which the CCP under their supervision or oversight is acting as a counterparty to the trade).

Analysis of the access to information provided by the PSI to CCP Supervisors and Overseers

435. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the specific access to the data that the PSI provided to the CCP Supervisors and Overseers, the Board notes the following.

436. The PSI did not have a set of filtering rules to provide CCP Supervisors with access to the data in place. As explained above, the PSI created a single set of filtering rules per asset class for the data access rules set out in the former Article 2(4), 2(9) and 2(10) of the Delegated Regulation (EU) No 151/2013 and even though the former Article 2(4) of the Delegated Regulation (EU) No 151/2013 (like the Article 81(3)(e) of the Regulation⁴²⁷) explicitly refers to the competent authorities supervising CCPs (CCP Supervisors), which might not necessarily be ESCB members⁴²⁸, the set of filtering

⁴²⁷ Ex Article 81(3)(c) of the Regulation.

⁴²⁸ Exhibit 105, Public Information folder, “List of competent authorities for the purposes of EMIR”.

rules only referred to the ESCB members. In addition, the set of filtering rules was not comprehensive, as it did not include any filtering rule to provide CCP Overseers with data regarding all the transactions cleared by the CCPs under their oversight.

437. According to this set of filtering rules (as contained in the Traceability Matrix), ESCB members were provided with data regarding those transactions in which (i) a market participant under their supervision was a counterparty to the trade (“Counterparty Location Rule”) or (ii) the underlying was any basket or index. In addition, with regards to credit and equity derivatives contracts, the ESCB members were also provided with data regarding those transactions in which the underlying was in their jurisdiction.

438. During the interviews that followed the investigation of ESMA’s Supervisors, the PSI explained that access to CCP Supervisors and Overseers was covered by the Counterparty Location Rule⁴²⁹. On 29 September 2018, the PSI confirmed that since the start of the reporting obligation under the Regulation on 12 February 2014, it had only provided CCP Supervisors and Overseers with information on trades in which the CCP located in their jurisdiction was acting as a counterparty to the trades but not with trades where without being a counterparty, the CCP was reported in the “CCP” field.⁴³⁰

Conclusion

439. The Board thus finds that by not having appropriate filtering rules in place and, as a result, by failing to provide CCP Supervisors and Overseers with transaction data regarding all the trades in which a CCP under their jurisdiction was mentioned in the “CCP” field of the reports submitted by counterparties and CCPs under Article 9 of the Regulation (i.e. regarding all the trades cleared by the CCP under their supervision or oversight), the PSI committed the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Intent or negligence

440. The factual background in the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

441. It should therefore be assessed whether the PSI acted with negligence.

Assessment of whether there is negligence in the present case

442. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the reasoning developed above in Section 4.

⁴²⁹ Supervisory Report, Exhibit 014, ESMA80-189-1540 - DDRL PVL, p. 13.

⁴³⁰ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 5, para. 18.

443. Regarding the facts at hand in the present case, the Board considers that the following should be taken into consideration to assess whether the PSI has been negligent.
444. First, the Board notes that, as explained above⁴³¹, the provision of Article 81(2) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI's position could not have failed to foresee that Article 81(2) requires correct and reliable reports to be provided to the Regulators.
445. Second, the Board notes that, according to the explanations provided by the PSI in response to the IIO's First RFI, the process to define and implement filtering rules involved among others the review of the EMIR Data Access Rules and that the filtering rules put in place by the PSI to determine the content of the reports to be provided to the onboarded Regulators were, inter alia, reviewed by the PSI's Legal and Compliance team.
446. With regards to Article 81(3)(e) of the Regulation⁴³², the PSI has repeatedly indicated that "DDRL defined and implemented filtering rules for reporting trade data to CCP regulators only where CCPs were direct counterparties to trades. DDRL designed the filtering rules in this way because it had interpreted the EMIR Data Access Rules as only requiring the provision of this type of trade data to CCP regulators".⁴³³
447. In its Response to the IIO's initial Statement of Finding, the PSI argued that "[...] DDRL notes that the IIO acknowledge in the Statement of Findings that Article 2(4) of the Delegated Regulation is capable of multiple forms of interpretation. [...] Following its assessment of the requirements of the Delegated Regulation, DDRL took the reasoned view that the correct interpretation of Article 81(3)(c) of the Regulation (and by extension, Article 2(4) of the Delegated Regulation) was that DDRL was required to provide CCP Supervisors and Overseers with the data regarding only those transactions where a CCP located in their jurisdiction was also a counterparty to the trade."⁴³⁴
448. The Board agrees with the IIO's dismissal of the PSI's argumentation.
449. The Board finds that Article 2(4) of the Delegated Regulation was not open to multiple forms of interpretation. As explained above, in order to comply with Article 81(3) of the Regulation, TRs must provide CCP Supervisors and Overseers with data regarding all the transactions in which a CCP under their supervision is involved.
450. The Board further notes that (i) the consultation paper regarding the draft regulatory technical standards⁴³⁵ already referred to "all the transactions data cleared or reported by the CCP" and that, even though the PSI responded to ESMA's public

⁴³¹ See paragraph 410 of this Decision.

⁴³² Ex Article 81(3)(c) of the Regulation.

⁴³³ Exhibit 10, PSI's Response to the IIO's First RFI, p.26, para. 92, lit (a). See also Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL , pp. 3-4.

⁴³⁴ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p. 15, para. 4.18.

⁴³⁵ Exhibit 129, Public Information folder, "ESMA/2012/379", p. 165.

consultation, it did not raise any comments in this respect⁴³⁶; and (ii) in the final report adopted on 27 September 2012 the following was indicated: “Supervisors and overseers of CCPs, who need to access TR data for performing their duties over such entities, should have access to all transaction level data on transactions cleared or reported by the supervised CCP.” Indeed, the transactions cleared refers to the transactions cleared by the CCP and reported to the relevant TR, which might be reported by the original counterparties or third parties. Transactions reported means transactions cleared and reported by the CCP.”⁴³⁷ [emphasis added]. Therefore, the Board considers that since 27 September 2012 it was clear (and should have been clear to the PSI) that after the start of the reporting obligation the PSI would have to report all the transactions cleared by CCPs whether they were reported by the CCP or by others.

451. Moreover, the Board notes that before 16 March 2018 the PSI was not providing CCP Supervisors and Overseers with all the transactions cleared by CCPs under their supervision or oversight nor with all the transactions reported by those CCPs. Without beforehand conducting a proper internal or external assessment of its obligations under Article 81(3)(e) of the Regulation⁴³⁸, the PSI decided to provide CCP Supervisors and Overseers with a completely different subset of transactions in which CCPs under their jurisdictions were involved, i.e. only with those transactions in which the CCPs under their supervision or oversight were a counterparty to the trades.

452. The Board finds that the PSI’s way of proceeding denotes a clear lack of care.

453. Third, the Board notes that the PSI created a single set of filtering rules per asset class for the EMIR Data Access Rules set out in the former Articles 2(4), 2(9) and 2(10) of the Delegated Regulation (EU) No 151/2013 both in the BRD and in the Traceability Matrix and this set of filtering rules did not refer to CCP Supervisors and Overseers but only to ESCB members. The Regulators supervising CCPs can be ESCB members. However, this is not necessarily always the case.⁴³⁹

454. In this regard, the PSI’s argued in its Response to the IIO’s initial Statement of Findings that “the IIO should not have taken [the above] into account when assessing whether DDRL was negligent. The matters giving rise to the Alleged CCP Reporting Infringement arose from how DDRL had interpreted the relevant provisions of the Regulation and the Delegated Regulation rather than the fact that DDRL had a single set of filtering rules”.⁴⁴⁰

455. The Board agrees with the IIO’s dismissal of the PSI’s argumentation, as there is no issue of interpretation. Moreover, the fact that the PSI set up a single set of filtering rules for several EMIR Data Access Rules, indicating only that they were applicable to

⁴³⁶ Exhibit 130, Public Information folder, “esma response tr final”.

⁴³⁷ Exhibit 131, Public Information folder, “ESMA/2012/600”, p. 64.

⁴³⁸ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 16, para. 59.

⁴³⁹ See Exhibit 105, List of competent authorities for the purposes of EMIR. For instance, in Belgium, the national competent authorities for CCPs are the Autoriteit voor Financiële Diensten en Markten / Autorité des services et marchés financiers (FSMA) and the Nationale Bank van België / Banque nationale de Belgique (NBB). Only the NBB is an ESCB member.

⁴⁴⁰ Exhibit 124, PSI’s Response to the IIO’s initial Statement of Findings, p. 26, para. 1.

ESCB members, also denotes a clear lack of care to ensure that all CCP Supervisors and Overseers got access to the data that they needed to fulfil their respective mandates and that there was no under- or over-reporting.

456. Fourth, in response to the PVL, the PSI stated that “As discussed with ESMA earlier this month, DDRL seeks guidance from ESMA regarding cleared trades. [...] It is DDRL’s interpretation that the transactions between Dealer A and Customer X, and between Dealer B and Customer Y are reportable as uncleared transactions. Thus, only the novating transaction between Dealer A and the CCP and Dealer B and the CCP are cleared transactions which should be reported to the CCP’s regulator. [...]. DDRL believes there is confusion across the industry regarding the reporting of cleared trades and would welcome guidance from ESMA about which legs of the reporting flow should be reported as cleared trades and which trades should be reported to the regulators of CCPs. Some market participants only report transactions B and C [...] as cleared; some participants report A, B, C and D as cleared.”⁴⁴¹

457. However, the Board finds that on 5 August 2013, ESMA already responded to a question regarding precisely whether the back-to-back contracts in a clearing arrangement are to be considered cleared or uncleared OTC derivative contracts for the purposes of EMIR (see General Question No 2 of the Q&A on EMIR Implementation). In the response, ESMA clarified that “In those jurisdictions in which the principal-to-principal model exists, the back-to-back contract is an integral part of the overall principal-to-principal model of OTC derivative client clearing. While it is a distinct legal contract from that to which the CCP is a counterparty, it does comprise one leg of the overall client clearing arrangement and exists solely to pass the legal and economic effects of CCP clearing onto the client. Article 4(3) of EMIR provides that ‘for ... [the] purpose ... [of meeting the clearing obligation] a counterparty shall become ... a client’. Where a counterparty to an OTC derivative contract has become a client (as foreseen in Article 4(3) of EMIR), the OTC derivative contract has been submitted to CCP clearing, and the CCP has recorded the OTC derivative trade in an individually segregated or omnibus client account), then the client is considered to have fulfilled all of its clearing obligations under EMIR in respect of both the original OTC derivative contract and in respect of any other legal contract which is created as part of the operational mechanics of the client clearing process (i.e. the back-to-back contract). Because the back-to-back contract is considered to have been cleared (in the context of Article 4 of EMIR), then the risk mitigation techniques for OTC derivative contracts not cleared by a CCP would not apply.”⁴⁴²

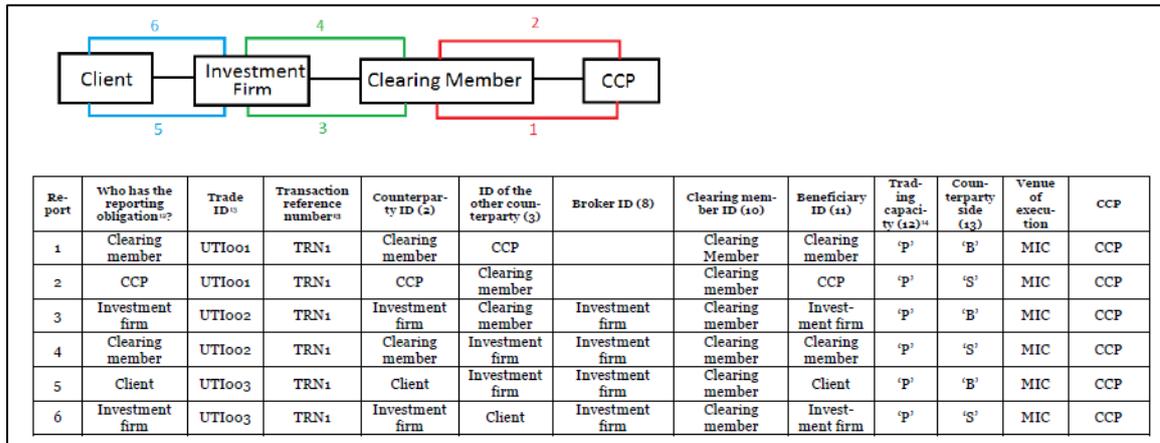
458. In addition, with regards to ETD reporting, the example provided on 20 December 2013 in the Q&A on EMIR implementation (see figure below)⁴⁴³ shows that all the transactions linked to the clearing (including any the back-to-back transactions)

⁴⁴¹ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, pp. 3-4; In this regard, see also Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 26, para. 92.

⁴⁴² Exhibit 106, Public information folder, “2013_1633_qa_iv_on_emir_implementation”, pp. 8-9.

⁴⁴³ Exhibit 107, Public information folder, “2013-1959_qa_on_emir_implementation”, p. 59.

also have to be reported to a TR and that the CCP clearing the derivative contract has to be indicated in the “CCP” field in all the reports.



459. In this regard, the PSI also indicated that its interpretation was that “[...] The opening transactions, as well as any back-to-back transactions between dealers, are of interest to the regulators overseeing market abuse in the jurisdictions whereas the novated transactions are of interest to the CCP’s regulator as the CCP has a risk position only in the novated transaction [...]”.⁴⁴⁴ However, when the PSI was asked to provide all supporting documentation dating from before 16 March 2018⁴⁴⁵ supporting this view, the PSI responded that “DDRL has not identified any documents dating from before 16 March 2018 which expressly record the assessment described in [the request]”⁴⁴⁶.

460. In this regard, the Board further notes that on 20 December 2013, ESMA had already clarified that “one of the main purposes of the EMIR reporting obligation is to enable the authorities to identify and analyse risk positions, although the reports will have other uses as well. Therefore, an authority analysing EMIR reports would expect to see the counterparties where the risk lies once the contract has been concluded. Under the principal clearing model, upon clearing, the risk lies on the clearing member (“CM”) vis-à-vis the CCP and on the client of the CM vis-à-vis the CM. Under this clearing model, when the client of the CM is an investment firm, the latter bears the risk arising from the derivative transaction vis-à-vis the CM, regardless of the investment service provided to its own clients. In order to achieve the objective of identifying risk positions, all of the following will be deemed to be counterparties of the trades arising from a derivative transaction and thus having an EMIR reporting obligation: 1. The CCP clearing the derivative contract 2. The clearing members of the CCP that are clearing the derivative contract 3. The MiFID investment firms involved in the trade chain anytime they bear the risk arising from the derivative transaction by virtue of its contractual relationship with their counterparties (in particular, with the clearing member) 4. Other parties that do not fall into any of the categories above and that take the risk arising from the derivative transaction, except when they are exempt because

⁴⁴⁴ Supervisory Report, Exhibit 015, Response to ESMA Preliminary views 2017-09-20 FINAL, p. 4.

⁴⁴⁵ Date in which the PSI updated its filtering rules regarding CCP Supervisors and Overseers.

⁴⁴⁶ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 16, para. 59.

of their status. All these parties have an obligation to report any trades with their own counterparties arising from a derivative contract. The latter holds true irrespective of whether they are in a “back to back” situation between two other parties or whether they bear the risk arising from a derivative contract vis-à-vis their counterparties according to a different arrangement, whereby the legal and economic effects of the contract are transferred to them. [...]”.⁴⁴⁷

461. In its Response to the IIO’s initial Statement of Findings, the PSI argued that “General Question 2, ESMA was considering whether a back-to-back contract would itself be subject to the clearing obligation or the risk mitigation techniques set out in the Regulation, while on ETDs Reporting Question 2, ESMA was considering which parties are required to report ETD contracts. Accordingly, neither question directly considers the issues within the scope of the Alleged CCP Reporting Infringement”⁴⁴⁸.

462. The Board agrees with the IIO’s view that the responses to General Question 2 and ETDs Reporting Question 2 are relevant for the assessment of whether there was negligence in this case because they refer to important aspects of the reporting of cleared transactions. The responses to these two questions demonstrate that it was already clear in December 2013 (i.e. before the start of the reporting obligation under the Regulation) that all the legs of the reporting flow are considered cleared derivative contracts for the purposes of EMIR and that they should be reported as such to TRs. It was also clear that, contrary to the PSI’s allegations, in order to be able to evaluate the risks to which CCPs are, or might be, exposed, a CCP Supervisor or Overseer is entitled to see data regarding all the transactions where the risk lies once the cleared derivative contract has been concluded and not just the transaction data regarding the reports in which the CCP itself is a counterparty.

463. In its Response to the IIO’s initial Statement of Findings, the PSI also indicated that “given the widespread uncertainty in the industry on this issue, DDRL sought guidance from ESMA (in discussions as well as in its response to ESMA’s Preliminary Views Letter dated 24 August 2017) as to the correct interpretation of Article 81(3)(c) of the Regulation and, by extension, also Article 2(4) of the Delegated Regulation. Accordingly, on 16 March 2018, DDRL remediated the issue by updating its filtering rules and duly informed ESMA”.⁴⁴⁹

464. In this regard, the Board notes that the discussions with ESMA’s Supervisors to which the PSI is referring started only after an investigation was opened by ESMA⁴⁵⁰ and ESMA’s Supervisors had expressed concerns regarding the filtering rules used by the PSI to give CCP Supervisors and Overseers access to the data⁴⁵¹. The PSI had not contacted ESMA before that event. The Board considers that the fact that being uncertain about its obligations (as per its own words) and not proactively contacting

⁴⁴⁷ Exhibit 107, 2013-1959_qa_on_emir_implementation, pp. 57-60.

⁴⁴⁸ Exhibit 124, PSI’s Response to the IIO’s initial Statement of Findings, p. 26, para. 2.

⁴⁴⁹ Exhibit 124, PSI’s Response to the IIO’s initial Statement of Findings, p. 15, para. 4.19.

⁴⁵⁰ Exhibit 15, Supervisors’ Response to the IIO’s Request, p. 10, question 22. See also Exhibit 1, Supervisory Report, p. 26.

⁴⁵¹ Supervisory Report, Exhibit 014, ‘ESMA80-189-1540 - DDRL PVL’, p. 13.

ESMA to dispel the uncertainty until the issue was subject to an investigation also denotes a clear lack of care.

465. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a TR. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entails and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omission, including particularly its infringement of the Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

466. Therefore, the Board considers that the PSI has been negligent when committing the infringement of Point (b) of Section III of Annex I of the Regulation.

Fines

467. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020.

468. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

Determination of the basic amount

469. Article 65 of the Regulation provides in paragraph 2⁴⁵² as follows:

“The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories

⁴⁵² In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 “in Article 65, paragraph 2 is amended as follows: [...] in point (a), ‘EUR 20 000’ is replaced by ‘EUR 200 000’;” However, this is not applicable to the present infringement because the facts occurred before the adoption and entry into force of Regulation (EU) 2019/834.

whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.”

470. It has been established that the PSI negligently committed the infringement set out at Point (b) of Section III of Annex I of the Regulation, by not providing CCP Supervisors and Overseers with transaction data regarding all the records of cleared trades in which a CCP under their jurisdiction was mentioned in the “CCP” field in the reports submitted by counterparties and CCPs under Article 9 of the Regulation.
471. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.
472. In 2020, the PSI had a turnover of USD 124 633 000⁴⁵³ (EUR 109 135 727).
473. Thus, the basic amount of the fine for the infringement listed in Point (b) of Section III of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

474. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO’s findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply

475. The infringement lasted more than six months (i.e. from 12 February 2014 to 16 March 2018). Therefore, the aggravating factor applies.

Annex II, Point I(c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

476. The Board notes that the Regulation does not provide guidance on what constitutes “systemic weaknesses in the organisation of the trade repository”. However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute “systemic weaknesses in the organisation of a TR”.

477. The Board agrees with the IIO’s analysis and considers the type and the level of seriousness of the PSI’s failure that led to the infringement.

478. First, according to the PSI’s Response to the IIO’s initial Statement of Findings, “the issues giving rise to the Alleged CCP Reporting Infringement were not indicative

⁴⁵³ Figures provided in the PSI’s annual report and financial statements for the year ended 31 December 2020, p. 19.

of systemic weaknesses in the organisation of DDRL. This is because DDRL had adequate systems and controls in place to: (a) identify the requirement to assess its regulatory obligations, reasonably assess the requirement and reach a reasonable view on interpretation (albeit that this view was different to the view reached by ESMA); and (b) adjust its mapping rules to align with ESMA's interpretation of the relevant provisions once ESMA clarified its position. Accordingly [...] the aggravating factor at Annex II, Point I(c) of the Regulation should not be applied"⁴⁵⁴

479. With regards to point (a), the PSI considered that "it is wrong for the IIO to conclude that there are systemic weaknesses in the organisation of DDRL simply because it arrived at a different interpretation of Article 2(4) of the Delegated Regulation than ESMA. This is particularly the case in circumstances where, as the IIO has acknowledged, the relevant provision was capable of more than one interpretation".⁴⁵⁵

480. In this regard, and as already set out above, the Board reiterates its finding that Article 2(4) of the Delegated Regulation was not open to multiple forms of interpretation. The Board agrees with the IIO's view that it is clear that in order to comply with Article 81(3) of the Regulation, TRs have to provide CCP Supervisors and Overseers with data regarding all the transactions in which a CCP under their supervision is involved. Moreover, the supervisory expectation in this respect was clear even before the start of the reporting obligation.

481. With regards to point (b), the Board notes that whether the PSI has subsequently adjusted its mapping rules to comply with the Regulation is only relevant to assess whether the PSI has taken remedial action since the breach was identified (i.e. to determine whether the aggravating factor set out at Annex IV, Point I(f) of the Regulation applies) and, if so, whether such measures are sufficient to ensure that a similar infringement cannot be committed in the future (i.e. to determine whether the mitigating factor set out at Annex IV, Point II(d) of the Regulation applies). However, the adoption of remedial action does not exclude the existence of systemic weaknesses in the organisation of the PSI (in its procedures, management systems or internal controls) revealed as a result of the infringement.

482. Second, the infringement stemmed from how the filtering rules to determine the data that should be provided to CCP Supervisors and Overseers were configured and not from an individual error or malfunction. The PSI did not have specific rules for CCP Supervisors and the filtering rules for ESCB members contained in the Traceability Matrix, which the PSI used in practice to provide CCP Supervisors and Overseers with data, were inherently incapable of providing them with the data that they needed to fulfil their mandates as they were designed to only provide them with transaction data when the CCP under their supervision or oversight was a counterparty to the trade.

⁴⁵⁴ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p.5, paras. 2-13 and 2-14. See also p. 18, paras. 4.29.

⁴⁵⁵ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p. 18, para. 4.30.

483. Third, the infringement reveals systemic weaknesses in the organisation of the PSI in relation to its procedures and management system regarding the verification of the filtering rules regarding the Regulators' access to the data on derivative contracts.

484. The PSI stated that the filtering rules put in place by the PSI to determine the content of the reports to be provided to the onboarded Regulators were, inter alia, reviewed by the PSI's Legal and Compliance team.⁴⁵⁶ In spite of it, the filtering rules were badly designed and failed to take into account that according to Article 2(17) of the Delegated Regulation (EU) No 151/2013⁴⁵⁷, CCP Supervisors and Overseers have to be provided with transaction data regarding all the trades cleared by a CCP under their supervision or oversight and not only regarding the trades in which said CCP was a counterparty to the trade. As a result, there was under-reporting.

485. Fourth, the infringement also reveals systemic weaknesses regarding the PSI's over- and under- reporting procedures. [...] Where there were Trade IDs present in the Regulator reports but not in the participant reports, the tool flagged that there was over-reporting and vice versa.⁴⁵⁸ Other parameters according to which a Regulator might have been granted access to the data were not taken into account for the assessment. Therefore, the Board considers that the over-/under- reporting assessment conducted by the PSI was not exhaustive.

486. Based on the above, the Board identifies significant weaknesses regarding the PSI's design and the verification of the filtering rules that it used to provide the Regulators with access to the data. Given the importance of ensuring that the Regulators receive all the data to which they are entitled under Article 81(3) of the Regulation and under Article 2 of the Delegated Regulation (EU) No 151/2013 in order to fulfil their respective mandates and responsibilities, these defects constitute "systemic weaknesses in the organisation" of the PSI.

487. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply

488. The Board considers that regarding the infringement at Point (b) of Section III of Annex I of the Regulation, "quality of data" operates within the context of the principal objective of introducing the reporting requirement under the Regulation, which is to ensure that Regulators have timely and complete access to the relevant data in order to be able to perform their mandates and responsibilities. Delays in providing regulators

⁴⁵⁶ See Exhibit 10, PSI's Response to the IIO's First RFI, p.15, para. 53: "Members of DDRL's Production Services, Product Management and Regulatory Reporting Teams met with DDRL's Legal and Compliance teams as part of the verification process. At this meeting, the filtering rules were explained by members of the Production Services, Product Management and Regulatory Reporting teams to the Legal and Compliance teams, and they were reviewed in their entirety in order to verify that they were compliant with EMIR requirements".

⁴⁵⁷ Ex Article 2(4) of the Delegated Regulation (EU) No 151/2013.

⁴⁵⁸ Exhibit 108, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q3 folder, "11_PROD-018 OTC Over and Under Reporting Procedure", p. 2; Exhibit 109, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q3 folder, "11_PROD-025 ETD Over and Under Reporting Procedure", p. 2; Exhibit 110, Correspondence with ESMA's Supervisors folder, Supervisors' Response to the IIO's Request folder, Q3 folder, "11_PROD-031 OTCLITE Over and Under Reporting Procedure", p. 2.

with access to the complete data that TRs hold reduce the value of such data for Regulators and prevent them from fulfilling their mandates.

489. As a result of the implementation of the set of filtering rules applicable to the Regulators entitled to have access to the data under Article 2(17) of the Delegated Regulation (EU) No 151/2013,⁴⁵⁹ CCP Supervisors and Overseers were not provided with data regarding more than 21 million of OTC and ETD positions and more than 589 million of ETD transactions that had been cleared by CCP under their respective jurisdictions.

490. Based on the above, the Board considers that the infringement has had a negative impact on the quality of the data that the PSI maintains and, therefore, the aggravating factor is applicable.

Applicable mitigating factors

491. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the mitigating factors set out below.

Annex II, Point II(d) if the trade repository has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply

492. The Board considers that the PSI has taken a number of actions, primarily resolving the issues in relation to the infringement:

493. On 24 August 2017, the PSI updated the EMIR business requirements document so as to indicate that "Regulator reports should also include the data on trades cleared by a CCP to regulators that have a CCP supervisory or oversight mandate. To support this SDO is to be updated with a new Type called CCP Jurisdiction in the Entity Regulator Mapping Active Details Section [...]. The regulator reports should also include the data where the country code in SDO CCP Jurisdiction matches the country code of the LEI (from GLEIF) submitted from the filed Clearing Venue – ID".⁴⁶⁰

494. With regards to historical data, the PSI indicated on 9 March 2018 that "The data that was not provided to CCP regulators is available to them and to ESMA through Trace. We can also run ad hoc queries for authorities that do not have Trace access".⁴⁶¹

495. With regards to future trades reported by counterparties and CCPs, the PSI indicated on 9 March 2018 that its Application Development team had been instructed to address the issue: "[...] DDRL must update its entitlement filtering rules to ensure that regulators that have a CCP oversight or supervisory mandate receive the correct data. To support this SDO is to be updated with a new Type called CCP Jurisdiction in

⁴⁵⁹ Ex Article 2(4) of the Delegated Regulation (EU) No 151/2013.

⁴⁶⁰ Exhibit 68, Business Requirements Document - ESMA RTS 2.0, p. 83.

⁴⁶¹ Supervisory Report, Exhibit 068, RE Follow-up question on the Remedial action plan 4a.

the Entity Regulator Mapping Active Details section. When selected a list of ISO 2 digit country codes can be selected which will identify the country code that the regulator has oversight for. The regulator reports should also include the data where the country code in SDO CCP Jurisdiction matches the country code of the LEI (from GLEIF) submitted from the field Clearing Venue – ID⁴⁶² and provided ESMA’s Supervisors with a TRACE Traceability matrix, in which it was indicated that “CCP supervisory or oversight mandate = Regulator - CCP Jurisdiction in the Entity Regulator Mapping in SDO”.⁴⁶³ On 29 September 2018, the PSI indicated to ESMA’s Supervisors that the filtering rules were amended by 16 March 2018.⁴⁶⁴

496. Moreover, in its Response to the IIO’s initial Statement of Findings, the PSI indicated that “further to the above changes, on 28 February 2020 DDRL also voluntarily implemented a dedicated filtering rule for CCP Supervisors and Overseers irrespective of whether they were an ESCB member (i.e. a central bank), following a process which was originally initiated in October 2019. The go-live data for this functionality was originally scheduled for 28 March 2020, however due to COVID-19, this was delayed until 20 June 2020 [...]”.⁴⁶⁵

497. The Board agrees with the IIO’s opinion that these remedial actions should ensure that similar infringement cannot be committed in the future. The Board thus assesses whether these measures were taken voluntarily. If that is the case, the mitigating factor provided by Annex II, Point II(d) of the Regulation is applicable.

498. The Board notes that there is no definition of what “voluntarily” (“de son plein gré” in the French version of the Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a TR has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the TR takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the TR, for example, through an action plan defined and monitored by the supervisor.

499. In the present case, the Board notes the following.

500. Until 20 June 2020, the PSI used one single set of filtering rules per asset class for the former Articles 2(4), 2(9) and 2(10) of the Delegated Regulation (EU) No 151/2013 and they only refer to ESCB members (i.e. central banks). The Board agrees with the IIO’s view that not having a specific rule for CCP Supervisors and Overseers, made it more likely that if the PSI onboarded a new CCP Supervisor (which is not an

⁴⁶² Supervisory Report, Exhibit 068, RE Follow-up question on the Remedial action plan 4a.

⁴⁶³ Exhibit 69, Regulator Entitlements – TRACE.

⁴⁶⁴ Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p. 5, para. 18.

⁴⁶⁵ Exhibit 124, PSI’s Response to the IIO’s initial Statement of Findings, p. 19, para. 4.34; Exhibit 126, Statement of Findings folder, “PSI’s Response to the IIO’s SoF” subfolder, “UKO1-2001349755-v1 Exhibit 2”.

ESCB member), it would not be granted access to data regarding all the transactions cleared by a CCP under its supervision.

501. However, on 28 February 2020, the PSI implemented a dedicated filtering rule for CCP Supervisors and Overseers (irrespective of whether they are ESCB members), which went live on 20 June 2020.⁴⁶⁶

502. In this respect, the Board further notes that, while the IIO's investigation had already started, at the date of implementation of the measures, there was no decision from ESMA ordering the PSI to put an end to its practices and, therefore, whether to take these measures was still within the PSI's remit.

503. In light of the above, the Board considers that the PSI has taken measures to ensure that a similar infringement cannot be committed in the future, and, therefore, the mitigation factor is applicable.

Determination of the adjusted fine

504. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

505. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Point I(b), Point I(c) and Point I(d) of Annex II and the mitigating factor set out in Point II(d) of Annex II is added to the basic amount in the case of the aggravating factors and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex II, Point I(b):

EUR 20 000 x 1,5 = EUR 30 000

EUR 30 000 – EUR 20 000 = EUR 10 000

Aggravating factor set out in Annex II, Point I(c):

EUR 20 000 x 2,2= EUR 44 000

EUR 44 000 – EUR 20 000 = EUR 24 000

Aggravating factor set out in Annex II, Point I(d):

EUR 20 000 x 1,5 = EUR 30 0000

EUR 30 0000– EUR 20 000 = EUR 10 000

⁴⁶⁶ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p.19, para. 4.34.

Mitigating factor set out in Annex II, Point II(d):

EUR 20 000 x 0,6 = EUR 12 000

EUR 20 000 – EUR 12 000 = EUR 8 000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 20 000 + EUR 10 000 + EUR 24 000 + EUR 10 000 – EUR 8 000 = EUR 56 000

506. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI amounts to EUR 56 000.

Supervisory measures

507. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.

508. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue on 16 March 2018, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

8 Findings of the Board with regard to the PSI not providing the AFM and the CSSF with access to certain data

509. This section of the decision analyses whether the PSI breached the following requirement:

“A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates” (Article 81(2) of the Regulation).

510. If this requirement is not met, this would constitute the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Analysis of the relevant provisions of the Regulation

511. The issue at stake in this case is whether the PSI has breached its obligation under Article 81(2) read in conjunction with Article 81(3)(j) (ex Article 81(3)(h)) of the Regulation⁴⁶⁷ to give the relevant Union securities and markets authorities direct and

⁴⁶⁷ Article 81 of the Regulation was amended by the Regulation (EU) 2015/2365, which entered into force on 12 January 2016. On that day, the former Article 81(3)(h) (A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:[...]the **relevant Union securities and market authorities**) was replaced by Article 81(3)(j) (“A trade repository shall make the necessary information available to the following entities to

immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

512. As set out above, from 11 February 2014 to 6 July 2017, the PSI did not provide the AFM with data regarding reported transactions where according to the Reuters Instrument Code (RIC), the underlying of the equity derivative trade was located in the Netherlands because the “RIC Location Mapping” (i.e. the mapping used by the PSI to report market regulators with data regarding equity derivatives contracts where the underlying is located under their jurisdiction) was not among the parameters setup for the AFM in SDO.

513. Similarly, from 22 May 2014 to 6 July 2017, the PSI did not provide the CSSF with data regarding reported transactions where the RIC location was Luxembourg because the “RIC Location Mapping” was not among the parameters set up for the CSSF in SDO.

514. The issue was due to the incorrect setup of the AFM and the CSSF in SDO.

515. The Board takes into account the wording and the context of Articles 81(2) and 81(3) (h) of the Regulation.

516. First, the wording of Article 81(2) is clear. The PSI has an obligation to provide Regulators with “direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates”. The only limiting factor, as set out in Article 81(2), to a Regulator’s access is the Regulator’s “responsibilities and mandates”.

517. Article 81(3)(j) of the Regulation provides that “A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibility and mandates: [...] the relevant Union securities and market authorities whose respective supervisory responsibilities and mandates cover contracts, markets, participants and underlyings which fall within the scope of this Regulation”.⁴⁶⁸

518. Second, further specifications regarding the data to be provided to Regulators are provided by the Delegated Regulation (EU) No 151/2013.

519. In particular, Article 2(8) provides that “A trade repository shall provide an authority referred to in Article 81(3)(j) of Regulation (EU) No 648/2012 with access to all transaction data on derivatives for markets, contracts, underlyings, benchmarks and

enable them to fulfil their respective responsibilities and mandates:[...] the **relevant Union securities and market authorities** whose respective supervisory responsibilities and mandates cover contracts, markets, participants and underlyings which fall within the scope of this Regulation”.

⁴⁶⁸ The former Article 81(3)(h) read as follows: “A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibility and mandates: [...] the relevant Union securities and market authorities”

counterparties that fall under the supervisory responsibilities and mandates of that authority.”⁴⁶⁹

520. Third, the Recitals of the Delegated Regulation (EU) No 151/2013 provide further insights as regards the kind of data that should be provided to each regulator.

521. Recital 7 of the Delegated Regulation (EU) No 151/2013 states that “the relevant Union securities and markets authorities have as a main duty investors protection in their respective jurisdictions and should be granted access to transaction data on markets, participants, products and underlyings covered under by their surveillance and enforcement mandates”.

522. Therefore, Board finds that to comply with Articles 81(2) and 81(3)(j) of the Regulation and Article 2(8) of the Delegated Regulation (EU) No 151/2013, the PSI had to provide market regulators with transactions data for all the contracts, markets, participants and underlyings in their jurisdiction.

Analysis of the access to information provided by the PSI to the AFM and the CSSF

523. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the access to information provided by the PSI to the AFM and the CSSF, the Board notes the following.

524. The PSI created a single set of filtering rules per asset class for the data access rules set out in the former Articles 2(5) and 2(8) of the Delegated Regulation (EU) No 151/2013. Between 12 February 2014 and 25 January 2017, these filtering rules remained broadly unchanged⁴⁷⁰. During this period, the PSI implemented the filtering rules as contained in the Traceability Matrix and not as described in the BRD⁴⁷¹.

525. According to the functional specifications regarding the filtering rules contained in the Traceability Matrix, market regulators had to be provided with transaction data when (i) the location of the counterparty was the same as the location of the market regulator; (ii) the location of the execution venue was the same as the location of the market regulator; (iii) one of the parties had declared the market regulator as its supervisor; or (iv) the underlying was any basket or index.

⁴⁶⁹ Article 2(8) of the Delegated Regulation (EU) No 151/2013 was amended by the Delegated Regulation (EU) 2019/361, which entered into force on 11 April 2019. The former Article 2(8) read as follows: “A trade repository shall provide the relevant Union securities and markets authorities referred to in Article 81(3)(h) of Regulation (EU) No 648/2012 with access to all transaction data on markets, participants, contracts and underlyings that fall within the scope of that authority according to its respective supervisory responsibilities and mandates”.

⁴⁷⁰ With the exception of the changes introduced to implement ESMA’s response to Question 37 d) in the Q&A on EMIR implementation (regarding which Regulators should have access to all transaction data of the derivatives where the underlying identification type is reported with an “X” or a “B”) and the addition of the rules specifically defined for ACER. See Supervisory Report, Exhibit 019, ESMA-CON-45 Simple Rfi, p. 2; See also Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 4, para. 16.

⁴⁷¹ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 4, para. 17; Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 15, para. 57.

526. In addition, with regards to credit and equity derivatives, the market regulator had also to be provided with transaction data when the location of the underlying was the same as the location of the market regulator. In order to provide the market regulators with the relevant data, the PSI developed two types of location mapping: the “Regulator Reference Entity Location Mapping” for credit derivatives and the “RIC Location Mapping” for equity derivatives.
527. According to the functional specifications regarding the filtering rules contained in the Traceability Matrix, prudential regulators had to be provided with transaction data when (i) one of the parties had declared the prudential regulator as its supervisor; or (ii) the underlying was any basket or index.
528. On 11 February 2014, the AFM was onboarded in SDO as a market regulator, but the setup parameters of its account did not include the “RIC Location Mapping”. As a result, unless other filtering criteria were met, between 12 February 2014 and 6 July 2017, the PSI did not provide the AFM with transaction data regarding equity derivatives contracts where the underlying was in the Netherlands.
529. Similarly, on 17 December 2014, the CSSF was onboarded in SDO as a market and prudential regulator but the setup parameters of its account did not include the “RIC Location Mapping”. As a result, unless other filtering criteria were met, between 17 December 2014 and 6 July 2017, the PSI did not provide the CSSF with transaction data regarding equity derivatives contracts where the underlying was in Luxembourg.

Conclusion

530. The Board thus finds that by failing to provide the AFM and the CSSF with the transaction data regarding equity derivatives contracts where the underlyings of those contracts were located in their respective jurisdictions, the PSI committed the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Intent or negligence

531. The factual background in the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
532. It should therefore be assessed whether the PSI acted with negligence.

Assessment of whether there is negligence in the present case

533. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the developments provided above in Section 4.
534. Regarding the facts at hand in the present case, the Board considers that the following should be taken into consideration to assess whether the PSI has been negligent.

535. First, the Board notes that, as explained above⁴⁷², the provision of Article 81(2) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI's position could not have failed to foresee that Article 81(2) requires correct and reliable reports to be provided to the Regulators.
536. Second, both breaches were due to manifest errors committed by the PSI when setting up in SDO the parameters to give the Regulators access to the data. According to the PSI, "the "RIC Location Mapping" was not included in the SDO accounts of the CSSF and the AFM as a result of inadvertent human error"⁴⁷³.
537. In addition, the Board finds that these were not the only errors that the PSI had committed when onboarding Regulators into its reporting system. Even though it had no impact on the reporting, the SDO setup parameters regarding FSMA, CONSOB, BdP, ASF, NBS and HANFA were also not consistent with the information that these Regulators had provided in their Regulator Onboarding Form as regards their mandates and responsibilities.
538. Third, the Board notes that the internal documentation that the PSI used to onboard the Regulators in SDO contained contradictory information as regards the parameters that should be set up in their accounts to ensure that they have access to all the data that they are entitled to receive.
539. For instance, with regards to equity derivatives asset classes, the EMIR business requirements document⁴⁷⁴ indicated that market regulators had to be provided with transaction data where: (i) the participant jurisdiction (derived from the participant GTR) was the same as the market regulator (derived from the Regulator static data); (ii) the participant was mapped to the market regulator; or (iii) the location of the venue in which the contract was executed was located in the jurisdiction of the market regulator; whereas the traceability matrix document⁴⁷⁵ indicated that market regulators had to be provided with transaction data where: (i) the participant jurisdiction (derived from the participant GTR) was the same as the market regulator (derived from the LEI data or the Reporting Party branch location on the trade position); (ii) the participant was mapped to the market regulator; (iii) the location of the venue in which the contract was executed (derived from the MIC); (iv) the underlying was any index or basket; or (v) the RIC location (derived from the trade position) matched the RIC Location Mapping of the Regulator.
540. Fourth, according to the PSI, "[...] DDRL implemented the filtering rules based on the traceability matrix document and not the BRD. The traceability matrix document was maintained and updated and was the document which internal teams used in practice to maintain the systems which used the filtering rules (as opposed to the BRD)"⁴⁷⁶ and "the traceability matrix document was the preferred source of information

⁴⁷² See paragraph 516 of this Decision.

⁴⁷³ Exhibit 10, PSI's Response to the IIO's First RFI, p. 17, para. 64.

⁴⁷⁴ Exhibit 64, Business Requirements Document - EMIR - v2.2, pp. 81-88.

⁴⁷⁵ Supervisory Report, Exhibit 064, Traceability ESMA Regulatory Reporting FS Ver 1.0.

⁴⁷⁶ Exhibit 10, PSI's Response to the IIO's First RFI, pp. 15-16, para. 57.

to determine queries regarding the filtering rules as it was a streamlined version of the BRDs, containing only the filtering rules”.⁴⁷⁷

541. However, the Board notes that, although it was clear from the Traceability Matrix that market regulators should have the “RIC Location Mapping” among its SDO setup parameters in order to be able to receive transaction data regarding equity derivatives contracts where the underlying is located in their jurisdictions, the person responsible for the incident did not include such mapping in the AFM’s and CSSF’s accounts in SDO.
542. Fifth, the Board notes that in order to setup regulators in SDO, the PSI followed two steps: “Step 1 (access request from regulator): When contacted by a regulator with an onboarding request, DDRL sent out a standard email message to the regulator containing two forms to be completed [...] DDRL also added each regulator to an EMIR regulatory access document which tracked the interactions leading to onboarding [...]. Step 2 (completeness check and access granting) DDRL then checked the returned forms for completeness and accuracy based on publicly available information and granted each regulator access to its systems based on the information provided by the regulator and the information contained in the “Traceability ESMA Regulatory Reporting FS chart” [...]”⁴⁷⁸
543. However, the Board notes that, as the PSI has itself recognised, “there were no applicable DDRL procedures for mapping set-up parameters into SDO accounts in place at the relevant time”⁴⁷⁹ and that the onboarding instructions provided by RRT did not undergo a second check. The person responsible for those errors was a Data Reporting Manager and this person reported to the Vice President of Product Management, who did not oversee the mapping of setup parameters of the AFM’s and CSSF’s accounts in SDO⁴⁸⁰. In addition, the Suite of Documents foresaw the verification and validation of the account setups by different members of the Onboarding and Operations teams.⁴⁸¹ However, the verification and validation processes did not call into question the correctness of the instructions provided by RRT.
544. Lastly, the Board notes that until March 2018, the PSI did not have a procedure to periodically review whether the information collected during on-boarding and used for reporting purposes had changed.⁴⁸²
545. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a TR. As a professional firm in the

⁴⁷⁷ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 16, para. 58.

⁴⁷⁸ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 17, para. 63.

⁴⁷⁹ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 18, para. 66, lit (d).

⁴⁸⁰ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 18, para. 66, lit (a) to (c).

⁴⁸¹ Supervisory Report, Exhibit 021, Operations Procedure -GTR Onboarding -Account Setup Procedures - Jan 24, p. 3; Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, p. 5; Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016, pp. 63-66; Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0, pp. 64-67; Supervisory Report, Exhibit 024, DerivSERV Onboarding Standard Operating Procedures - v3, pp. 71-74; Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1, pp. 72-75; Supervisory Report, Exhibit 026, DerivSERV Onboarding Standard Operating Procedures- v5 pp. 80-83; Supervisory Report, Exhibit 027, - DerivSERV Onboarding Standard Operating Procedures - v6, pp. 84-87.

⁴⁸² Exhibit 29, 20180319 ESMA Deliverables 3.16.18, p. 1; Exhibit 45, 20180319 Periodic EU Authority Onboarding Review, p. 8.

financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entails and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omission, including particularly its infringement of the Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

546. Therefore, the Board considers that the PSI has been negligent when committing the infringement of Point (b) of Section III of Annex I of the Regulation.

Fines

547. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020⁴⁸³.

548. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

Determination of the basic amount

549. Article 65 of the Regulation provides in paragraph 2⁴⁸⁴ as follows:

"The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade

⁴⁸³ See paragraphs 177- 178 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020-D-03), available at https://www.esma.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

⁴⁸⁴ In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 "in Article 65, paragraph 2 is amended as follows: [...] in point (a), 'EUR 20 000' is replaced by 'EUR 200 000';" However, this is not applicable to the present infringement because the facts occurred before the adoption and entry into force of Regulation (EU) 2019/834.

repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.”

550. It has been established that the PSI negligently committed the infringement set out at Point (b) of Section III of Annex I of the Regulation, by not providing the CSSF and the AFM with the transaction data regarding equity derivatives contracts where the underlying of the contracts were located in their respective jurisdictions.

551. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.

552. In 2020, the PSI had a turnover of USD 124 633 000⁴⁸⁵ (EUR 109 135 727).

553. Thus, the basic amount of the fine for the infringement listed in Point (c) of Section II of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

554. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(a) if the infringement has been committed repeatedly, for every time it has been repeated, an additional coefficient of 1,1 shall apply

555. The infringement set out at Point (b) of Section III of Annex I of the Regulation has been committed each time that as a result of incorrect set up of the parameters in SDO, a market Regulator (in this case, the AFM and the CSSF) has not been provided with direct and immediate access to all the transaction data that, according to its mandate and responsibilities, it should have had access to, i.e. two times.

556. Therefore, this aggravating factor is applicable and, putting aside the first time the PSI has committed the infringement, it has been repeated once.

Annex II, Point I(b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply

557. In both instances in which the infringement was committed, the infringement lasted more than six months (i.e. for the AFM from 11 February 2014 to 6 July 2017 and for the CSSF from 22 May 2014 to 6 July 2017).

558. Thus, the Board considers that the aggravating factor is applicable.

⁴⁸⁵ Figures provided in the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

Annex II, Point I(c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

559. The Board notes that the Regulation does not provide guidance on what constitutes “systemic weaknesses in the organisation of the trade repository”. However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute “systemic weaknesses in the organisation of a TR”.

560. The Board agrees with the IIO’s analysis and considers the type and the level of seriousness of the PSI’s failure that led to the infringement.

561. The PSI stated that “the “RIC Location Mapping” was not included in the SDO account of the CSSF and the AFM as a result of inadvertent human error”.⁴⁸⁶ However, the Board considers that this infringement revealed more than an individual instance of malfunction.

562. First, as already explained, in addition to the AFM’s and CSSF’s accounts in SDO, ESMA’s Supervisors also detected issues regarding the account setup of other Regulators.

563. Second, contrary to the information provided by the PSI to ESMA’s Supervisors and the IIO⁴⁸⁷, the CSSF was not onboarded in SDO in December 2014 but rather in May 2014.⁴⁸⁸ However, the CSSF completed and returned the Regulator Onboarding and SAC forms to the PSI only in November 2014.⁴⁸⁹

564. In addition, the Board notes that, as a result of the submission of the forms, the setup of the CSSF’s account in SDO was modified on 17 December 2014. However, the PSI was not able to detect that the “RIC Location Mapping” was missing and, therefore, the infringement continued until ESMA’s Supervisors discovered it.

565. Third, the filtering rules were contained in two different documents (the BRD and the Traceability Matrix). The filtering rules described in the BRD differed from the filtering rules contained in the Traceability Matrix. According to the PSI, the Traceability Matrix was the document that it used in practice to implement the filtering rules. However, if this had always been the case, the PSI could not have overlooked that as market regulators, the AFM and CSSF accounts in SDO had to include the “RIC Location Mapping” when setting them up in SDO.

566. Fourth, until 2 January 2018, the procedure to onboard Regulators was covered by several policies and procedures at the same time (i.e. the Suite of Documents),

⁴⁸⁶ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 17, para. 64.

⁴⁸⁷ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 7, paras. 24 and 25.

⁴⁸⁸ Exhibit 76, Document 8.1, p.3.

⁴⁸⁹ Exhibit 75, DOC011214-01122014094041.

which, in general, made it more difficult for the Onboarding agent to know what were the steps that needed to be followed to onboard a Regulator in SDO.

567. In addition, the Board observes that while the Suite of Documents indicated that RRT would provide the data that is needed to complete the “Entity Regulator Mapping Setup”,⁴⁹⁰ the mapping of set-up parameters into SDO accounts was not subject to controls. In response to the IIO’s request to indicate whether somebody had overseen that the appropriate set-up parameters were mapped into the SDO accounts of the CSSF and the AFM and to confirm whether the person responsible for the error was contravening the applicable procedures, the PSI indicated that “the person responsible for the “RIC Location Mapping” issue in relation to the CSSF and the AFM was the Data Reporting Manager [...] The Data Reporting Manager did not oversee the mapping set-up parameters of the SDO account of the CSSF and the AFM [...] there were no applicable DDRL procedures for mapping set-up parameters into SDO accounts in place at the relevant time”.⁴⁹¹

568. Likewise, the Board notes that until 27 September 2016, the account setup verification and validation process carried out in accordance with the Suite of Documents was very limited in scope as it only required a mandatory dual verification of four fields (“GTR Participant ID”, “Legal Name”, “Country of Incorporation” and “O-Code”)⁴⁹². Once these four fields were verified, the account setup could proceed to validation⁴⁹³.

569. Based on this, the Board identifies significant weaknesses regarding the PSI’s procedure to onboard Regulators into its system. Given the importance of ensuring that the Regulators are properly onboarded and have direct and immediate access to the data that they need to fulfil their mandates and to detect any under- or over-reporting at an early stage, these defects constitute “systemic weaknesses in the organisation” of the PSI.

570. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply

571. The Board considers that regarding the infringement at Point (b) of Section III of Annex I of the Regulation, “quality of data” operates within the context of the principal objective of introducing the reporting requirement under the Regulation, which is to ensure that Regulators have timely and complete access to the relevant data in order to be able to perform their mandates and responsibilities. Delays in providing regulators

⁴⁹⁰ Supervisory Report, Exhibit 038, Standard operating procedure dated 20 September 2016, p. 109; Supervisory Report, Exhibit 023, DerivSERV Onboarding Standard Operating Procedures - v1.0, p. 110; Supervisory Report, Exhibit 024, DerivSERV Onboarding Standard Operating Procedures - v3, p. 117; Supervisory Report, Exhibit 025, DerivSERV Onboarding Standard Operating Procedures - v4.1, p. 119; Supervisory Report, Exhibit 026, DerivSERV Onboarding Standard Operating Procedures-v5 p. 142; Supervisory Report, Exhibit 027, - DerivSERV Onboarding Standard Operating Procedures - v6, p. 146.

⁴⁹¹ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 18, para. 66.

⁴⁹² Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 7, para. 21.

⁴⁹³ Supervisory Report, Exhibit 032, Standard operating procedure dated 12 August 2013, pp. 41-44.

with access to the complete data that TRs hold reduce the value of such data for the Regulators and prevent them from fulfilling their mandates.

572. As explained above, as market regulators, the AFM and the CSSF were entitled to have direct and immediate access to transaction data for all the markets, participants, products and underlyings under their supervision. However, by not including the "RIC Location Mapping" in the setup parameters of the AFM's and CSSF's accounts in SDO, the PSI failed to provide them with direct and immediate access to the transaction data regarding equity derivatives contracts where the underlyings of those contracts were located in their respective jurisdictions (unless other filtering criteria were met).

573. According to the information provided by the PSI during ESMA's Supervisors' and the IIO's investigations, with regards to the AFM, the infringement impacted a total of 6 070 UTIs, 29 458 records and 32 reports; whereas with regards to the CSSF, the infringement impacted a total of 3 189 UTIs, 5 733 records and 32 reports.

574. Based on the above, the Board considers that the infringement has had a negative impact on the quality of the data that the PSI maintains and, therefore, the aggravating factor is applicable.

Applicable mitigating factors

575. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers that no mitigating factors are applicable.

Determination of the adjusted fine

576. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

577. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Point I(a), Point I(b), Point I(c) and Point I(d) of Annex II is added to the basic amount:

Aggravating factor set out in Annex II, Point I(a):

EUR 20 000 x 1,1 = EUR 22 000

EUR 22 000 – EUR 20 000 = EUR 2 000

1 repetition: 1 x 2 000 = 2 000

Aggravating factor set out in Annex II, Point I(b):

EUR 20 000 x 1,5 = EUR 30 000

EUR 30 000 – EUR 20 000 = EUR 10 000

Aggravating factor set out in Annex II, Point I(c):

EUR 20 000 x 2,2= EUR 44 000

EUR 44 000 – EUR 20 000 = EUR 24 000

Aggravating factor set out in Annex II, Point I(d):

EUR 20 000 x 1,5 = EUR 30 000

EUR 30 000– EUR 20 000 = EUR 10 000

Adjusted fine taking into account applicable aggravating factors:

EUR 20 000 + EUR 2 000 + EUR 10 000 + EUR 24 000 + EUR 10 000 = EUR 66 000

578. Consequently, following adjustment by taking into account the applicable aggravating factors, the amount of the fine to be imposed on the PSI amounts to EUR 66 000.

Supervisory measures

579. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.

580. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue on 7 July 2017, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

9 Findings of the Board with regard to the PSI not providing the ECB with access to certain data

581. This section of the decision analyses whether the PSI breached the following requirement:

“A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates” (Article 81(2) of the Regulation).

582. If this requirement is not met, this would constitute the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Analysis of the relevant provisions of the Regulation

583. The issue at stake in this case is whether the PSI has breached its obligation under Article 81(2) and Article 81(3)(g) of the Regulation (ex Article 81(3)(e))⁴⁹⁴ to give the relevant members of the ESCB (in this case, the ECB) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.
584. As set out above, from 1 January 2015 to 6 July 2017, except where other filtering criteria were met, the PSI did not provide the ECB with data regarding reported transactions where the “Party Registered Office Mapping”, the “Reference Entity Location Mapping” or the “RIC Location mapping” were linked to Lithuania / LT.
585. The issue was due to the entry of Lithuania into the euro area on 1 January 2015 did not lead to an update by the PSI of its filtering rules.
586. The Board takes into account the wording and the context of Articles 81(2) and 81(3) (e) of the Regulation.
587. First, the wording of Article 81(2) is clear. The PSI has an obligation to provide Regulators with “direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates”. The only limiting factor, as set out in Article 81(2), to a Regulator’s access is the Regulator’s “responsibilities and mandates”.
588. Article 81(3)(g) of the Regulation provides that “A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibility and mandates: [...] the relevant members of the ESCB, including the ECB in carrying out its tasks within a single supervisory mechanism under Council Regulation (EU) No 1024/2013”.
589. According to Article 282(1) of the Treaty on the Functioning of the European Union (TFEU), “The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). [...]”
590. Second, the Delegated Regulation (EU) No 151/2013 provides further specifications regarding the data to be provided to Regulators.
591. In particular, the former Article 2(9), set out that “A trade repository shall provide [...] the relevant members of the ESCB with transaction level data: (a) for all counterparties within their respective jurisdiction; and (b) for derivatives contracts where the reference entity of the derivative contract is located within their respective

⁴⁹⁴ Article 81 of the Regulation was amended by the Regulation (EU) 2015/2365, which entered into force on 12 January 2016. On that day, the former Article 81(3)(e) (“A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:[...] the **relevant members of the ESCB**”) was replaced by Article 81(3)(g) (“A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:[...] the **relevant members of the ESCB**, including the ECB in carrying out its tasks within a single supervisory mechanism under Council Regulation (EU) No 1024/2013”).

jurisdiction or where the reference obligation is sovereign debt of the respective jurisdiction”.

592. With the entry into force of the Delegated Regulation (EU) 2019/361, the former Article 2(9) of the Delegated Regulation (EU) No 151/2013 was replaced by a new Article 2(9) and by Article 2(11). With regards to the ESCB members whose currency is the euro, the new Article 2(9) provides that: “A trade repository shall provide a member of the ESCB whose Member State's currency is the euro with access to:(a) all transaction data on derivatives where the reference entity of the derivative is established within the Member State of that ESCB member or within a Member State whose currency is the euro and falls within the scope of the member according to that member's supervisory responsibilities and mandates, or where the reference obligation is sovereign debt of the Member State of that ESCB member or of a Member State whose currency is the euro; (b) position data for derivatives contracts in euro.” In addition, a new Article 2(13) has been added, according to which “A trade repository shall provide the ECB, when carrying out its tasks within the single supervisory mechanism under Council Regulation (EU) No 1024/2013, with access to all transaction data on derivatives concluded by any counterparty which, within the single supervisory mechanism, is subject to the ECB's supervision pursuant to Council Regulation (EU) No 1024/2013”.
593. Third, according to Article 127(5) TFEU, “The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.”
594. In this regard, Article 9.2 of the Protocol (No 4) of the TFEU on the Statute of the ESCB and the ECB sets out that “The ECB shall ensure that the tasks conferred upon the ESCB under Article 127(2), (3) and (5) of the Treaty on the Functioning of the European Union are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14.”
595. Further, Article 282(4) TFEU provides “The European Central Bank shall adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133, with Article 138, and with the conditions laid down in the Statute of the ESCB and of the ECB. [...]”
596. Lastly, the Council Regulation (EU) No 1024/2013, and, notably its Article 4, confers to the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions.
597. It is, thus, clear that in order to be able to fulfil the responsibilities and mandates arising from the EU primary and secondary legislation, the ECB needs to have access to transaction data for all counterparties within the euro area and derivatives contracts where the reference entity of the derivative contract is located within the euro area or where the reference obligation is sovereign debt of a EU Member State of the euro area. Since 1 January 2015, the euro area included Lithuania.

598. Therefore, the Board finds that in order to comply with Articles 81(2) and 81(3)(g)⁴⁹⁵ of the Regulation and Articles 2(9) of the Delegated Regulation (EU) No 151/2013, from 1 January 2015 onwards, the PSI had to provide the ECB with transactions data for (i) all the counterparties in Lithuania and (ii) all the derivatives contracts where the reference entity of the derivative contract is located in Lithuania or where the reference obligation is sovereign debt of Lithuania.

Analysis of the access to information provided by the PSI to the ECB

599. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the access to information provided by the PSI to the ECB, the Board notes the following.

600. As explained above, the PSI created a single set of filtering rules per asset class for the data access rules set out in the former Articles 2(4), 2(9) and 2(10) of the Delegated Regulation (EU) No 151/2013. Between 12 February 2014 and 25 January 2017, the filtering rules remained broadly unchanged.⁴⁹⁶ During this period, the PSI implemented the filtering rules as contained in the Traceability Matrix and not as described in the BRD⁴⁹⁷.

601. According to the functional specifications regarding the filtering rules contained in the Traceability Matrix, ESCB members (including the ECB) had to be provided with transaction data when (i) the location of the counterparty was the same as the location of the central bank or (ii) the underlying was a basket or an index. With regards to credit and equity derivatives, the ESCB members had also to be provided with transaction data when the location of the underlying was the same as the location of the ESCB member.

602. On 28 March 2014, the ECB was onboarded in the PSI's system and its SDO account was mapped to the 18 EU Member States that were part of the euro area at that time (i.e. Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, Netherlands, Portugal, Slovakia, Slovenia and Spain).

603. However, the PSI did not update the ECB's account in SDO despite the fact that on 1 January 2015, Lithuania joined the euro area. As a result, from 1 January 2015 to 6 July 2017 (when the ECB's account in SDO was ultimately updated), the PSI did not provide the ECB with transaction data regarding derivatives contracts where the counterparties or the underlying were in Lithuania.

⁴⁹⁵ Ex Article 81(3)(e) of the Regulation.

⁴⁹⁶ With the exception of the changes introduced to implement ESMA's response to Question 37 d) in the Q&A on EMIR implementation (regarding which Regulators should have access to all transaction data of the derivatives where the underlying identification type is reported with an "X" or a "B") and the addition of the rules specifically defined for ACER. See Supervisory Report, Exhibit 019, ESMA-CON-45 Simple Rfi, p. 2; Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 4, para. 16.

⁴⁹⁷ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 4, para. 17; Exhibit 10, PSI's Response to the IIO's First RFI, p. 15, para. 57.

604. Given that since 1 January 2015 Lithuania was part of the euro, the ECB needed to have direct and immediate access to all transaction data where the counterparties to the derivatives contracts or the underlying of those contracts were located in Lithuania in order to be able to fulfil its responsibilities and mandate.
605. In Response to the IIO's initial Statement of Findings, the PSI argued that "each of the AFM/CSSF Reporting Issue and the ECB Reporting Issue had the same fundamental root cause [...] up until the issuance of the Statement of Findings, ESMA treated the AFM/CSSF Reporting Issue and the ECB Reporting Issue as a single collection of connected acts. In particular (i) on 6 August 2018, ESMA's Supervisors issued a simple request for information to DDRL under Articles 61(1) and 61(2) of the Regulation. In that request for information, questions relating to both the AFM/CSSF Reporting Issue and the ECB Reporting Issue were grouped in a single collection of questions under the heading "Incidents regarding regulators' mandate not being correctly set up in SDO"; and (ii) on 18 September 2019, ESMA's Supervisors issued a supervisory report to ESMA's Executive Director under Article 64 of the Regulation (the Supervisory Report). In the Supervisory Report, ESMA's Supervisors treated the AFM/CSSF Reporting Issue and the ECB Reporting Issue as a single set of facts (these were dealt with together in section 3.5 of the Supervisory Report). DDRL submits that the IIO should be consistent with the approach adopted by ESMA prior to her appointment and should treat the AFM/CSSF Reporting Issue and the ECB Reporting Issue as a single set of facts constituting a potential infringement of the Regulation".⁴⁹⁸ According to the PSI, another reason to consider them as the same infringement was that "the IIO has concluded that the mitigating factor at Annex II, Point II(d) of the Regulation does not apply to either the AFM/CSSF Reporting Issue or the ECB Reporting Issue for exactly the same reason [...]. The relevant text of the Statement of Findings is identical for both the AFM/CSSF Reporting Issue and the ECB Reporting Issue. This demonstrates that both issues have the same fundamental root cause."⁴⁹⁹
606. Moreover the PSI, in its submissions before the IIO and again before the Board, generally alleged that the infringements identified were "six discrete and unconnected issues" and that if the findings "ultimately lead ESMA to apply a single set of supervisory measures and issue a public notice, there is a high likelihood that these supervisory measures will: (a) create the inaccurate and prejudicial impression in the markets in which DDRL operates that DDRL has acted negligently and that there are significant systemic weaknesses in the organisation of DDRL; and (b) as a result, cause unjustified and disproportionate reputation damage to DDRL"⁵⁰⁰
607. The Board, in line with the IIO, dismissed the PSI's arguments.
608. First, in the Board's view and in line with the IIO's dismissal of the PSI's argument, it is clear from Article 64(1) of the Regulation and the letter that the Executive Director sent to the PSI on 19 September 2019⁵⁰¹, that the Supervisory Report contains

⁴⁹⁸ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, pp. 20-21, para. 4.40.

⁴⁹⁹ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p. 21, para. 4.41.

⁵⁰⁰ Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p. 8, para. 3.2.

⁵⁰¹ Exhibit 3, ESMA-2019-CONF-11 - ED letter notifying the referral to the IIO.

information regarding facts that could constitute infringements listed in Annex I of Regulation, which are then investigated by the appointed IIO. The Supervisory Report does not limit the scope of any investigation by the appointed IIO nor does it prejudge the IIO's findings.

609. Second, the Board takes a holistic approach to the facts of each case and takes into account the combination of a number of differences between each of the issues to establish the separate infringements.
610. Third, regarding the more general arguments, the size of the PSI and the fact that, in comparison with its total operations, only a small portion of reports would have been affected, does not exclude the existence of infringements or negligence, and, therefore, in accordance with Articles 65 and 73 of the Regulation, in such circumstances ESMA is obliged take supervisory measures and impose fines.
611. Moreover, in the Regulation there is not a threshold of accepted reporting errors. On the contrary, Articles 80 and 81 of the Regulation are very clear in saying that TRs shall ensure the confidentiality, integrity and protection of the information received and shall ensure that Regulators have direct and immediate access to the details of all the derivatives contracts that they need to fulfil their respective responsibilities and mandates. Recital 75 of the Regulation further emphasises that “Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict operational, record-keeping and data-management requirements.”
612. Fourth, the PSI's argument that by dealing with six issues leading to infringements in a single investigation ESMA created “the inaccurate and prejudicial impression in the markets in which DDRL operates that DDRL has acted negligently and that there are significant systemic weaknesses in the organisation of DDRL”⁵⁰² is irrelevant in the present assessment and, in any case, unfounded.
613. Pursuant to Article 64(1) of the Regulation “Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I, ESMA shall appoint an independent investigation officer within ESMA to investigate the matter.” As indicated by the CJEU in relation to competition law cases⁵⁰³, there is no reason at all why ESMA should not make a single decision covering several infringements. It is therefore legitimate and fully understandable that if ESMA finds serious indications of the existence of several infringements, it deals with them in a single investigation. Dealing with several infringements in a single investigation instead of separate investigations ensures an economy of procedure, which is beneficial not only for ESMA as an organisation with finite resources, but also to the PSI.

⁵⁰² Exhibit 124, PSI's Response to the IIO's initial Statement of Findings, p. 3, para. 2.2.

⁵⁰³ See e.g. Judgement of the Court of 16 December 1975, *Suiker Unie*, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, ECLI:EU:C:1975:174, para. 111.

614. Moreover, dealing with each infringement identified by ESMA Supervisors in a separate investigation would not have had any incidence on the IIO's and the Board's findings (including as regards the existence of negligence and systematic weaknesses in the organisation of the PSI revealed by the infringements) or the amount of the fines to be imposed. Pursuant to Article 2(1) of the Procedural Regulation, the statement of findings of the IIO shall set out the facts liable to constitute one or more of the infringements listed in Annex I of Regulation (EU) No 648/2012, including any aggravating or mitigating factors of those infringements and, pursuant to Article 65 of the Regulation, the basic amount of the fines to be imposed for each of the infringements committed by a TR shall be adjusted by applying the coefficients attached to those aggravating or mitigating factors, as set out in Annex II of the Regulation. Whether negligence or a specific aggravating or mitigating factor applies is thus determined separately for each of the infringements, irrespectively of whether the infringements are dealt with in one or several investigations.
615. With this the Board turns to the facts in this specific case: Each of the infringements is different in nature and result.
616. In particular, contrary to what the PSI's stated in its Response to the IIO's initial Statement of Findings, the root cause of the 'AFM/CSSF Reporting Issue' and the 'ECB Reporting Issue' is not at all the same. The AFM and the CSSF were both onboarded in SDO as a market regulator⁵⁰⁴, but the setup parameters of their SDO accounts did not include the 'RIC Location Mapping'. As a result, neither the AFM nor the CSSF were provided with transaction data regarding equity derivatives contracts where the underlying of those contracts were in their respective jurisdictions until 6 July 2017, when both SDO accounts were updated by the PSI.
617. The issue with the ECB was completely different: the ECB's original setup parameters in SDO were correct, however even though Lithuania joined the euro area on 1 January 2015, the PSI did not update the ECB's SDO account to map it to Lithuania and, as a result, and until 6 July 2017 the ECB did not receive any data regarding derivatives contracts where the counterparties or the underlyings were in Lithuania.
618. Moreover, in these infringements, the reports affected were different. This meant, not only the cause was different, also the outcome and the effect on the affected Regulators was different. This is reflected also in Delegated Regulation (EU) No 151/2013, which sets out regarding the obligation to provide direct and immediate access the specific requirements for these different groups of Regulators that TRs have to fulfil. The infringement regarding the AFM and the CSSF concerns Article 2(8), whereas the infringement described in this Section regarding the ECB concerns Article 2(9) of the Delegated Regulation (EU) No 151/2013.
619. In light of the above, the Board considers that the 'ECB Reporting Issue' clearly constitutes a different infringement and not a repetition of the infringement regarding

⁵⁰⁴ The AFM was onboarded on 11 February 2014, whereas the CSSF was onboarded on 22 May 2014.

the AFM and the CSSF. The fact that both infringements ended on the same date, i.e. on 6 July 2017, does not change this conclusion⁵⁰⁵; nor does the fact that the Board considers that the adoption of the Regulator Onboarding Review Policy by the PSI⁵⁰⁶ is not sufficient to ensure that neither a similar infringement to the one regarding the AFM and the CSSF nor a similar infringement to the one regarding the ECB can be committed in the future.

Conclusion

620. The Board thus finds that by failing to provide the ECB with the transaction data regarding derivatives contracts where the counterparties or the underlyings of those contracts were located in Lithuania between 1 January 2015 and 6 July 2017, the PSI committed the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Intent or negligence

621. The factual background in the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

622. It should therefore be assessed whether the PSI acted with negligence.

Assessment of whether there is negligence in the present case

623. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the developments provided above in Section 4.

624. Regarding the facts at hand in the present case, the Board considers that the following should be taken into consideration to assess whether the PSI has been negligent.

625. First, the Board notes that, as explained above⁵⁰⁷, the provision of Article 81(2) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI's position could not have failed to foresee that Article 81(2) requires correct and reliable reports to be provided to the Regulators.

626. Second, the PSI has stated that "Due to an inadvertent human error, DDRL did not update the mapping in the SDO with the code for Lithuania after it had migrated to the Euro as its currency [...]"⁵⁰⁸, which constitutes a clear case of negligence, in

⁵⁰⁵ The only reason why both infringements ended on the same date is because it was when ESMA Supervisors "advised DDRL of the incorrect set-up parameters for the AFM, CSSF and ECB in SDO. DDRL updated the account information for the AFM, CSSF and ECB to correct the reports per the regulator mandates" (Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 8, para. 28) and not because they share the same root cause.

⁵⁰⁶ Exhibit 45, "20180319 Periodic EU Authority Onboarding Review".

⁵⁰⁷ See paragraph 587 of this Decision.

⁵⁰⁸ Exhibit 10, PSI's Response to the IIO's First RFI, p. 16, para. 62.

particular, taking into account that the infringement lasted for more than two years and a half.

627. Third, as a professional firm in the financial sector active in the EU market, the PSI should have been informed and attentive of any developments regarding not only the financial markets but also the Economic and Monetary Union as they can have an impact on its compliance with the Regulation.

628. The news about the upcoming entrance of Lithuania in the euro area on 1 January 2015 was well known within the EU financial sector since the Council adopted the decision allowing Lithuania to adopt the euro as its currency on 23 July 2014.

629. Therefore, the PSI had almost half a year to prepare itself and make the necessary changes to its filtering rules to ensure that from 1 January 2015 onwards, the ECB would receive also transaction data regarding derivatives contracts where the counterparties or the underlyings of those contracts were located in Lithuania.

630. Fourth, the Board notes that, while the ECB setup parameters in SDO included Latvia⁵⁰⁹ among the jurisdictions to which it should be mapped⁵¹⁰, the PSI did not update its BRD, which on 16 July 2014 still indicated that “ECB Regulator mapped to 17 European jurisdictions that use the Euro (€) currency in SDO”⁵¹¹ (instead of 18 European jurisdictions). The outdated information remained unchanged even after Lithuania’s entry into the euro area.⁵¹²

631. Lastly, the Board notes that until March 2018, the PSI did not have a procedure to periodically review whether the information collected during on-boarding and used for reporting purposes had changed.⁵¹³

632. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a TR. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entails and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omission, including particularly its infringement of the Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

633. Therefore, the Board considers that the PSI has been negligent when committing the infringement of Point (b) of Section III of Annex I of the Regulation.

⁵⁰⁹ Latvia had joined the euro area on 1 January 2014. See Exhibit 111, Public Information folder, “Council Decision on the adoption by Latvia of the euro on 1 January 2014”.

⁵¹⁰ Exhibit 80, 07 ECB - RE Please can you setup European Central Bank in SDO - RSG setup; Supervisory Report, Exhibit 069, 03_20170516 SDO Regulator setup parameters, pp.1-2.

⁵¹¹ Exhibit 65, Business Requirements Document - EMIR - v2.3, p. 79.

⁵¹² Supervisory Report, Exhibit 063, Business Requirements Document - EMIR - v2.4, p. 80.

⁵¹³ Exhibit 29, 20180319 ESMA Deliverables 3.16.18, p. 1; Exhibit 45, 20180319 Periodic EU Authority Onboarding Review, p.8.

Fines

634. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI's annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020⁵¹⁴.

635. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

Determination of the basic amount

636. Article 65 of the Regulation provides in paragraph 2⁵¹⁵ as follows:

"The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million."

637. It has been established that the PSI negligently committed the infringement set out at Point (b) of Section III of Annex I of the Regulation, by not providing the ECB with the details of derivatives contracts it needs to fulfil its responsibilities and mandates following the adoption of the euro by Lithuania on 1 January 2015.

638. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.

639. In 2020, the PSI had a turnover of USD 124 633 000⁵¹⁶ (EUR 109 135 727).

⁵¹⁴ See paragraphs 177- 178 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA's decision (ref. BoA 2020-D-03), available at https://www.eba.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

⁵¹⁵ In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 "in Article 65, paragraph 2 is amended as follows: [...] in point (a), 'EUR 20 000' is replaced by 'EUR 200 000';" However, this is not applicable to the present infringement because the facts occurred before the adoption and entry into force of Regulation (EU) 2019/834.

⁵¹⁶ Figures provided in the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

640. Thus, the basic amount of the fine for the infringement listed in Point (b) of Section III of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

641. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply

642. Between 1 January 2015 and 6 July 2017 (i.e. for more than two and a half years), the PSI failed to provide the ECB with the transaction data regarding derivatives contracts where the counterparties or the underlyings of the derivative contracts were located in Lithuania.

643. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

644. The Board notes that the Regulation does not provide guidance on what constitutes "systemic weaknesses in the organisation of the trade repository". However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute "systemic weaknesses in the organisation of a TR".

645. The Board agrees with the IIO's analysis and considers the type and the level of seriousness of the PSI's failure that led to the infringement.

646. First, the PSI has stated that the ECB account in SDO was not updated to include the code for Lithuania due to an inadvertent human error.⁵¹⁷ However, the fact of having overlooked that Lithuania had entered the euro area denoted more than a single human error. It revealed problems affecting the organisation of the PSI, which not only allowed such an obvious error to occur but, of even more concern, allowed that the error to go unnoticed for a very long time.

647. Second, as already explained, until March 2018, the PSI did not have a procedure to periodically review whether the information collected during on-boarding and used for reporting purposes had changed. As a result, the PSI was not able to detect that the ECB was missing one EU Member State from its mapping.

⁵¹⁷ Exhibit 10, PSI's Response to the IIO's First RFI, p. 16, para. 62.

648. Moreover, this was not the only time that the PSI did not realise that the account static data of a Regulator was not updated in due time. In a letter sent to ESMA's Supervisors on 2 January 2018, as part of the RAP, the PSI indicated that "DDRL has completed a review of each authority, which involved the Regulatory Reporting team confirming that the information contained in each authority's Onboarding Documentation [(i) DDRL Regulator Onboarding Form & the (ii) Super Access Coordinator Form] against the data stored in the GTR's account static data tables ("SDO"). The SDO data was provided by DDRL Business on 20 December 2017 as a data extract. [...]. For 3 authorities, Banco de Portugal, National Bank of Slovakia & Croatian Financial Supervisory Agency, updates are required to the authority's account static data. The Regulatory Reporting Team has instructed the Onboarding Team to make the necessary changes. The Regulatory Reporting Team will work with the DDRL Business to determine if any under/over reporting occurred as a result of the original SDO set up. [...]"⁵¹⁸

649. Based on the above, the Board identifies significant weaknesses regarding the PSI's procedure to review and update the accounts of the Regulators in SDO. Given the importance of ensuring that the Regulators have direct and immediate access to the data that they need to fulfil their mandates and to detect any under- or over-reporting at an early stage, these defects constitute "systemic weaknesses in the organisation" of the PSI.

650. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply

651. The Board considers that regarding the infringement at Point (b) of Section III of Annex I of the Regulation, "quality of data" operates within the context of the principal objective of introducing the reporting requirement under the Regulation, which is to ensure that Regulators have timely and complete access to the relevant data in order to be able to perform their mandates and responsibilities. Delays in providing regulators with access to the complete data that TRs hold reduce the value of such data for Regulators and prevent them from fulfilling their mandates.

652. As explained above, on 1 January 2015, Lithuania joined the euro area and, therefore, in order to be able to adequately fulfil its mandate, the ECB should have been given direct and immediate access to the transaction data regarding derivatives contracts where the counterparties or the underlyings of those contracts were located in Lithuania.

653. However, as a result of the infringement, between 1 January 2015 and 7 July 2017, 20 416 UTIs were not reported and 912 815 records were not provided to the ECB and, in total, 6 761 reports were impacted.

⁵¹⁸ Supervisory Report, Exhibit 067, 20180102 ESMA Response Letter, pp. 1-2.

654. Based on the above, the Board considers that the infringement has had a negative impact on the quality of the data that the PSI maintains and, therefore, the aggravating factor is applicable.

Applicable mitigating factors

655. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers that no mitigating factors are applicable.

Determination of the adjusted fine

656. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

657. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Point I(b), Point I(c) and Point I(d) of Annex II is added to the basic amount:

Aggravating factor set out in Annex II, Point I(b):

$$\text{EUR } 20\,000 \times 1,5 = \text{EUR } 30\,000$$

$$\text{EUR } 30\,000 - \text{EUR } 20\,000 = \text{EUR } 10\,000$$

Aggravating factor set out in Annex II, Point I(c):

$$\text{EUR } 20\,000 \times 2,2 = \text{EUR } 44\,000$$

$$\text{EUR } 44\,000 - \text{EUR } 20\,000 = \text{EUR } 24\,000$$

Aggravating factor set out in Annex II, Point I(d):

$$\text{EUR } 20\,000 \times 1,5 = \text{EUR } 30\,000$$

$$\text{EUR } 30\,000 - \text{EUR } 20\,000 = \text{EUR } 10\,000$$

Adjusted fine taking into account applicable aggravating factors:

$$\text{EUR } 20\,000 + \text{EUR } 10\,000 + \text{EUR } 24\,000 + \text{EUR } 10\,000 = \text{EUR } 64\,000$$

658. Consequently, following adjustment by taking into account the applicable aggravating factors, the amount of the fine to be imposed on the PSI amounts to EUR 64 000.

Supervisory measures

659. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.
660. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue on 7 July 2017, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

10 Findings of the Board with regard to the PSI not providing regulators with access to intraday trade data

661. This section of the decision analyses whether the PSI breached the following requirement:
- “A trade repository shall collect and maintain data and shall ensure that the entities referred to in paragraph 3 have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates” (Article 81(2) of the Regulation).
662. If this requirement is not met, this would constitute the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Analysis of the relevant legal provisions of the Regulation

663. The issue at stake in this case is whether the PSI has breached its obligation under Articles 81(2) to give Regulators direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.
664. As set out above, from 12 February 2014 to 15 April 2016, the PSI did not provide the Regulators with the details of the OTC derivative trades that were opened and exited, terminated or matured on the same day, except for the information contained in the “Exit” and “Cancel” messages.
665. The Board takes into account the wording and the context of Articles 81(2) and 81(3) (e) of the Regulation, consistent with ESMA’s previous decisional practice.⁵¹⁹
666. First, the wording of Article 81(2) is clear. The PSI has an obligation to provide Regulators with “direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates”. On a simple reading, “the details” refer to all the details of the contract including the opening of the trade and any subsequent modifications, as there is no limitation of the details specified or carved-out included in the article. The only limiting factor, as set out in Article 81(2), to a Regulator’s access is the Regulator’s “responsibilities and mandates”.

⁵¹⁹ In particular, the Board considered the decision adopted by the Board of Supervisors against Regis TR SA (Decision 2019/8): https://www.esma.europa.eu/sites/default/files/library/regis-tr_decision.pdf

667. Second, the Delegated Regulation (EU) No 151/2013 provides further specifications regarding the data to be provided to Regulators. In Article 2, it sets out that TRs have to provide Regulators with access to all transaction data. Access to all transaction data clearly includes access to the initial trade message and to all trade modifications made thereafter. In this respect, Recital 13 of the Delegated Regulation (EU) No 151/2013 explains that “Transaction data should include individual trade details”.
668. Third, the analysis of the relevant paragraphs of Article 9 and Article 81(2) of the Regulation further sheds light on the meaning of “details of the derivative contracts”.
669. The “details” of Article 9(1) and Article 81(2) are the same. The only difference in the drafting of Article 9(1) compared to Article 81(2) is that the former separates the stages of initial contract conclusion from updates to the contract, whereas the latter refers to the contract as a whole.
670. Indeed, Article 9(1) of the Regulation differentiates between new contracts and updates, requiring counterparties and CCPs to report to a TR “details of any derivative contract they have concluded and of any modification or termination of the contract”. In this way, counterparties and CCPs are reminded of their duty to report at the beginning and throughout the lifecycle of a contract.
671. Specifically, Delegated Regulation (EU) No 148/2013 sets out the details that counterparties and CCPs have to report to a TR. Article 1(b) of the Delegated Regulation (EU) No 148/2013 specifies that reports to TRs must contain “the information set out in Table 2 of the Annex which contains details pertaining to the derivative contract concluded between the two counterparties”. Table 2 includes in Section 2i the types of actions that need to be reported to a TR, which inter alia comprise the actions “new”, “modify”, “error”, “cancel”.
672. While Article 81(2) of the Regulation does not refer separately to the newly concluded contract and the modifications or termination of the contract, it refers to the “details of derivatives contracts [Regulators] need to fulfil their respective responsibilities and mandates”. The article does not refer to “contracts they have concluded” but considers each derivative contract as a whole. Thus, Article 81(2) captures all the lifecycle of the derivative contracts.
673. This means that TRs should provide Regulators with the same details as counterparties and CCPs submit to them – i.e. with the details regarding the opening of the trade and any modifications made thereafter, including its termination (as set out in Delegated Regulation (EU) No 148/2013).
674. Fourth, the drafting of Article 81(2) makes it clear that the details to be transmitted to the Regulators are those that help them fulfil their responsibilities and mandates. It follows logically that where a Regulator has the right to be informed of the initial details of a contract, it also has the right to be informed about any contract modification and about its termination.

675. Fifth, neither Article 9(1) nor 81(2) make any distinction between the derivative trades that are opened and exited / terminated / matured on the same day (Intraday trades) and the derivative trades that are opened for a period longer than one day.

676. Thus, the wording of the Regulation and the relevant delegated regulations leaves no doubt. Irrespective of the period over which a trade is opened, Regulators are entitled to receive data regarding all the individual details of derivatives contracts, which are the same as reported by the counterparties, and include trade terminations, but also any modifications thereof.

Analysis of the data provided to the Regulators regarding Intraday OTC derivative trades

677. Having assessed the applicable legal provisions, the complete case file, the submissions made by the PSI and the findings of the IIO regarding the access to information provided by the PSI to the Regulators regarding Intraday OTC derivative trades, the Board notes the following.

678. Before the re-architecture of its system in October 2017, the PSI provided counterparties with several in-bound message interfaces to report their data, using different message types.

679. With regards to OTC derivative trades, irrespective of the in-bound message interface used by the participants to report the trade, the submission of an “Exit”, “Global Cancel” or “Position Cancel” message had the effect of removing the trade from any reported position calculation generated in the GTR and also from the participant and regulatory reports because these contained only live trades.⁵²⁰ In addition, upon maturity, the trades were also removed from the regulator reports.⁵²¹

680. As a result, since the start of the reporting obligation under the Regulation on 12 February 2014, with the exception of the transaction data included in the “Cancel” and “Exit” messages (which were “pass through” messages), the Trade Activity Reports (TAR) by which the PSI provided the Regulators with data regarding “[...] all trades against which New, Cancel, Compression and Error events have been reported for that day [...]”⁵²² did not include the trade details regarding the OTC derivative trades that were opened and exited/cancelled/matured on the same day (Intraday trades)⁵²³.

681. This was confirmed by the PSI in the e-mail that it sent to ESMA’s Supervisors on 18 January 2016, in which the PSI declared that “DDRL only includes activity in the Trade Activity Report for regulators (TAR) [...] if there is an associated open position

⁵²⁰ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, pp. 20, 25- 27 and 56; Exhibit 34, GTR Functional Description v.6.1, p. 25 and 53; Exhibit 35, GTR Functional Description v.6.2, pp.25-26 and 54-55.

⁵²¹ Supervisory Report, Exhibit 072, GTR Functional Description v.5.5, p. 56 (see also p. 28); Exhibit 34, GTR Functional Description v.6.1, p. 54; Exhibit 35, GTR Functional Description v.6.2, p. 55.

⁵²² Exhibit 64, Business Requirements Document - EMIR - v2.2, pp. 57 and 79; Exhibit 65, Business Requirements Document - EMIR - v2.3, pp. 55 and 78; Supervisory Report, Exhibit 063, Business Requirements Document - EMIR - v2.4, pp. 55 and 78.

⁵²³ Supervisory Report, Exhibit 078, Summary as of 11 February 2016.

in the ITR. As a result, if no open position is found in in the ITR table DDRL does not include the activity in the TAR [...]”.⁵²⁴

682. On 29 September 2018, at the request of ESMA’s Supervisors, the PSI provided further explanations about the issue: “The system adopted for this purpose was that each day a computer script or code would be run over the EOD positions, extract the relevant data and feed that data into Inter-Trade Repository Reconciliation (“ITR”) table which is the data source for the regulator and public reports. However, due to the design of the reporting system which was based on trade state tables, the composition of each report was based on an incomplete starting point as non-outstanding trades were not present in the trade state tables. As a result, the script did not capture trades that had expired, matured or been exited (i.e. non-outstanding) or that had been cancelled prior to the EOD. In turn, these trades were not fed down to the ITR table and hence were not included in the TAR for regulators and in the OTC New Trade Count Public Report. As a consequence, the script only identified OTC trades from the open positions identifiable at EOD. To the extent that OTC trades were opened and exited/terminated prior to the EOD position build, no open position would have been in existence at EOD and so was not picked up by the script and would not have been fed into the ITR. One exception to the position described above is that for OTC trades, the message types of “Exit” and “Cancel” were included in the TAR even when there was no corresponding open position in the ITR table at EOD. As a result, for an OTC intraday trade where an “Exit” or “Cancel” message has been submitted for the UTI, the TAR will include the exit or cancel message, but not any of the other activity submitted for that UTI”.⁵²⁵

683. Nevertheless, the PSI claimed that the fact that the TAR sent to the Regulators did not include the trade details regarding the OTC derivative trades that were opened and exited/cancelled/matured on the same day would have had no impact in those cases where the counterparties had used the OTC Lite reporting channel. According to the PSI, “[...] for OTC Lite Cancels include all of the 85 mandatory fields under Art9 of EMIR. Therefore, the population of trades affected by this issue can be reduced by the number for which a Cancel message was sent on the same day it was reported”⁵²⁶, “when a client submits a “Cancel” message (a Cancel Message) using the Core Method, it is not required to populate the same fields that it is required to populate when submitting an Initial Trade Message using the Core Method. This meant that, as a result of the Intraday Reporting Issue, where a trade was opened and cancelled on the same day using the Core Method, the information contained in the Initial Trade Message was not reported in the end of day reporting. Only the information provided in the Cancel Message was reported. When a client submits a Cancel Message using the OTC Lite Method, it is required to populate all the same fields that it is required to populate when sending an Initial Trade Message using the OTC Lite Method. This meant that, in practice, the Intraday Reporting Issue did not impact trades which were opened and cancelled on the same day using the OTC Lite Method. This is because, for these

⁵²⁴ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016.

⁵²⁵ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 18, paras. 82-84.

⁵²⁶ Supervisory Report, Exhibit 078, Summary as of 11 February 2016, p. 3.

trades, the identical information was included in both the Initial Trade Message and the Cancel Message. This had the effect that the information contained in the Initial Trade Message was reported in the end of day reporting (i.e. because the same information was included in the Cancel Message)".⁵²⁷

684. The Board agrees with the IIO's dismissal of the PSI's arguments. Based on the review of the Regulation and the relevant delegated regulations as set out above, the Board considers that Regulators must have access to all individual updates to a reported trade (i.e. all trade modifications, terminations, valuations and collateral updates). The PSI has itself recognised that "[...] for OTC trades exit and cancel messages are included in the TAR even if there is no corresponding open position in the ITR table at EOD, so for an OTC trade that is exited or canceled on the same day as it is reported the TAR will include the exit or cancel message, but not the original submission"⁵²⁸ and also that "[...] the TAR will include the exit or cancel message, but not any of the other activity submitted for that UTI"⁵²⁹. Therefore, the Board considers that providing the Regulators with the data contained in "Exit" and "Cancel" messages (even where those messages included information regarding all the mandatory EMIR reporting fields because the counterparties had reported them using the OTC Lite channel) was not sufficient to comply with the Regulation. To comply, the PSI should have provided the Regulators with the details regarding the opening of the trade (i.e. with the data contained in the "Initial Trade Message") as well as with details regarding any subsequent modifications or amendments to that trade, and not just about its termination (i.e. with the data contained in the "Exit" or "Cancel" messages).

685. The PSI implemented a permanent fix to correct the code for regulatory reporting on 15 April 2016. Following the fix, all OTC intraday trades were included in the TAR to Regulators.⁵³⁰

Conclusion

686. The Board thus finds that by failing to provide the Regulators with transaction data regarding all the details of OTC intraday derivatives contracts between 12 February 2014 and 15 April 2016, the PSI committed the infringement set out at Point (b) of Section III of Annex I of the Regulation.

Intent or negligence

687. The factual background in the present case does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.

688. It should therefore be assessed whether the PSI acted with negligence.

⁵²⁷ Exhibit 10, PSI's Response to the IIO's First RFI, pp. 20-21, paras.78- 79.

⁵²⁸ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016.

⁵²⁹ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 18, para. 84.

⁵³⁰ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p.18, para. 89; Supervisory Report, Exhibit 076, ESMA29_00039, slide 23.

Assessment of whether there is negligence in the present case

689. Regarding the concept of negligence for the purposes of the Regulation, the Board refers to the developments provided above in Section 4.
690. Regarding the facts at hand in the present case, the Board considers that the following should be taken into consideration to assess whether the PSI has been negligent.
691. First, the Board notes that, as explained above⁵³¹, the provision of Article 81(2) of the Regulation is clear. A TR normally informed and sufficiently attentive in the PSI's position could not have failed to foresee that Article 81(2) requires correct and reliable reports to be provided to the Regulators.
692. Second, the Board notes that until 15 April 2016, the code for regulatory reporting (plus the reconciliation process) used to populate the TAR selected the transactions to be reported based on positions instead of transactions. On 23 October 2019, the IIO requested the PSI to provide all supporting documentation that would show that the PSI carried out an internal or external assessment of compliance with the Regulation's requirements before deciding to use such code. The PSI indicated that "DDRL has not identified any document which expressly record the assessment described in [the request]".⁵³²
693. Third, the Board notes that the data completeness controls that the PSI had in place before the re-architecture of its system had several shortcomings and in particular, there were no controls in place that would have prevented that, when an OTC derivative trade matured or was exited or cancelled on the same day that it was opened, the PSI's system did not build a position for that trade and therefore the trade was excluded from reporting.
694. Indeed, in response to a request for information from ESMA's Supervisors, the PSI confirmed on 29 September 2018 that "DDRL did not implement completeness controls between the transactions and positions stored in the [...] infrastructure and those provided in the final regulatory reporting during the Sample Period⁵³³ for OTC Core channel. Completeness controls between [...] and [...] to ensure the correct number of transactions were available for reporting were implemented on 12 November 2015 and provided to ESMA in the response on 30 December 2015. Enhancement to these controls were implemented as part of the re-architecture implementation on 27 October 2017. Details and documentation supporting the implementation of these controls were provided to ESMA on 1 December 2017."⁵³⁴ Likewise, the PSI also confirmed that "The processes to ensure the accuracy of reports for OTC intraday

⁵³¹ See paragraph 666 of this Decision.

⁵³² Exhibit 10, PSI's Response to the IIO's First RFI, p. 20, para. 74.

⁵³³ The Sample period was defined in the Request for Information that ESMA Supervision Department sent to the PSI on 6 August 2019 as the period between 12 February 2014 and the 25 January 2017 (see Supervisory Report, Exhibit 019, ESMA-CON-45 Simple Rfi ,p.2).

⁵³⁴ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p.6, para. 23.

trades were not implemented during the Sample Period. These controls were implemented as part of the re-architecture implementation on 27 October 2017. [...]”⁵³⁵

695. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a TR. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is required to take special care in assessing the risks that its acts or omissions entail, and has failed to take that care; and as the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of the Regulation, in circumstances where a TR in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.

696. Therefore, the Board considers that the PSI has been negligent when committing the infringement of Point (b) of Section III of Annex I of the Regulation.

Fines

697. The Board preliminary notes that the basic amount of the applicable fine is calculated taking as a reference the latest available official financial statements regarding the PSI’s annual turnover in the business year preceding the year of the decision, as recommended by the Joint Board of Appeal of the three ESAs in its Decision of 28 December 2020⁵³⁶.

698. The description of the basic amount of the fine as well as the assessment of the application of aggravating and mitigating factors is set out below.

Determination of the basic amount

699. Article 65 of the Regulation provides in paragraph 2⁵³⁷ as follows:

“The basic amounts of the fines referred to in paragraph 1 shall be included within the following limits:

(a) for the infringements referred to in point (c) of Section I of Annex I and in points (c) to (g) of Section II of Annex I, and in points (a) and (b) of Section III of Annex I the amounts of the fines shall be at least EUR 10 000 and shall not exceed EUR 20 000 [...]

⁵³⁵ Supervisory Report, Exhibit 018, LT- 20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 98.

⁵³⁶ See paragraphs 177- 178 of the decision of the Board of Appeal in the Appeal of Scope Ratings GmbH against ESMA’s decision (ref. BoA 2020-D-03), available at https://www.eba.europa.eu/sites/default/files/document_library/961882/BoA%20D%202020%2003%20%28Decision%20on%20Scope%20Ratings%20v%20ESMA%29.pdf.

⁵³⁷ In this regard, the Board notes that with the entry into force of Regulation (EU) 2019/834, the amount of the fines to be imposed in case of an infringement of the Regulation has significantly increased. According to Article 1(16)(a) of Regulation (EU) 2019/834 “in Article 65, paragraph 2 is amended as follows: [...] in point (a), ‘EUR 20 000’ is replaced by ‘EUR 200 000’;” However, this is not applicable to the present infringement because the fact occurred before the adoption and entry into force of Regulation (EU) 2019/834.

In order to decide whether the basic amount of the fines should be at the lower, the middle or the higher end of the limits set out in the first subparagraph, ESMA shall have regard to the annual turnover of the preceding business year of the trade repository concerned. The basic amount shall be at the lower end of the limit for trade repositories whose annual turnover is below EUR 1 million, the middle of the limit for the trade repository whose turnover is between EUR 1 and 5 million and the higher end of the limit for the trade repository whose annual turnover is higher than EUR 5 million.”

700. It has been established that the PSI negligently committed the infringement set out at Point (b) of Section III of Annex I of the Regulation, by not providing Regulators with all data regarding the OTC derivatives contracts that were opened and exited, cancelled or matured on the same day.
701. To determine the basic amount of the fine, the Board has regard to the latest official financial statement regarding the annual turnover of the PSI.
702. In 2020, the PSI had a turnover of USD 124 633 000⁵³⁸ (EUR 109 135 727).
703. Thus, the basic amount of the fine for the infringement listed in Point (b) of Section III of Annex I of the Regulation is set at the higher end of the limit of the fine set out in Article 65(2)(a) of the Regulation and shall not exceed EUR 20 000.

Applicable aggravating factors

704. Annex II of the Regulation lists the aggravating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the aggravating factors set out below.

Annex II, Point I(b) if the infringement has been committed for more than six months, a coefficient of 1,5 shall apply

705. The infringement lasted more than six months (i.e. from 12 February 2014 to 15 April 2016). Therefore, the aggravating factor applies.

Annex II, Point I(c) if the infringement has revealed systemic weaknesses in the organisation of the trade repository, in particular in its procedures, management systems or internal controls, a coefficient of 2,2 shall apply

706. The Board notes that the Regulation does not provide guidance on what constitutes “systemic weaknesses in the organisation of the trade repository”. However, based on the wording of the terms used, not all weaknesses in the procedures, management systems or the internal controls will necessarily constitute “systemic weaknesses in the organisation of a TR”.

⁵³⁸ Figures provided in the PSI's annual report and financial statements for the year ended 31 December 2020, p. 19.

707. The Board agrees with the IIO's analysis and considers the type and the level of seriousness of the PSI's failure that led to the infringement.
708. First, the infringement stemmed from the design of the PSI's reporting system. The code that the PSI used for regulatory reporting between 12 February 2014 and 15 April 2016 was inherently incapable of including transaction data regarding intraday OTC derivative trades in the TAR to Regulators. As indicated by the PSI in the [...] incident report: "In January 7th 2016, it was identified that OTC trades which expired/terminated on, or before, the day they were first reported to the GTR are not being captured in regulatory and public transaction reports or in the reconciliation process. This is because the code for regulatory and public reporting (plus the reconciliation process) selects transactions based on positions yet positions were not built for these trades. As a result, although all transactions are correctly included in the [...] database tables, those which do not have a corresponding position are not included in transaction reports [...]"⁵³⁹
709. The infringement was thus not due to, for example, a temporary outage; it was fundamentally due to the way the PSI had set up its IT infrastructure regarding the Regulators' access to the information that they were required to receive under the Regulation.
710. Second, as explained above, between 12 February 2014 and 27 October 2017, the PSI did not implement completeness controls between the transactions and positions stored in the [...] infrastructure and those provided in the final regulatory reporting for OTC derivative trades and it did not check the accuracy of reports for OTC intraday trades either.⁵⁴⁰
711. Third, the issue regarding the intraday OTC derivative trades was only one of many under-reporting incidents that the PSI was experiencing at the time.⁵⁴¹
712. Based on this, the Board identifies significant weaknesses regarding the design of the PSI's IT system for reporting derivatives trade data to the Regulators. Given the importance of a TR's IT infrastructure and also given the importance of ensuring that the Regulators have direct and immediate access to the data that they need to fulfil their mandates as well as of detecting any under- or over-reporting at an early stage, the Board considers that these defects constitute "systemic weaknesses in the organisation" of the PSI. Thus, the Board considers that the aggravating factor is applicable.

Annex II, Point I(d) if the infringement has a negative impact on the quality of the data it maintains, a coefficient of 1,5 shall apply

713. The Board considers that regarding the infringement at Point (b) of Section III of Annex I of the Regulation, "quality of data" operates within the context of the principal

⁵³⁹ Supervisory Report, Exhibit 074, GTR Incident GI-576, p. 3.

⁵⁴⁰ Supervisory Report, Exhibit 018, LT-20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, paras. 23 and 98.

⁵⁴¹ Supervisory Report, Exhibit 113, ESMA29_00013 (Attachment "DDRL Incidents Jan 16 (V 3)").

objective of introducing the reporting requirement under the Regulation, which is to ensure that Regulators have timely and complete access to the relevant data in order to be able to perform their mandates and responsibilities. Delays in providing regulators with access to the complete data that TRs hold reduce the value of such data for Regulators and prevent them from fulfilling their mandates.

714. As explained above, between 12 February 2014 and 15 April 2016, according to the PSI's own estimates, "DDRL has calculated that approximately 11 million OTC trades have been incorrectly excluded from the TAR since the go-live of L2 validations. Extrapolating this back to the inception of reporting DDRL believes that approximately 100 million trades may not have been included in the TAR."⁵⁴²

715. Based on the above, the Board considers that the infringement has had a negative impact on the quality of the data that the PSI maintains and, therefore, the aggravating factor is applicable.

Applicable mitigating factors

716. Annex II of the Regulation lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board agrees with the IIO's findings and considers applicable to the present case the mitigating factors set out below.

Annex II, Point II(c) if the trade repository has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply

717. In this respect, the Board notes the following.

718. The PSI informed ESMA on its own initiative about the incident. The issue was identified on 7 January 2016 and notified to ESMA on 11 January 2016, and the PSI provided the additional information requested by ESMA's Supervisors within a week.⁵⁴³

719. More precisely, on 11 January 2016, the PSI indicated that "We have recently become aware of a scenario whereby certain trades with very short trading life cycles may be excluded from DDRL's reporting".⁵⁴⁴

720. On 18 January 2016, the PSI indicated the following: "DDRL has determined that OTC trades which are opened and exited/terminated on the same day are not being fed down to the ITR table which is the data source for the regulator and public reports. This is because DDRL only sends OTC trade details where there is open positions at EOD to the ITR from the upstream database tables. Additionally, DDRL only includes activity in the Trade Activity Report for regulators (TAR) and in the OTC New Trade Count Public Report if there is an associated open position in the ITR. As a result, if no open position is found in the ITR table DDRL does not include the activity

⁵⁴² Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016.

⁵⁴³ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016. See also Supervisory Report, Exhibit 078, Summary as of 11 February 2016.

⁵⁴⁴ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016, p. 3.

in the TAR or in its public reporting. It should be noted that ETD trades are unaffected by this issue and that for OTC trades exit and cancel messages are included in the TAR even if there is no corresponding open position in the ITR table at EOD, so for an OTC trade that is exited or canceled on the same day as it is reported the TAR will include the exit or cancel message, but not the original submission". It also indicated that "DDRL has calculated that approximately 11 million OTC trades have been incorrectly excluded from the TAR since the go-live of L2 validations. Extrapolating this back to the inception of reporting DDRL believes that approximately 100 million trades may not have been included in the TAR."⁵⁴⁵

721. The Board agrees with the IIO's view that the core elements of the infringement were brought quickly, efficiently and completely to ESMA's attention in the PSI's e-mails quoted above.

722. Therefore, the Board considers that the mitigating factor should apply.

Annex II, Point II(d) if the trade repository has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply

723. The Board considers that the PSI has taken a number of actions, primarily resolving the issues in relation to the infringement:

724. On 15 April 2016, the PSI fixed the code that it used for the TAR/Inter-TR reconciliation.⁵⁴⁶

725. With regards to the historical data, a fix was implemented in October 2016 in order to report the OTC Intraday Trades submitted using the OTC Lite Method and on 27 October 2017, to report the OTC Intraday Trades submitted using the Core Method.⁵⁴⁷ With regards to the reconciliation of historical reporting, the PSI reconciled all the trades reported through the OTC Lite method by November 2017 and agreed with ESMA's Supervisors that it would postpone the reconciliation of the trades reported through the Core Method until the re-architecture of the PSI's took place.⁵⁴⁸ The reconciliation of the latter was completed by 12 June 2018.⁵⁴⁹

726. In addition, as part of the re-architecture of its reporting and reconciliation system, the PSI has also implemented controls aiming at ensuring that OTC intraday trades are included in the reports to the Regulators.⁵⁵⁰

727. The Board agrees with the IIO's opinion that these remedial actions should ensure that similar infringement cannot be committed in the future. The Board thus assesses whether these measures were taken voluntarily. If that was the case, it would

⁵⁴⁵ Supervisory Report, Exhibit 017, E-mail from David Bray to Supervision DDRL and ESMA Comms dated 18 January 2016, p. 1.

⁵⁴⁶ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 18, paras. 88 and 89.

⁵⁴⁷ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 91.

⁵⁴⁸ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 94.

⁵⁴⁹ Supervisory Report, Exhibit 018, LT-_20945304-v1-Letter_to_ESMA_29_September_2018, p. 19, para. 95.

⁵⁵⁰ Exhibit 36, Document 27.3, pp. 111,112, 126, 127, 136, 137, 141 and 142.

imply that the mitigating factor provided by Annex II, Point II(d) of the Regulation would be applicable.

728. The Board notes that there is no definition of what “voluntarily” (“de son plein gré” in the French version of the Regulation) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a TR has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the TR takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the TR, for example, through an action plan defined and monitored by the supervisor.

729. In the present case, the Board notes the following.

730. First, at the date of implementation of the measures, there was no decision from ESMA ordering the PSI to put an end to its practices.

731. Second, some of the measures might have been triggered following interactions with ESMA’s staff. However, the decision of whether or not to take these measures was within the PSI’s remit.

732. Therefore, the Board considers that the PSI has voluntarily taken measures to ensure that similar infringement cannot be committed in the future. The mitigating factor is thus applicable.

Determination of the adjusted fine

733. In accordance with Article 65(3) of the Regulation, taking into account the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.

734. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Point I(b), Point I(c) and Point I(d) of Annex II and the mitigating factors set out in Point II(c) and Point II(d) of Annex II is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

Aggravating factor set out in Annex II, Point I(b):

EUR 20 000 x 1,5 = EUR 30 000

EUR 30 000 – EUR 20 000 = EUR 10 000

Aggravating factor set out in Annex II, Point I(c):

EUR 20 000 x 2,2= EUR 44 000

EUR 44 000 – EUR 20 000 = EUR 24 000

Aggravating factor set out in Annex II, Point I(d):

EUR 20 000 x 1,5 = EUR 30 000

EUR 30 000– EUR 20 000 = EUR 10 000

Mitigating factor set out in Annex II, Point II(c):

EUR 20 000 x 0,4 = EUR 8 000

EUR 20 000 – EUR 8 000 = EUR 12 000

Mitigating factor set out in Annex II, Point II(d):

EUR 20 000 x 0,6 = EUR 12 000

EUR 20 000 – EUR 12 000 = EUR 8 000

Adjusted fine taking into account applicable aggravating and mitigating factors:

EUR 20 000 + EUR 10 000 + EUR 24 000 + EUR 10 000 – 12 000 – 8 000 = EUR 44 000

735. Consequently, following adjustment by taking into account the applicable aggravating and mitigating factors, the amount of the fine to be imposed on the PSI amounts to EUR 44 000.

Supervisory measures

736. Regard must be had to Article 73, paragraphs 1 and 2, of the Regulation.

737. Given the factual findings in the present case and in particular the fact that the PSI permanently solved the issue on 7 July 2017, only the supervisory measure of the public notice, set out in Article 73(1)(c) of the Regulation, is considered appropriate with regard to the nature and the seriousness of the infringement.

On the basis of the above Statement of Findings, the Board hereby

DECIDES

that

DTCC Derivatives Repository Plc committed with negligence the following infringements:

- infringement set out at Point (c) of Section II of Annex I of the Regulation (by granting asset managers access to data that they were not entitled to receive).
- infringement set out at Point (c) of Section II of Annex I of the Regulation (by implementing mapping rules which altered the substance of the information reported to it).
- infringement set out at Point (b) of Section III of Annex I of the Regulation (by generating incorrect reports for Regulators, containing data that was not consistent with the data reported to it).
- infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide CCP Supervisors and Overseers with the transaction data they were entitled to receive).
- infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide the AFM and the CSSF with the transaction data regarding equity derivatives contracts where the underlying of those contracts were located in their respective jurisdictions).
- infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide the ECB with the transaction data regarding derivatives contracts where the counterparties or the underlying of those contracts were located in Lithuania).
- infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide the Regulators with all data regarding the OTC derivatives contracts that were opened and exited, cancelled or matured on the same day).

therefore

IMPOSES

the following **fines**:

- EUR 112 000 for the infringement set out at Point (c) of Section II of Annex I of the Regulation (by granting asset managers access to data that they were not entitled to receive).

- EUR 66 000 for the infringement set out at Point (c) of Section II of Annex I of the Regulation (by implementing mapping rules which altered the substance of the information reported to it).
- EUR 66 000 for the infringement set out at Point (b) of Section III of Annex I of the Regulation (by generating reports for Regulators that contained data that was not consistent with the data reported to it).
- EUR 56 000 for the infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide CCP Supervisors and Overseers with the transaction data they were entitled to).
- EUR 66 000 for the infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide the AFM and the CSSF with the transaction data regarding equity derivatives contracts where the underlying of those contracts were located in their respective jurisdictions).
- EUR 64 000 for the infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide the ECB with the transaction data regarding derivatives contracts where the counterparties or the underlying of those contracts were located in Lithuania).
- EUR 44 000 for the infringement set out at Point (b) of Section III of Annex I of the Regulation (by failing to provide the Regulators with all data regarding the OTC derivatives contracts that were opened and exited, cancelled or matured on the same day).

Upon having applied Article 65(4), second paragraph, of Regulation (EU) No 648/2012 in respect of the fines imposed for the infringements set out at Point (c) of Section II and Point (b) of Section III of Annex I in relation to mapping rules that altered the substance of the data reported and the submission of reports to Regulators containing data that was inconsistent with the information received, whereby the fine of EUR 66 000 is applied for both infringements;

for the overall amount of **EUR 408 000**

and

ADOPTS

a **supervisory measure** in the form of a **public notice** to be issued in respect of the infringements.

DTCC Derivatives Repository Plc may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this decision.



This decision is addressed to **DTCC Derivatives Repository Plc** – Broadgate Quarter, 7th Floor, One Snowden Street, London, EC2A 2DQ (United Kingdom)

Done at Paris, on 8 July 2021

[PERSONAL SIGNATURE]

For the Board of Supervisors

Anneli Tuominen

The Interim Chair