

BoA-D-2024-01

**DECISION**

given by

the  
**BOARD OF APPEAL**  
**OF THE EUROPEAN SUPERVISORY AUTHORITIES**

on

the request for an extension of the adaptation period

in the appeal case brought by

Dubai Commodities Clearing Corporation (DCCC)  
[Appellant]

against

The European Securities and Markets Authority (ESMA)  
[Respondent]

**Board of Appeal**

Michele Siri (President and Co-Rapporteur)  
Christos Gortsos (Vice President)  
Gerben Everts  
Geneviève Helleringer  
Margarida Lima Rego  
Carsten Zatschler (Co-Rapporteur)

Place of this decision: Paris

**29.01.2024**

## Summary

A. The Appellant, Dubai Commodities Clearing Corporation (“DCCC”), which is established and authorised in the United Arab Emirates (“UAE”), challenged a decision by the European Markets and Securities Authority (“ESMA”) to withdraw the recognition of DCCC as a Tier 1 third-country central counterparty (“CCP”) with an adaptation period of three months (the “Contested Decision”). Such recognition is a prerequisite for CCPs from outside the EU to provide certain clearing services or activities to clearing members in the EU. DCCC did not challenge ESMA’s decision to withdraw recognition as such, but requested an extension of the adaptation period from three months to two years and a suspension of the contested decision until the outcome of the Appeal.

The conditions for the recognition of third-country CCPs in the EU are set forth in the European Market Infrastructure Regulation (“EMIR”). One of the conditions is that the CCP is established or authorised in a third-country that is not considered by the European Commission as having strategic deficiencies in its national anti-money laundering and counter financing of terrorism regime that pose significant threats to the financial system of the EU. In December 2022, the Commission added the UAE to the list of countries that have such strategic deficiencies. Since the condition set out in EMIR was no longer met, ESMA was required to withdraw the recognition of DCCC as a Tier 1 third-country CCP. EMIR also provides that, when determining the date of entry into effect of its decision, ESMA “*shall endeavour to minimise potential market disruption and provide for an appropriate adaptation period which shall not exceed two years*”.

In the case at hand, ESMA provided for an adaptation period of three months. According to DCCC, ESMA acted in excess of its powers and infringed DCCC’s rights. The arguments raised by DCCC can be grouped in three sets: (i) an alleged violation of the duty to state reasons in the contested decision, (ii) an alleged violation of the proportionality principle in the determination of the adaptation period and (iii) an alleged violation of the right to be heard in preparing the decision.

In October 2023, as requested by DCCC, the Board of Appeal suspended the contested decision and asked both parties to exchange further written submissions. This would enable the Board of Appeal to decide on the merits of the case, without forcing DCCC to offboard and disconnect its EU clearing member prior to the decision. The written submissions were received in November 2023.

In the case at hand, an explanation by ESMA of the reasons why three months are considered an appropriate adaptation period is required (duty to state reasons). The reasoning behind the decision to set the adaptation period at three months was not made explicit in the contested decision. However, ESMA has followed up on the request to clarify the basis on which the length of the adaptation period was deemed proportionate. Thus, the duty to state reasons has been fully complied with by the time the present decision is made.

Although minimising potential market disruption is an important reason for executing ESMA’s power under EMIR, it should not be the sole consideration. A fair assessment necessarily entails that ESMA should also consider the effects of the decision on the adaptation period on its addressee (as required by the principle of proportionality as set out in EU primary law). However, even in light of the need to pay due consideration to the impact of the adaptation period’s length on DCCC, the Board of Appeal could not find any evidence that the adaptation period of three months was disproportionate. ESMA’s use of its discretion does not appear to have led to an excessive burden on DCCC, duly taking into consideration the need to avoid the risk of exposure to money laundering and terrorist financing. Although a longer adaptation period might soften the direct organisational and financial consequences for DCCC, it will also increase overall risk exposure in the market. It is clear that some costs and missed revenues are inherent in any disconnection or adaptation to the changed legal framework brought about by the inclusion of the UAE by the Commission in the list of high-risk third countries. The Board of Appeal found no evidence that the adverse economic consequences DCCC faced were disproportionate.

On the right to be heard, although this right was found not to have been initially complied with, there was no evidence that, had DCCC been heard during the procedure for the determination of the adaptation period, this would have materially affected the outcome of the procedure.

B. The Board of Appeal rendered the present decision on the merits and unanimously decided that the Appeal is dismissed. The decision by ESMA is consequently confirmed.

The Board of Appeal has considered, in its suspension decision of October 2023, whether the suspension should be maintained for a short period of time even after the Appeal is dismissed so as to safeguard the effectiveness of the decision. Given the resignation of DCCC’s only EU clearing member and the fact that DCCC has not requested any maintenance of the suspension beyond the date of the decision disposing of the Appeal, the Board of Appeal also unanimously decided that it is appropriate to allow the suspension to expire on the date of publication of the present decision. Consequently, the decision by ESMA has become fully operational.

## DCCC v ESMA – Decision on the merits

1 This is the decision of the Board of Appeal of the European Supervisory Authorities (hereinafter the “Board of Appeal”) on the Appeal filed, together with a request for suspension, by the Appellant, Dubai Commodities Clearing Corporation (“DCCC”), pursuant to Article 60 of the Regulation of the European Parliament and of the Council establishing the European Markets and Securities Authority (“ESMA Regulation”).<sup>1</sup> The Appellant is represented in the appeal by Maggie Mansour, Compliance Director, and Jignesh Sanghvi, Board Member. The Respondent is ESMA, established by Regulation (EU) No 1095/2010, and is represented in the appeal by Gerasimina Filippa, Fabrizio Barzanti, and Krista Zarina, of its Legal Unit.

2 By its appeal, DCCC challenges the Decision of the ESMA Board of Supervisors of 21 July 2023<sup>2</sup> to withdraw the recognition of DCCC as a Tier 1 third-country central counterparty (“CCP”) under Article 25p of Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>3</sup> (“EMIR”) with effect of 25 October 2023 (“the Contested Decision”). DCCC takes issue with the length of the adaptation period of three months accorded in Article 2 of the Contested Decision and submits that this should have been longer.

### I – Background of facts

3 DCCC had been first recognised by ESMA on 29 March 2017 as a third-country CCP in accordance with Article 25 EMIR. Following a review of that decision pursuant to Article 89(3c) EMIR,<sup>4</sup> the DCCC was granted recognition as a Tier 1 third-country CCP under (the amended) Article 25 EMIR by ESMA on 18 March 2022.<sup>5</sup>

4 By the Contested Decision, ESMA withdrew the recognition of DCCC as a Tier 1 third-country CCP based on the fact that DCCC no longer complied with the requirements set out in Article 25(2), point (d) EMIR. The Contested Decision is based on Article 25p(1) EMIR, which sets out the conditions for withdrawing the recognition decision of a (Tier 1 and/or Tier 2) third-country CCP, and on the inclusion of the United Arab Emirates (“UAE”) to the list of “*high-risk third countries which have provided a written high-level political commitment to address the identified deficiencies and have developed an action plan with FATF*” as provided for in point I of the Annex to Commission

<sup>1</sup> 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, pp. 84-119), as in force.

<sup>2</sup> Decision ESMA91-2145765636-8059 of 21 July 2023.

<sup>3</sup> 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, pp. 1-59, as in force. *Inter alia*, this legislative act was amended by Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 (...), by virtue of which, *inter alia*, Article 25p was inserted; see paragraphs 10-11 below.

<sup>4</sup> This Article was adopted by virtue of (the just above-mentioned) Regulation (EU) 2019/2099.

<sup>5</sup> Decision ESMA91-398-4665 of 18 March 2022.

Delegated Regulation (EU) 2016/1675,<sup>6</sup> which was adopted on the basis of Article 9(2) of the so-called “AML Directive No 5”.<sup>7</sup>

5 The Contested Decision provides for an adaptation period of three months, expiring on 25 October 2023. Its recital (9) recalls the following in this respect:

*“In accordance with the third subparagraph of Article 25p(1) of EMIR, in order to minimise potential market disruption and impact on EU market participants, ESMA concluded that it should provide for an adaptation period of three months, which will accordingly determine the date of entry into effect of this Decision.”*

## II – Legal framework

6 The relevant provisions of EMIR were introduced or substantially amended by Regulation 2019/2099.<sup>8</sup> That Regulation introduced the concept of “tiering” of CCPs, described as follows in its recital (32):

*“CCPs that are not systemically important to the financial stability of the Union or of one or more of its Member States should be considered as ‘Tier 1’ CCPs. CCPs that are systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States should be considered as ‘Tier 2’ CCPs. Where ESMA determines that a third-country CCP is not systemically important for the financial stability of the Union or of one or more of its Member States, the existing recognition conditions under Regulation (EU) No 648/2012 should apply to that CCP. Where ESMA determines that a third-country CCP is systemically important, specific requirements should be imposed on that CCP. [...]”*

7 Recital (55) of Regulation 2019/2099 is worded as follows:

*“In the case of an infringement committed by a Tier 2 CCP, ESMA should be empowered to apply a range of supervisory measures, including requiring a Tier 2 CCP to bring the infringement to an end and, as a last resort, withdrawing the recognition where a Tier 2 CCP has seriously or repeatedly infringed Regulation (EU) No 648/2012. The supervisory measures should be applied by ESMA taking into account the nature and seriousness of the infringement*

<sup>6</sup> Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies, OJ L 254, 20.9.2016, pp. 1-4, in force as last amended by Commission Delegated Regulation (EU) 2023/2070 of 18 August 2023, OJ L 239, 28.9.2023, pp. 1-4. In accordance with Article 1 of this delegated act, ‘high-risk third countries’ means third-country jurisdictions which have strategic deficiencies in their anti-money laundering (“AML”) and countering the financing of terrorism (“CFT”) regimes that pose significant threats to the EU financial system.

<sup>7</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (...), OJ L 141, 5.6.2015, pp. 73-117, as in force.

<sup>8</sup> Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (OJ L 322, 12.12.2019, pp. 1-44).

*and should respect the principle of proportionality. Before taking a decision on supervisory measures, ESMA should give the persons subject to the proceedings the opportunity to be heard in order to respect their rights of defence. Where ESMA decides to withdraw recognition, ESMA should limit potential market disruption by defining an appropriate adaptation period not exceeding two years.”*

8 Article 25 EMIR provides that third-country CCPs may only provide clearing services to clearing members established in the Union where they are recognised by ESMA and sets forth the conditions for the recognition. In particular, under Article 25(2) provides as follows:

*“ESMA, after consulting the authorities referred to in paragraph 3, may recognise a CCP established in a third country that has applied for recognition to provide certain clearing services or activities where:*

[...]

*(d) the CCP is established or authorised in a third country that is not considered, by the Commission in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council, as having strategic deficiencies in its national anti-money laundering and counter financing of terrorism regime that poses significant threats to the financial system of the Union.”*

9 Article 25(3) EMIR further states:

*“When assessing whether the conditions referred to in points (a) to (d) of paragraph 2 are met, ESMA shall consult:*

- (a) the competent authority of a Member State in which the CCP provides or intends to provide clearing services and which has been selected by the CCP;*
- (b) the competent authorities responsible for the supervision of the clearing members of the CCP that are established in the three Member States which make or are anticipated by the CCP to make the largest contributions to the default fund of the CCP referred to in Article 42 on an aggregate basis over a one-year period;*
- (c) the competent authorities responsible for the supervision of trading venues located in the Union, served or to be served by the CCP;*
- (d) the competent authorities supervising CCPs established in the Union with which interoperability arrangements have been established;*
- (e) the relevant members of the ESCB of the Member States in which the CCP provides or intends to provide clearing services and the relevant members of the ESCB responsible for the oversight of the CCPs with which interoperability arrangements have been established;*
- (f) the central banks of issue of all Union currencies of the financial instruments cleared or to be cleared by the CCP.”*

10 The first sub-paragraph of Article 25p(1) EMIR sets forth the conditions for the withdrawal of the recognition decision of a third-country Tier 1 CCP. It requires ESMA, “*after consulting the authorities and entities referred to in Article 25(3)*”, to

*“withdraw a recognition decision adopted in accordance with Article 25 where”, inter alia, “(c) the CCP concerned has seriously and systematically infringed any of the conditions for recognition laid down in Article 25 or no longer complies with any of those conditions and in any of those situations has not taken the remedial action requested by ESMA within an appropriately set timeframe of up to a maximum of six months.”*

11 Furthermore, under Article 25p(1), third sub-paragraph EMIR:

*“When determining the date of entry into effect of the decision to withdraw the recognition, ESMA shall endeavour to minimise potential market disruption and provide for an appropriate adaptation period which shall not exceed two years.”*

12 Article 25(2a), second sub-paragraph required the Commission to adopt a delegated act (within the meaning of Article 290 TFEU) to specify further the criteria set out in the Article 25(2a), first sub-paragraph, for determining whether a third-country CCP is to be categorised as “Tier 2”. The Commission accordingly adopted Delegated Regulation 2020/1303,<sup>9</sup> Article 6 of which specifies the following four indicators of minimum exposure of clearing members and clients established in the EU to it for a third-country CCP to be categorised as “Tier 2” and provides that ESMA may only determine (based on the criteria specified in Articles 1-5) a third-country CCP as a Tier 2 CPP where at least one of them is met:

- “(a) the maximum open interest of securities transactions, including securities financing transactions, or exchange traded derivatives denominated in Union currencies cleared by the CCP over a period of one year prior to the assessment or intended to be cleared by the CCP over a period of one year following the assessment is more than EUR 1 000 billion;*
- (b) the maximum notional outstanding of OTC derivatives transactions denominated in Union currencies cleared by the CCP over a period of one year prior to the assessment or intended to be cleared by the CCP over a period of one year following the assessment is more than EUR 1 000 billion;*
- (c) the average aggregated margin requirement and default fund contributions for accounts held at the CCP by clearing members that are entities established in the Union or part of a group subject to consolidated supervision in the Union, calculated by the CCP on a net basis at clearing member account level over a period of two years prior to the assessment is more than EUR 25 billion;*

<sup>9</sup> Commission Delegated Regulation (EU) 2020/1303 of 14 July 2020 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the criteria that ESMA should take into account to determine whether a central counterparty established in a third country is systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States, (OJ L 305, 21.9.2020, pp. 7-12).

- (d) *the estimated largest payment obligation committed by entities established in the Union or part of a group subject to consolidated supervision in the Union and computed over a period of one year prior to the assessment, that would result from the default of at least the two largest single clearing members and their affiliates, in extreme but plausible market conditions is more than EUR 3 billion.”*

13 On 19 December 2022, the Commission adopted its Delegated Regulation (EU) 2023/410,<sup>10</sup> adding the UAE to the list of “high-risk third countries which have provided a written high-level political commitment to address the identified deficiencies and have developed an action plan with FATF” as provided for in point I of the Annex to (the above-mentioned) Commission Delegated Regulation (EU) 2016/1675.<sup>11</sup> Delegated Regulation (EU) 2023/410 was published in the Official Journal on 24 February 2023 and, in accordance with its Article 2, entered into force on the twentieth day following its publication, *i.e.*, on 16 March 2023. Accordingly, by application of Article 25p(1), first sub-paragraph EMIR, ESMA was required to withdraw the recognition of DCCC as a third-country CCP, since the condition set out in Article 25(2), point (d) EMIR<sup>12</sup> was no longer met (which DCCC has not contested).

### **III – Procedure and forms of order sought**

14 DCCC filed its Notice of Appeal by email on 31 August 2023, thus within the three-month period provided in Article 60(2) of the ESMA Regulation.

15 The Appeal requests the Board of Appeal to:

- (i) extend the adaptation period from three months to two years; and
- (ii) suspend the Contested Decision until the outcome of the Appeal.

16 In accordance with directions of the President of the Board of Appeal, ESMA filed on 22 September 2023 a Response to the suspension request, also addressing the admissibility of the Appeal.

17 In accordance with directions of the President of the Board of Appeal, further written submissions were made as follows:

- on 6 October 2023, DCCC filed a Response to ESMA’s Response; and

<sup>10</sup> Commission Delegated Regulation (EU) 2023/410 of 19 December 2022 amending Regulation (EU) 2016/1675 as regards adding (...) and the United Arab Emirates to Table I of the Annex to Delegated Regulation (EU) 2016/1675 (...), OJ L 59, 24.2.2023, pp. 3-7.

<sup>11</sup> In accordance with recital (5) (third sentence) of the Contested Decision, the concerns that led to the listing of the UAE by the FATF had not yet been fully addressed despite the commitment and progress by it.

<sup>12</sup> See paragraph 8 above.

- on 18 October 2023, ESMA in turn filed a Response to DCCC’s Response.

18 On 23 October 2023, the Board of Appeal suspended the Contested Decision (BoA-D-2023-03) (hereinafter “the Suspension Decision”).

19 As per directions of the President of the Board of Appeal, the parties exchanged further written submissions as follows:

- DCCC and ESMA filed on 15 November 2023 further Responses on the merits of the case;
- DCCC and ESMA filed on 29 November 2023 Responses to their counterparty’s Responses.

20 Neither of the parties having requested to make oral representations, the Board of Appeal decided on 19 December 2023 under Article 18(1) of its Rules of Procedure that no hearing was necessary for the just determination of the Appeal. Accordingly, pursuant to Article 20 of those Rules, the Appeal was deemed lodged as of that date for the purposes of Article 60(2) of the ESMA Regulation.

#### **IV – Findings of the Board of Appeal**

##### *A – Admissibility of the Appeal*

21 In its Suspension Decision,<sup>13</sup> the Board of Appeal concluded that the Appeal is admissible.

22 For the sake of clarity, the Board of Appeal has interpreted the Appeal as requesting the Board to remit the case to the ESMA’s Board of Supervisors for it to adopt an amended decision according DCCC a longer adaptation period in accordance with guidance to be provided by the Board of Appeal.

##### *B – ESMA Application to Lift the Suspension*

23 In its Response of 15 November 2023, ESMA submitted a request for the Board of Appeal to lift its Suspension Decision. ESMA reiterated the request in its Response of 29 November 2023.

24 ESMA’s application of 15 November 2023 was made at the conclusion of the submissions of ESMA on the merits and was based, in particular, on ESMA’s submissions concerning proportionality, the duty to state reasons, and the right to be heard, as well as the alleged damage, and the balancing of interests.

25 The reiterated application of 29 November 2023 was based in addition on the fact outlined in DCCC’s Response of 15 November 2023, and confirmed by data in the possession of ESMA,

<sup>13</sup> Suspension Decision, paragraphs 15-21.



according to which DCCC's sole EU clearing member had resigned, and accordingly been offboarded and disconnected in the meantime. In the circumstances, ESMA submits that it is not clear what the suspension of the operation of the Contested Decision would serve. The maintenance of DCCC's status as an EU-recognised third-country CCP could, according to ESMA, only allow DCCC to continue and even grow its EU business. Conversely, ESMA submits, DCCC can perform any business outside the EU without needing any EU recognition.

26 In its Response of 29 November 2023, DCCC has requested the Board of Appeal to keep the suspension of the Contested Decision in place until the outcome of the Appeal is concluded.

27 In its Response of 15 November 2023, DCCC made two sets of submissions relevant in this regard concerning the resignation of its only EU clearing member and the fact that its more substantial UK business in effect depends on the continuing ESMA recognition.

28 Firstly, according to DCCC, in view of the length of the appeal process and the fact that the Board of Appeal's Suspension Decision was published only on 24 October 2023, *i.e.*, one day before the effective date of the Contested Decision on 25 October 2023, it was left with no option but to complete the resignation of its only EU clearing member.

29 Secondly, DCCC explained that, on 20 October 2023, it had received a notification from the Bank of England informing DCCC that upon the conclusion of ESMA's adaptation period under the Contested Decision, DCCC will be transferred from the Temporary Recognition Regime ("TRR") to the run-off-regime pursuant to the UK regulatory framework, under which DCCC will be required to wind down relevant contracts and business with UK counterparties. DCCC has submitted that it possesses substantial current business engagements in the UK and that exiting the TRR will result in the resignation of four UK broker members and potentially another three trade members that clear through these UK broker members.

30 In the light of the fact that the Board of Appeal is in a position to render the decision on the merits (see immediately below), dismissing the Appeal, and consequently lift the suspension (see paragraph 108 below), there is no need to rule separately on ESMA's application to lift the suspension anymore.

### *C – Decision on the Merits*

31 The issues raised can be grouped in three sets of grounds of challenge. The first ground relates to an alleged violation of the duty to state reasons in the Contested Decision, the second one to an alleged violation of the proportionality principle in the determination of the adaptation period and the third one to an alleged violation of the right to be heard. These arguments will be addressed separately and in this order. Based on the expertise of its members, the Board of Appeal must examine whether the arguments put forward by the Appellant (*i.e.*, DCCC) are likely to show that the considerations on which the Contested Decision is based are flawed.

## C.1 – Duty to state reasons in the Contested Decision

32 The first ground of challenge concerns the duty to state reasons. According to settled case law, the duty to state reasons is an essential procedural requirement, compliance with which falls to be verified by an adjudicating body of its own motion.<sup>14</sup>

33 DCCC submits that the Contested Decision does not disclose the reasons for selecting three months rather than a longer time span for the adaptation period and in effect challenges the proportionality of the three-month duration.

34 In its responses on this matter, ESMA stresses that, in the first place, the sole criterion provided in EMIR that ESMA should consider when determining the adaptation period is the need to minimise potential market disruption. Second, ESMA states that (the above-mentioned<sup>15</sup>) recital (9) of the Contested Decision provides reasons for that Decision.

35 In its submissions following the Board of Appeal’s Suspension Decision, ESMA expanded on these arguments and submitted that, in order for a person to be able to ascertain the reasons of a decision, that person should be able to do so not necessarily just by reading the decision itself, but also by requesting such information from the authority taking it. In ESMA’s view, should DCCC not have fully understood the reasoning provided in the Decision, it could have requested ESMA to provide clarifications.

36 In its Responses of 15 and 29 November 2023, ESMA also provided additional clarifications on the procedure followed when preparing the Contested Decision and elucidated the background information supporting it. In particular, ESMA pointed out precedents and examples of market practice it considered as a reference for the determination of the three-month adaptation period and highlighted the provisions in DCCC’s own Rulebook that it deemed compatible with that adaptation period, as further set out below in the context of the ground of challenge concerning the proportionality of the three-month adaptation period.

37 As the Board of Appeal observed in its Suspension Decision,<sup>16</sup> the Contested Decision does not make explicit the reasoning behind the decision to set the adaptation period at three months. The wording of recital (9) in the Contested Decision is not sufficient to comply with the requirements relating to the duty to give reasons in accordance with Article 296 TFEU and Article 41(2), point (c) of the Charter of Fundamental Rights of the EU (the “CFR”). As the settled case law of the Court of Justice has clarified, the duty to state reasons is intertwined with the need to protect the addressee’s interest in deciding whether to challenge the relevant act, as well as on the need to enable the adjudicating body to ascertain whether the challenged act was well grounded. The duty to provide reasons is not discharged merely by taking formal considerations into account but seeks to give an opportunity to the parties defending their rights of ascertaining the reasons for the measure adopted, as well as to the Court of exercising its power of review. At the same time, the requirements to be

<sup>14</sup> Judgments of the Court of 20 March 1959 in Case 18/57, *Nold v High Authority of the European Coal and Steel Community*, EU:C:1959:6, p. 51, and of 8 December 2011 in Case C-272/09 P, *KME Germany (et al.) v European Commission*, C-272/09 P, EU:C:2011:810, paragraph 101.

<sup>15</sup> See paragraph 5 above.

<sup>16</sup> Suspension Decision, paragraph 36.

satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law.<sup>17</sup>

38 The Board of Appeal is, thus, not satisfied that a mere repetition of the objective of the power, such as ESMA's power of minimising potential market disruptions under Article 25p(1), third subparagraph EMIR, without any explanation regarding the reasons why the length of the adaptation period accorded (*in casu* three months) is considered appropriate, can meet the duty to state the reasons underpinning the Contested Decision. This is all the more so seeing that setting the length of the adaptation period was in effect the only part of the Contested Decision in respect of which ESMA had any choice to make, the withdrawal of recognition itself being the automatic consequence of the inclusion of the UAE in the list of high-risk third countries.

39 The Board of Appeal must in this regard reject ESMA's contention that DCCC should have requested the relevant reasoning from ESMA. Any decision adversely affecting a person must itself state the reasons on which it is based, in order to provide the persons concerned with details sufficient to allow them to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested.<sup>18</sup> ESMA's reliance on the case law of the Court of Justice concerning Article 47 CFR on the right to an effective remedy and to a fair trial<sup>19</sup> is misguided in this regard.

40 It is true that, in order to satisfy the requirements of Article 47 CFR, it is sufficient that the person concerned by a decision has the right to ask for the provision of the reasoning (or a clarification thereof), the essential point for the exercise of the rights of the defence protected by that provision being that the reasoning is somehow ascertainable. That, however, does not exclude that a duty exists by virtue of Article 296 TFEU and Article 41(2), point (c) CFR for (in the case at hand) ESMA to state its reasoning clearly from the outset. In this case, such reasoning was not provided in the Contested Decision.

41 It should however be noted that, in the case at hand, ESMA followed up on the Board of Appeal and its President's request to clarify the basis on which it deemed the length of the adaptation period of three months set in the Contested Decision proportionate. In particular, ESMA's submissions of 15 and 29 November 2023 provided exhaustive information on the factual and logical background of the Contested Decision. Had such information, at least in summary, been provided in the recitals of the Contested Decision, the duty to state reasons would have been satisfied.

42 It is true that, in the context of proceedings before the Court of Justice, the fact that the EU body concerned provides the reasons for the decision at issue in the course of the proceedings cannot

<sup>17</sup> See, e.g., the judgments of the Court of 1 July 2008 in joined Cases C-341/06 P and C-342/06 P, *Chronopost and La Poste v UFEX and Others*, EU:C:2008:375, paragraph 88, and of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraph 172.

<sup>18</sup> Judgment of the Court of 22 January 2004 in Case C-353/01 P, *Mattila v Council and Commission*, EU:C:2004:42, paragraph 32.

<sup>19</sup> Judgment of the Court of 28 November 2013 in Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, paragraph 68 (citing further case law).

compensate for an inadequacy of the initial statement of reasons for that decision. The reasons for a decision may not be explained for the first time *ex post facto* before the Court, save in exceptional circumstances, which are not present in this case.<sup>20</sup>

43 The Board of Appeal, though, was established specifically in the interests of procedural economy, as referred to in recital (58) of the ESMA Regulation, and proceedings in front of the Board of Appeal are not subject to the strict procedural requirements as those in front of the Court of Justice.

44 Therefore, the explanations provided by ESMA during the course of the Appeal should in the context of the present proceedings be capable of compensating the lack of sufficient reasons in the Contested Decision, if only for reasons of procedural economy. Remitting the decision to the ESMA Board of Supervisors for the sole purpose of having its wording modified to integrate information that was already provided to DCCC in the context of the Appeal proceedings would not improve the protection of DCCC's interests.

45 It is relevant to note in this context that the Board of Appeal by virtue of Article 6(5) of the ESMA Regulation forms part of ESMA itself. The Court of Justice have indeed confirmed that, to the extent that a decision of an internal appeal body is inherently linked with the decision appealed against, reasoning contained in the appeal body's decision can subsequently be taken into account for the purpose of determining the reasons on which the authority's decision is based.<sup>21</sup>

46 By way of consequence, the failure of the Contested Decision to set out the reasoning underpinning the decision to set the adaptation period at three months is made up for by the reasoning of ESMA as set out below and adapted by the Board of Appeal, which supplements the Contested Decision. It is therefore unnecessary to remit the Contested Decision to the Board of Supervisors on this account.

### C.2 – Proportionality of the Contested Decision

47 The second ground of challenge concerns the proportionality of the three-month adaptation period.

48 In its Appeal, DCCC asked the Board of Appeal to extend the adaptation period set in the Contested Decision from three months to two years. As mentioned in paragraph 21 above, the Board of Appeal has interpreted this as a request to remit the case to the ESMA Board of Supervisors for it to adopt an amended decision according DCCC a longer adaptation period.

49 Even if DCCC did not use the word “proportionality” in its Notice of Appeal, it was clear to the Board of Appeal that its arguments to the effect that the adaptation period granted by ESMA in the Contested Decision was too short were tantamount to questioning their proportionality. Hence,

<sup>20</sup> Judgment of the Court of 11 May 2023 in Case C-101/22 P, *Commission v Sopra Steria Benelux*, EU:C:2023:396, paragraph 88 with further citations of case law.

<sup>21</sup> Judgment of the Court of 8 May 2019 in Case C-450/17 P, *Landesbank Baden-Württemberg – Förderbank v ECB*, EU:C:2019:372, paragraphs 95 and 96.

the Board of Appeal merely translated the pleas into the corresponding traditional categories of EU law.

50 Likewise, contrary to ESMA’s submissions, DCCC does not alter the ambit of the Appeal by arguing in its Response of 15 November 2023 that it should have been accorded a “longer” adaptation period than three months, when it had in its Notice of Appeal requested that the adaptation period be extended to “two years”. In accordance with the principle *maior continet in se minus* (‘the greater includes the lesser’), the Board of Appeal would not rule *ultra petita* by concluding that an adaptation period longer than the one in fact accorded, but falling short of the two years originally requested, would be appropriate.

51 The Board of Appeal once again recalls that proceedings in front of it are – and in the interests of procedural economy are intended to be – materially different from the more formal adversarial proceedings in front of the Court of Justice and it is appropriate to make certain allowances as regards the pleas and reasoning put forward by non-legally represented parties in proceedings before the Board.<sup>22</sup>

52 More in general, an appellant is entitled to invoke material facts and submit requests through an Appeal, regardless of the legal qualification of those facts and requests.

53 In its submissions of 18 October, as well as of 15 and 29 November 2023, ESMA set out the basis on which the length of the adaptation period was set at three months and was (accordingly) considered proportionate. In essence, ESMA started from the proposition that in setting the length of the adaptation period, it was only required to take into account potential disruption of the EU markets and that it was not required to have regard to the needs of DCCC. In determining the potential EU market disruption, ESMA considered that the maximum two-year adaptation period permitted by EMIR would be appropriate only for Tier 2 third-country CCPs, or Tier 1 CCPs with a substantial activity in the EU. The period of three months was finally set considering that only one clearing member established in the EU would be affected by the withdrawal of recognition in respect of DCCC, so that the impact of the withdrawal of recognition was going to be significantly less than in the situations for which a 2-year adaptation period was provided for by EMIR. The central concern of ESMA appears to have been to ensure that the adaptation period would provide the time necessary for the EU clearing member to disconnect.

#### Identification of the relevant considerations in setting the adaptation period

54 The preliminary legal question to consider are the objectives which have a bearing on the application of the proportionality test to the length of the adaptation period in the case at hand.

55 In this regard, it is common ground that the withdrawal decision pursues the general public interest objective identified notably in recital (28) of the AML Directive of protecting the proper functioning of the EU financial system and of the internal market from money laundering and terrorist financing. Due to the addition of the UAE to AML blacklist by the Commission, there are deemed to

<sup>22</sup> Suspension Decision, paragraph 21.

be AML/CFT risks stemming from DCCC's continued recognition as a third-country CCP, requiring that recognition to be withdrawn in principle as speedily as possible.

56 A withdrawal with immediate effect would at the same time be liable to lead to market disruption, as well as have an impact on individual stakeholders active in the market. Article 25p(1), third sub-paragraph EMIR expressly imposes in this regard the obligation on ESMA to "*provide for an appropriate adaptation period*".

57 There is a dispute between the parties as to whether the impact on DCCC should have been taken into account by ESMA.

58 DCCC contends that the impact of the withdrawal of recognition on its business should have been taken into account in setting the length of the adaptation period.

59 In its submissions of 18 October, as well as of 15 and 29 November 2023, ESMA reiterated that, in its interpretation, Article 25p(1), third sub-paragraph EMIR should be interpreted as meaning that the only purpose of the power to determine the adaptation period lies with the need "*to minimise potential EU market disruption*", and not to serve the needs of any individual entities.

60 ESMA considers that its position in this respect is supported by a comparative reading of other provisions of EMIR providing for adaptation periods or withdrawal of authorisation. ESMA notes that, by contrast with Article 25p EMIR, Articles 25(2c), second sub-paragraph, point (b) and 25(5), second sub-paragraph EMIR impose express requirements to take into account the position of individual entities in setting adaptation periods. Moreover, ESMA points out that there are some circumstances of withdrawal of authorisation or registration in which EMIR does not provide for any adaptation period at all, such as where an authorisation of an EU CCP was to be withdrawn under Article 20(1), point (c) EMIR by its national competent authority, or where ESMA was to withdraw registration of an EU trade repository under Article 71(1), point (c) EMIR.

61 ESMA further considers its reading of Article 25p EMIR as limiting the objectives to be taken into account in setting the adaptation period to minimising potential EU market disruption to be supported by recital (55) of Regulation 2019/2099 (which amended the EMIR),<sup>23</sup> which considers that the adaptation period is to be set to avoid market disruption, without adding any other considerations.

62 In its Suspension Decision, the Board of Appeal had considered on a preliminary basis<sup>24</sup> that the need to minimise potential market disruption may be only one of the elements ESMA should take into account when determining the date of entry into effect of the decision to withdraw the recognition under Article 25p(1), third sub-paragraph EMIR, another element being the need to "*provide for an appropriate adaptation period*".

63 In the light of the arguments presented, the Board of Appeal holds that Article 25p(1), third sub-paragraph EMIR should be interpreted in the sense that ESMA must endeavour to minimise

<sup>23</sup> See paragraph 7 above.

<sup>24</sup> Suspension Decision, paragraph 35.

potential market disruptions and, at the same time, provide for an “*appropriate*” adaptation period which shall not exceed two years and that this assessment necessarily entails that ESMA should, *inter alia*, also consider the effects of the decision on the adaptation period may have on its addressee.

64 In fact, any addressee of a decision of an EU body can be deemed to be directly and individually concerned by that decision, as appears notably from Article 263(4) TFEU, and must be able to expect that their interests are taken into account in determining the proportionality of the decision, as well as for the purposes of ensuring compliance with other general principles or fundamental rights flowing from EU law, such as notably the right to good administration enshrined in Article 41 CFR.

65 The express requirement posited in Article 25p(1), third sub-paragraph EMIR that the adaptation period should be “*appropriate*” can be seen as a concrete expression of the general principle of proportionality, compliance with which is incumbent on all EU institutions and bodies. This conclusion is reinforced by the wording of that same provision of EMIR, where the need that ESMA endeavours to minimise potential market disruption and the requirement to “*provide for an appropriate adaptation period which shall not exceed two years*” are juxtaposed. The wording of that provision therefore does not subordinate the determination of an appropriate adaptation period to the minimisation of the potential market disruption, although this can be considered as a prominent end of that power.

66 The interest of the CCP concerned in avoiding an unduly abrupt withdrawal of recognition must therefore also be taken into account in setting the length of the adaptation period and ESMA has therefore failed, on its express admission, to duly take into account a relevant consideration in assessing proportionality. As DCCC correctly submitted, ESMA did not examine the impact of the duration of the adaptation period on DCCC and did not assess whether the measure is excessive or not.

67 However, even in the light of the need to pay due consideration to the impact of the adaptation period’s length on DCCC, the Board of Appeal considers that the three-month adaptation period set in the Contested Decision did not violate the principle of proportionality, for the following reasons.

#### Proportionality assessment

68 In accordance with the general principle enshrined in Article 5(4) TEU, action by EU bodies is not to exceed what is necessary to attain the objectives of the Treaties. EU bodies are required to apply the principle of proportionality as laid down in Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the TFEU.<sup>25</sup> It is settled case-law that, in accordance with that principle, the acts adopted by EU bodies must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate

<sup>25</sup> Judgment of the General Court of 6 October 2021 in Cases T-351/18 and T-584/18, *Ukrseļhosprom PCF LLC and Versobank AS v ECB*, EU:T:2021:669, paragraph 306.

measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.<sup>26</sup>

69 The assessment concerning the definition of an appropriate adaptation period must notably be performed taking into account in turn, first, the two-year maximum specified in Article 25p(1), third sub-paragraph EMIR (see below, under a), second, the impact on DCCC's EU clearing member (under b) and, third, the impact on DCCC itself (under c).

a) The two-year maximum for adaptation periods

70 First, as a starting point, the two years which the adaptation period "*shall not exceed*" must be seen as applying to situations significantly more complex than that which has arisen out of the withdrawal of DCCC's recognition.

71 As ESMA pointed out, the principle of proportionality is already embedded in EMIR to a certain extent insofar as the maximum adaptation period of two years is to cater for all possible cases in which a recognition of third-country CCPs could be withdrawn. Considerations of proportionality are further reflected in the concept of tiering, introduced by EMIR, whereby third-country CCPs applying for recognition are to be tiered based on their systemic importance for the financial stability of the EU or one or more of its Member States. Third-country CCPs deemed systemically important are determined as Tier 2<sup>27</sup> and those not systemically important as Tier 1.<sup>28</sup>

72 Unlike Article 25(2) EMIR, which only applies to Tier 1 third-country CCPs,<sup>29</sup> Article 25p EMIR applies to both Tier 1 and Tier 2 third-country CCPs. Accordingly, as ESMA has argued, it is reasonable to expect that, by application of the principle of proportionality and taking into account the specificities of each particular case, the maximum adaptation period of two years should be applied by to Tier 2 third-country CCPs, as well as to Tier 1 third-country CCPs with a significant volume of activity in terms of assets outstanding and a significant number of individual clients and contracts, also taking into account the liquidity of the market, the complexity of the instruments involved and the transferability of the collateral.

73 ESMA has pertinently compared DCCC's situation and market share to the indicators set out in Article 6 of Regulation 2020/1303,<sup>30</sup> as well as to other CCPs, both Tier 1 and Tier 2, providing services in the EU to conclude that there is a striking difference in terms of market exposures and related risks stemming from Tier 2 CCPs as compared to those of DCCC.

74 For example, basing itself on publicly available information, ESMA points out that the total initial margins (*i.e.*, collateral) posted to CME, a US-based Tier 1 CCP is around USD 225 billion, collateral posted to LCH Ltd, a UK-based Tier 2 CCP is USD 246 billion. The total initial margin

<sup>26</sup> *Ibid.*, paragraph 307.

<sup>27</sup> EMIR, Article 25(2a).

<sup>28</sup> *Ibid.*, Article 25(2), point (e).

<sup>29</sup> See Article 25(2), point (e) EMIR.

<sup>30</sup> See paragraph 12 above.



posted to DCCC by comparison is merely just over USD 26 million, *i.e.*, more than 9,000 times less than that of LCH Ltd. LCH Ltd, was able to disconnect a client in default – Maple Bank GmbH – and liquidate its portfolio in less than three days. Other comparators provided by ESMA are ICE Clear Europe, a UK-based Tier 2 CCP with 13 clearing members established in the EU and serving three trading venues based in the EU; and SIX x-Clear, a Switzerland-based Tier 1 CCP with 17 clearing members established in the EU, serving 12 trading venues in the EU and having an interoperability arrangement with one CCP authorised in the EU.

75 On the basis of the facts of the case at hand, DCCC's operations are by comparison much less complex, which was also not contested by DCCC. DCCC has one clearing member established in the EU, no trading venues served in the EU and no interoperable CCPs authorised in the EU. It would therefore be disproportionate to apply the same adaptation period of two years to DCCC as to Tier 2 CCPs.

76 Therefore, as a starting point, an adaptation period significantly shorter than the maximum of two years would appear to be indicated in principle.

#### b) Impact on the EU clearing member of DCCC

77 Second, in its submissions of 18 October, as well as of 15 and 29 November 2023, ESMA develops on the sources which, in its view, could have led to potential market disruption in the case at hand and have led to its determination of the three-month adaptation period, focussing on the impact of the withdrawal on the EU clearing member of DCCC.

78 Considering that DCCC is a Tier 1 CCP with only one clearing member in the EU, the possibility of an EU market disruption could, according to ESMA, be considered as low to non-existent. With just one clearing member in the EU, the exposure to the EU market was considered as very limited, and the three-month adaptation period was established to accommodate possible consequences for the relevant EU clearing member, while balancing the overall public interest of minimising to the extent possible risks stemming from AML/CTF.

79 The duration of three months for the adaptation period was, according to ESMA, endorsed by all three authorities involved in the supervision of the EU clearing member in question as adequate for that EU clearing member. Moreover, the two authorities from the Netherlands, involved by virtue of the fact that the EU clearing member was established in the Netherlands, confirmed to ESMA that a longer adaptation period would in their view have been inappropriate and excessive. The authorities consulted on the basis of Article 25(3) EMIR, as recorded in recital (8) of the Contested Decision, were Autoriteit Financiële Markten (AFM), De Nederlandsche Bank (DNB), and the Single Supervisory Mechanism (SSM).

80 As DCCC at the relevant time had only one clearing member established in the EU, ESMA was under an obligation to consult these authorities on the basis of Article 25(3) points (a), (b) and (e) EMIR. No further obligation to consult arose on the basis of Article 25(3), point (c) EMIR as DCCC did not provide services to any trading venues established in the EU; on the basis of Article 25(3), point (d) EMIR as DCCC did not have interoperability arrangements with any EU CCP; or on the basis of Article 25(3), point (f) EMIR as DCCC did not clear any instruments denominated in EU currencies.

81 In addition, in its submission of 29 November 2023, ESMA adds some related considerations in respect of the capital requirements under the Capital Requirements Regulation<sup>31</sup> (CRR)<sup>32</sup> arising for “institutions” as defined in Article 4(1), point (3) thereof (mainly credit institutions).

82 The CRR requires such institutions to calculate own fund requirements for their trade exposures and default fund contributions to CCPs. The calculation significantly differs depending on whether the CCP is a “qualifying CCP” (*i.e.*, an EU CCP authorised under EMIR or a third-country CCP recognised by ESMA), or a “non-qualifying CCP”. EU institutions which are not clearing members but, nonetheless, have trade exposures arising from contracts or transactions cleared at a non-qualifying CCP would be subject to significantly higher own fund requirements as set out under Article 305 CRR.

83 Therefore, the withdrawal of recognition of DCCC was capable of generating a material increase in the own fund requirements for other EU market participants potentially indirectly exposed to DCCC. The three-month adaptation period was provided also so that such EU market participants could adapt to the higher own fund requirements, *i.e.*, to allow them to endow themselves with the necessary capital covering all their risk-weighted exposures, over a reasonable timeframe. Article 311(2) CRR provides in this respect EU institutions with three months to apply specified treatments where a CCP used by the institution in question will no longer comply with the conditions for recognition.

#### c) Impact on DCCC

84 Third, while ESMA on its own admission did not directly take into account the impact on DCCC in setting the length of the adaptation period, it did so at least to some extent indirectly in considering that the period of three months was deemed sufficient for offboarding the one EU clearing member of DCCC, as set out above.

85 If the adaptation period was sufficient from the point of view of its EU clearing member, the adequate length of the adaptation period with regard to the need that it leaves DCCC a sufficiently long time to disconnect also appears to be substantiated.

86 In this regard, ESMA has argued that the three-month adaptation period is in line with DCCC’s own Rulebook.<sup>33</sup> Rules B.19 and B.22, as well as B.23 according to ESMA, provide for a possibility of immediate suspension and termination without notice, respectively. It has to be pointed out in this respect that the Rules in question govern suspension and termination of a clearing member for breaches of the Rules, and the only possibility of immediate suspension arises where the clearing member is in “default”,<sup>34</sup> and where timelines can naturally be expected to be rigorous. By contrast, the present case concerns the forced disconnection of a clearing member that was presumably fully

<sup>31</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions (...), OJ L 176, 27.6.2013, pp. 1-337, as in force.

<sup>32</sup> See paragraphs 16-19 of the ESMA’s further submission of 29 November 2023.

<sup>33</sup> DCCC Rules, Version 2.00, updated on 1 May 2019, published on DCCC’s website: <https://dccc.co.ae/application/files/7915/6879/6403/DCCCclearingRulesVersion2.pdf>.

<sup>34</sup> The notion of default is further defined in Rule H.1.

compliant with the Rules. Moreover, according to their wording, the Rules in question in fact do not permit termination without notice, as alleged by ESMA. Even a clearing member suspended for default can have their membership terminated only if the default is not remedied within one month (Rule B.22.1). Finally, in the event of termination for breach, Rule B.23, also referred to by ESMA, provides that there is no entitlement to a refund of membership fees, which are paid on an annual basis, so that DCCC would in such a situation have had greater financial stability.

87 The Board of Appeal notes that Rule B.27 permits a clearing member to resign their membership apparently with immediate effect.<sup>35</sup> At the same time, a clearing member resigning their membership will presumably have wound down their business in the runup to the resignation, and DCCC will also in this situation have some financial stability arising out of the fact that the Rule precludes and refund of fees or diminution of liability to DCCC.

88 These Rules from DCCC's Rulebook can, however, at least be taken as indicating that a disconnection of a clearing member must be technically feasible within one month.

89 This *a fortiori* provides support for the conclusion that the termination of the operations within a three-month adaptation period is technically feasible, at least when this is required by the compelling need to minimise certain crucial risks, such as the use of CCPs for money laundering and terrorist financing (such protection being particularly important in the context of credit institutions' authorisation withdrawals<sup>36</sup>).

90 It is also relevant in this respect that, as DCCC itself reported, its only EU clearing member has already disconnected within the three-month adaptation period, which also suggests that the three-month period provided by the ESMA in the Contested Decision was a sufficient time to arrange the discontinuation in the provision of the clearing services.

91 To be sure, the disconnection of the EU clearing member within the three-month adaptation period does not lead, in and of itself, to the conclusion that this adaptation period was appropriate in terms of overall meeting the principle of proportionality. In this regard, it must be noted that DCCC did not claim that it was physically or legally impossible to disconnect its EU clearing member within that timeframe but rather claimed that this disconnection came with additional costs, as compared to a disconnection after a longer adaptation period.

92 However, it is clear that some costs are inherent in any disconnection or adaptation to the changed legal framework, brought about by the inclusion of the UAE, in 2023, in the list of high-risk third countries provided for in the Commission Delegated Regulation (EU) 2016/1675 as amended by its Delegated Regulation (EU) 2023/410.<sup>37</sup>

<sup>35</sup> Rule B.27.1(c) states that resignation may be "*expressed to become effective after a period of time*", suggesting that resignation may also be with immediate effect.

<sup>36</sup> See the (above-mentioned) judgment of the General Court of 6 October 2021 in Cases T-351/18 and T-584/18, paragraph 329 (with reference to paragraph to 320 which makes further reference to the case law cited therein).

<sup>37</sup> See paragraph 13 above.

93 DCCC has not adduced evidence that the adverse economic consequences it faced as a consequence of the length of the adaptation period being set at three months were disproportionate. Likewise, DCCC has not adduced evidence to show that a longer adaptation period would be the appropriate one in connection to the withdrawal of its recognition.

94 Moreover, the fact that the other two UAE CCPs had been granted by ESMA three-month adaptation periods as well, although they were smaller, is not such as to undermine the proportionality of that period with regard to DCCC, as a three-month adaptation period can be taken to be the reasonable minimum one, equally applying to several Tier 1 third-country CCPs with the same relative significance (in terms of volume of activity and number of individual clients and contracts), even though some of them may be smaller (even considerably) than others. The correlation between the size of the CCP and the duration of the adaptation period required for an orderly withdrawal from activities is not necessarily a linear one.

#### Interim conclusion on proportionality

95 ESMA has clarified during the course of the Appeal that its assessment relied on a broad information basis and pointed out the determinants of the Contested Decision, as set out above. The information provided by ESMA in that context has permitted the Board of Appeal to verify that the three-month adaptation period complies with the principle of proportionality, a conclusion with none of the arguments put forward by DCCC have undermined.

96 In more detail, the three-month adaptation period appears at the same time sufficiently long to achieve the purpose of minimising potential market disruptions as well as the impact on DCCC and its EU clearing member (thus being appropriate), without being excessively long by going manifestly beyond what is required for this purpose (thus being necessary). The two criteria do not necessarily contrast with each other, because too short an adaptation period can harm the CCP and its clients or members, hence also entailing the risk of market disruptions. Overall, the reasoning ESMA provided during the course of the Appeal supports the conclusion that the three-month adaptation period set in the Contested Decision does not appear to lead to an excessive burden on DCCC duly taking into consideration the need to avoid the risk of exposure to money laundering and terrorist financing (so that proportionality in a narrow sense is equally respected).

97 The second ground of challenge therefore does not require the Contested Decision to be remitted to the Board of Supervisors.

#### C.3 – Right to be heard

98 The third ground of challenge to be examined in the context of the merits concerns the right of DCCC to be heard before the Contested Decision was taken.

99 According to Article 41(2) point (a) CFR, the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is

taken.<sup>38</sup> The right to be heard is one of the rights of the defence, a general principle of EU law which is applicable even in the absence of any specific rules in that regard. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views.<sup>39</sup>

100 As noted by the Board of Appeal in its Suspension Decision, the Contested Decision does not mention that ESMA had given DCCC any opportunity to be heard in the course of the proceeding that led to the adoption of the Contested Decision. In this regard, ESMA reports that it has consulted the relevant authorities and entities referred to in Article 25(3) EMIR, as required by Article 25p(1), first sub-paragraph EMIR.

101 ESMA's submissions essentially relate to three points. Firstly, ESMA did inform both DCCC and the competent UAE regulator before the adoption of the Contested Decision and provided copies of this correspondence, encompassing a letter of 1 June 2023 and an email of 28 June 2023, to the Board of Appeal. Secondly, it is according to ESMA difficult to imagine that the absence of a textual reference to a right to be heard in Article 25p EMIR would essentially be an 'oversight' by the co-legislators. Rather, it should be seen as conscious choice of them. Thirdly, where the fulfilment of an objective condition for the recognition is lacking (as it is for the non-fulfilment of the condition in Article 25(2), point (d) EMIR), a hearing of the third-country CCP whose recognition will have to be withdrawn would make no difference.

102 With regard to the first point, the Board of Appeal recalls that, in accordance with the relevant case law of the Court of Justice, sharing information on a pending procedure has not always been deemed sufficient to ensure compliance with the right to be heard. Essential in that regard is whether the information shared is complete and the opportunity of being heard is given.<sup>40</sup> It can be remarked in this respect that both the letter and the email addressed to DCCC, which are essentially identical in wording, merely mentioned that “[t]o minimise potential market disruption, ESMA may consider an appropriate adaptation period”, without inviting DCCC to make its views on the point known. The closing phrase (“*We remain at your disposal to provide any additional clarification you may need.*”) also does not suggest that input from DCCC as regards the decision to be taken by ESMA is invited.

103 As to ESMA's claim that Article 25p EMIR does not mention the right of the CCP concerned to be heard, it is worth recalling that, according to the case law of the Court of Justice, the right to be

<sup>38</sup> See by means of indication the judgment of the Court of 3 July 2014 in joint Cases C-129/13 and C-130/13, *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics BV v Staatssecretaris van Financiën*, ECLI:EU:C:2014:2041, paragraph 29; and the Order of the General Court of 12 March 2021 in Case T-50/20, *PNB Banka v ECB*, ECLI:EU:T:2021:141, paragraphs 79-80. Under both these judgments, the right to be heard in all proceedings is not only affirmed in Articles 47-48 CFR, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in its Article 41, which guarantees the right to good administration.

<sup>39</sup> Judgment of the General Court 1 March 2023 in Case T-324/21, *Harley-Davidson Europe Ltd, Neovia Logistics Services International v European Commission*, EU:T:2023:101, paragraph 161.

<sup>40</sup> Judgment of the Court of 12 February 1992 in joined Cases C-48/90 and C-66/90, *Netherlands, Koninklijke PTT Nederland NV and PTT Post BV v Commission*, EU:C:1992:63, paragraphs 49-52.

heard in all proceedings is affirmed in Article 41 CFR with a view to foster the right to good administration.

104 As stated by the Board of Appeal in its Suspension Decision, it is true that Article 25(3) EMIR, which Article 25p(1) EMIR cross-refers to, does not expressly mention the CCP among the entities which ESMA is required to consult. However, this should not preclude the CCP from enjoying the right to be heard on the basis of Article 41(2), point (a) CFR. ESMA is directly subject to both Article 25p EMIR and Article 41 CFR, so that the principle “*ubi lex voluit dixit, ubi noluit tacuit*”, which ESMA invokes, is not relevant here because there is indeed no silence in the law (which includes primary EU legislation). If one prefers to refer to Article 25p alone, therefore, the legal rule to apply is “*lex minus dixit quam voluit*.”

105 In this regard, mention should also be made of the case law, according to which the right to be heard is required even where the applicable legislation does not expressly provide for such a procedural requirement<sup>41</sup> and, therefore, is a fundamental principle of EU law which must be guaranteed even in the absence of any specific rules.<sup>42</sup> Moreover, the Board of Appeal notes that Article 41(2) CFR, when granting the right to be heard (under point (a)), does not require that a procedure be initiated against the party, but only fixes on the potential adverse effects of the decision that are of direct and individual concern to such a party.

106 The Board of Appeal agrees, nevertheless, with the essence of the third argument raised by ESMA, when applied to the setting of the length of the adaptation period. According to the case law, in order for an infringement of the right to be heard to result in annulment, it is necessary to establish that, had it not been for such an irregularity, the outcome of the procedure might have been different.<sup>43</sup>

107 In the course of the Appeal proceedings, DCCC did not put forward any arguments or evidence convincing the Board of Appeal that, had DCCC shared such information with ESMA during the procedure for the determination of the adaptation period, this could have materially affected the outcome of the procedure. None among the submissions of DCCC leads to suggest that ESMA would and should have taken a different decision in that hypothetical scenario where DCCC’s right to be heard would not have been infringed.

108 The third ground of challenge therefore also does not provide a basis for remitting the Contested Decision to the Board of Supervisors.

<sup>41</sup> See, e.g., the judgment of the General Court of 7 December 2018 in Case T-280/17, *GE.CO.P. (...) v European Commission*, ECLI:EU:T:2018:889, paragraph 44 (with reference to paragraphs 31 and 39 of the (just above-mentioned) judgment of the Court of 3 July 2014 in joint Cases C-129/13 and C-130/13 and the case-law cited therein).

<sup>42</sup> See the (above-mentioned) judgment of the Court of 12 February 1992 in joint Cases C-48/90 and 66/90, paragraph 44 (with further reference to the judgment of the Court of 14 February 1990 in Case C-301/87, *French Republic v Commission of the European Communities*, ECLI:EU:C:1990:67).

<sup>43</sup> See the (just above-mentioned) judgment of the Court of 14 February 1990 in Case C-301/87, paragraph 31 and the (also above-mentioned) judgment of the General Court of 1 March 2023 in Case T-324/21, paragraph 162.

## **V – Expiration of the suspension**

109 The Board of Appeal has considered in its Suspension Decision<sup>44</sup> whether the suspension should be maintained for a short period of time even after the Appeal is dismissed so as to safeguard the *effet utile* of this Suspension Decision.

110 Given the resignation of DCCC's only EU clearing member and the fact that DCCC has not requested any maintenance of the suspension beyond the date of the decision disposing of the Appeal,<sup>45</sup> it is appropriate to allow the suspension to expire on the date of publication of the present decision.

## **VI – Decision**

**On the grounds developed above, the Board of Appeal unanimously decides:**

- 1) The Appeal submitted by DCCC with its notice of 31 August 2023 challenging Decision ESMA91-2145765636-8059 of the European Securities and Markets Authority of 21 July 2023, to withdraw the recognition decision of Dubai Commodities Clearing Corporation as a Tier 1 third-country CCP pursuant to Article 25p of Regulation (EU) No 648/2012 (EMIR), is dismissed.**
- 2) The Decision ESMA91-2145765636-8059 is consequently confirmed.**
- 3) The effects of the Suspension Decision BoA-D-2023-03 given by the Board of Appeal on 23 October 2023 will expire on the date of publication of the present decision.**

<sup>44</sup> Suspension Decision, paragraphs 64-65.

<sup>45</sup> See, respectively, paragraphs 27 and 25 above.

The original of this Decision is signed by the Members of the Board of Appeal in electronic format and countersigned by hand by the Secretariat.

Michele Siri (President, Co-Rapporteur)  
(SIGNED)

Christos Gortsos (Vice President)  
(SIGNED)

Gerben Everts  
(SIGNED)

Geneviève Helleringer  
(SIGNED)

Margarida Lima Rego  
(SIGNED)

Carsten Zatschler (Co-Rapporteur)  
(SIGNED)

On behalf of the Board of Appeal Secretariat

Adrien Rorive  
(SIGNED)

A signed copy of the decision is held by the Secretariat

***Date of the decision: 29.01.2024.***  
***Publication of the decision after verifications in accordance with Articles 23 and 24(2) of the Rules of Procedure: 06.02.2024.***