



BoA-D-2023-03

DECISION

given by

the
BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

on

the request for suspension

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

Date: 23 October 2023

DCCC v ESMA – Decision on suspension

- 1 This is the decision of the Board of Appeal of the European Supervisory Authorities (“Board of Appeal”) on the request for suspension filed, together with the main appeal, by the appellant Dubai Commodities Clearing Corporation (“DCCC” or “appellant”) pursuant to Article 60 of the ESMA Regulation.¹
- 2 By its appeal, DCCC challenges European Securities and Markets Authority’s (“ESMA”) Decision of 21 July 2023² to withdraw the recognition of DCCC as a Tier 1 third-country CCP under Article 25 of the “EMIR” Regulation³ with effect of 25 October 2023 (the Contested Decision).

I – Background to the dispute

- 3 The 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, the DCCC was again granted recognition as a third-country CCP under Article 25 EMIR by ESMA on 18 March 2022.⁴
- 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 complies with the requirements set out in Article 25(2), point (d) EMIR. The Contested Decision is based on Article 25p EMIR, which sets out the conditions for withdrawing the recognition decision of a 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

¹ 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 2009/79/EC (OJ 2010 L 331, pp. 84), as most recently amended by Article 2 of Regulation (EU) 2019/2175 (OJ L 334, 27.12.2019), as in force.

² Decision ESMA91-2145765636-8059 of 21 July 2023.

³ 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 was amended by Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 (...) 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), by virtue of which Article 25p was inserted.

⁴ Decision ESMA91-398-4665 of 18 March 2022.

have developed an action plan with FATF (Financial Action Task Force)” provided for in the Commission Delegated Regulation (EU) 2016/1675.⁵

- 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 Article 25 EMIR sets forth the conditions for the recognition of third-country CCPs in the European Union. Under Article 25(2), *“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”, inter alia, “(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”.*
- 7 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;*

⁵ 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, p. 1, as last amended by Commission Delegated Regulation (EU) 2023/1219 of 17 May 2023, OJ L 160, 26.6.2023, pp. 1-4, as in force.

(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.”

8 Article 25p(1) EMIR sets forth the conditions for the withdrawal of the recognition decision of a third-country. 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*”.

9 Under Article 25p(1), last sub-para., 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.*”

10 On 19 December 2022, the European Commission adopted its Delegated Regulation (EU) 2023/410,⁶ 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” provided for in the Commission Delegated Regulation (EU) 2016/1675. Regulation 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., 16 March 2023.

III – Procedure and forms of order sought

11 DCCC filed its Notice of Appeal by email on 31 August 2023.

12 The Appeal requests the Board of Appeal to:

⁶ 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.

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

13 In accordance with directions of the President of the Board of Appeal, ESMA on 22 September 2023 filed a Response to the suspension request, also addressing the admissibility of the Appeal. In its Response, ESMA considered the Appeal to be admissible but challenged the suspension request as being manifestly inadmissible and in any event not satisfying the requirements that would justify a suspension.

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

- DCCC on 6 October 2023 filed a Response to ESMA’s Response; and
- ESMA on 18 October 2023 in turn filed a Response to DCCC’s Response.

IV – Findings of the Board

A – The Admissibility of the Appeal

15 Under Article 60(4) of the ESMA Regulation and Article 9 of the Rules of Procedure, the Board of Appeal shall examine whether the appeal is admissible before examining whether it is well-founded. It is therefore appropriate to rule on the admissibility at the same time as ruling on the suspension request.⁷

16 Admissibility is a matter of public policy which the Board of Appeal should consider of its own motion if necessary.⁸

17 In the present case, the Board of Appeal considers that the Appeal is admissible, falling within the ambit of Article 60(1) of the ESMA Regulation and duly filed in accordance with Article 60(2) of that regulation. Specifically:

- the Contested Decision is a decision taken by the Board of Supervisors of ESMA in accordance with EMIR, which is a legally binding Union act conferring tasks on ESMA, pursuant to Article 1(2) of the ESMA Regulation;
- the Contested Decision is directly addressed to the Appellant;

⁷ Decision of 8 June 2023, *Euroins v EIOPA*, BoA-D-2023-01, paragraph 24.

⁸ Decision of 19 July 2023, *Euroins v EIOPA*, BoA-D-2023-02, paragraph 52.

- the Appeal was filed in writing within a period of three months starting as of the date of the notification of the Contested Decision to the Appellant.

- 18 The Board of Appeal notes that ESMA has acknowledged the admissibility in its submissions.
- 19 This conclusion is not affected by the circumstance that, as ESMA noted in its Response of 18 October 2023, the specific remedy identified in the Appeal, i.e., an extension of the adaptation period is not a remedy which the Board of Appeal is empowered to grant. Article 60(5) of the ESMA Regulation does not empower the Board of Appeal to modify a decision of ESMA, but merely to remit the case for adoption of an amended decision while being bound by the decision of the Board of Appeal.
- 20 The Appeal must be interpreted as requesting the Board of Appeal to remit the case to the ESMA 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. It is appropriate to read the Appeal in the light of the powers of the Board of Appeal and its formulation should not have the consequence of rendering it inadmissible unless there was no way that a decision of the Board of Appeal could further the result intended to be achieved by the Appeal.
- 21 The Board of Appeal takes into account the fact that the ESMA Regulation and the Rules of Procedure do not require appellants to be represented by lawyers. By way of consequence, certain allowances necessarily need to be made as regards the clarity and cogency of the pleas and reasoning put forward by non-legally represented parties in proceedings before the Board.

B – The Admissibility of the Suspension Request

- 22 ESMA contests the admissibility of the suspension request, in essence on two grounds.
- 23 First, ESMA argues that the Notice of Appeal does not comply with point (iii) of Article 5(4) of the Rules of Procedure and does not put forward any “grounds”.
- 24 In this respect, the Board of Appeal considers that the suspension request is sufficiently clear and particularised to comply with point (iii) of Article 5(4) of the Rules of Procedure, enabling in particular ESMA to respond to it and the Board of Appeal to rule on it. As noted in paragraph 21 above, the Board of Appeal here also takes into account the circumstance that the ESMA Regulation and the Rules of Procedure do not require appellants to be represented by lawyers. By way of consequence, certain allowances necessarily need to be made as regards the clarity and cogency of the pleas and reasoning put forward by non-legally represented parties in proceedings before the Board of Appeal.

- 25 Second, ESMA notes that the subject-matter of the Appeal overlaps with that of the application for suspension in that the Appellant is not challenging the withdrawal of recognition per se, but merely the length of the adaptation period foreseen, and that any suspension would accordingly provide the Appellant to some extent with the substantive relief sought. By way of consequence, according to ESMA, the decision on suspension requires a definite ruling on the merits of the Appeal, therefore rendering a subsequent decision on the Appeal itself nugatory. This would, according to ESMA, run counter to the case-law of the Court of Justice according to which interim measures may not prejudice the future decision in the main proceedings, nor render the claim in these proceedings nugatory or devoid of purpose.
- 26 The Board of Appeal is unconvinced by this line of argument, which fails to properly distinguish between the respective legal object and effects of, on the one hand, a suspension decision, and on the other hand the Appeal itself. While there may be a certain practical overlap, the legal object and effects are different. A suspension decision is aimed at ensuring the availability of an effective remedy, enabling the Board of Appeal to render its decision without that decision being rendered nugatory by the time it is pronounced. Such a suspension decision is moreover necessarily strictly limited in time to the duration of the proceedings in front of the Board of Appeal, which are in turn confined, by virtue of Article 60(2) of the ESMA Regulation, to three months from the Appeal being lodged in accordance with Article 20 of the Rules of Procedure. A final decision on the Appeal, by contrast, will – if allowed – formally result in the contested decision being remitted to the body having adopted it with a view to the adoption of an amended decision. It is only in the context of the decision on the Appeal that the duration of the adaptation period, and the reasons underlying that duration, will become relevant.
- 27 By way of consequence, the request for suspension is admissible.

C – The Suspension Request

- 28 Pursuant to Article 60(3) of the ESMA Regulation, reflected in Article 10(1) of the Rules of Procedure, the Board of Appeal may suspend the application of the Contested Decision “if it considers that circumstances so require”. That wording reflects Article 278 TFEU, which lays down the circumstances in which the Court of Justice and the General Court may suspend the application of a contested act. In line with its established decisional practice, the Board of Appeal therefore considers that a decision on a suspension request should follow the case law of the Court of Justice and the General Court on similar requests.

- 29 It results from that case law that suspensions are granted only in exceptional circumstances, in light of the principle that the acts adopted by an EU body are presumed to be lawful.⁹
- 30 According to the case law, interim measures may be granted if it is established, first, that they are justified, *prima facie*, in fact and in law, i.e., that there is a *fumus boni iuris*, and, second, that they are urgent in so far as they are necessary in order to avoid serious and irreparable harm. An application for interim measures must also, third, involve a weighing of the competing interests.¹⁰ It is appropriate to consider these three aspects in turn.

1. The *fumus boni iuris* requirement

- 31 The *prima facie* case requirement is satisfied where at least one of the pleas in law put forward by the party seeking interim measures in support of the main action appears, at first sight, not to be unfounded. That is the case where one of those pleas reveals the existence of a major legal or factual disagreement the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the judge hearing the application for interim measures but must be the subject of the main proceedings.¹¹
- 32 As to this first requirement, the Board of Appeal believes that it is not unreasonable to consider that the appeal may be grounded on the merits. The Board of Appeal reserves to further assess any matters in this respect during the next steps of the proceeding. However, without prejudice to a different decision on the merits, at least two of the DCCC's pleas appear not unfounded *prima facie*.
- 33 First, DCCC contends that the Contested Decision does not comment on 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 this regard, the Board of Appeal observes that the Contested Decision does not make explicit the reasoning behind the decision to set the adaptation period at three months. ESMA stresses in its second Response 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 Recital (9) of the Contested Decision provides reasons for the Decisions, as it specifies that "In accordance with the third subparagraph of Article 25p(1) EMIR, in order to

⁹ Order of the President of the General Court of 29 October 2020, *Facebook Ireland v Commission*, T-451/20 R, ECLI:EU:T:2020:515, paragraph 23, citing order of 19 July 2016, *Belgium v Commission*, T-131/16 R, EU:T:2016:427, paragraph 12.

¹⁰ Decision of 8 June 2023 in *Euroins v EIOPA*, BoA-D-2023-01, paragraph 29, citing the Order of 2 March 2016, *Evonik Degussa v Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 21 and the case-law cited. See also the Order of the President of the General Court of 29 October 2020, *Facebook Ireland v Commission*, T-451/20 R, ECLI:EU:T:2020:515, paragraph 24.

¹¹ Order of the President of the General Court of 29 October 2020, *Facebook Ireland v Commission*, T-451/20 R, ECLI:EU:T:2020:515, paragraph 30.

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.”

- 35 However, the need to minimise potential market disruption is only one of the elements ESMA should consider when determining the date of entry into effect of the decision to withdraw the recognition under Article 25p(1), sub-para. 3, EMIR. Another element is the need to “provide for an appropriate adaptation period”. A reasonable reading of the rule may be that this second element, which may include consideration of the effects the decision on the adaptation period may have on its addressee, should also play a role in determining the entry into effect of the decision itself. It is indeed arguable that this second requirement is not absorbed by the need to minimise market disruptions and, therefore, additional explanations from ESMA would have been called for.
- 36 As to the second point raised by ESMA, it is arguable that the wording of Recital (9) does not comply with the requirements relating to the duty to state reasons as per Article 41(2)(c) of the Charter of Fundamental Rights and Article 296(2) TFEU. 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. In the words of the Court, the duty to provide reasons is not discharged merely by taking formal considerations into account but seeks to give an opportunity of ascertaining the circumstances to the parties defending their rights, as well as to the court of exercising its supervisory functions, to Member States, and to all those interested in ascertaining the circumstances.¹²
- 37 Therefore, a challenge to the proportionality of the three-month adaptation period is, at first sight, not unfounded, and neither is a challenge to the lack of reasoning. The (partial) repetition of the wording of the relevant regulation in the Contested Decision does not seem *prima facie* sufficient in this regard.
- 38 In light of the limited explanations, the Board of Appeal President gave ESMA instructions to clarify the basis on which the length of the adaptation period of three months set in the Contested Decision was deemed proportional. In this regard, the Board of Appeal does not concur with the ESMA’s statement that such matter pertains to the merit alone, it being a crucial element to assess the *fumus boni iuris* of the suspension request.
- 39 In this regard, ESMA stated in its Response of 18th October 2023 that the principle of proportionality is already embedded in EMIR 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. Moreover, ESMA stressed that the 3-month adaptation period was established to accommodate possible consequences for the

¹² Judgments of 1 July 2008, *Chronopost and La Poste v UFEX and Others*, C-341/06 P and C-342/06 P, 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.

relevant EU clearing member, while balancing the overall public interest of minimising to the extent possible risks stemming from AML/CFT. Finally, it highlighted that DCCC has only one clearing member established in the EU (in the Netherlands), that it does not provide services to any trading venues established in the EU, that it does not have interoperability arrangements with any EU CCP, and that it does not clear any instruments denominated in EU currencies.

- 40 The Board of Appeal takes note of the explanations provided by ESMA in the Responses submitted within the appeal procedure. However, the fact that Article 25p EMIR already sets a maximum adaptation period of two years does not suffice to absorb the need for ESMA to provide reasons for their decisions on the adaptation periods for withdrawals of recognition. Moreover, it is arguable that the justifications ESMA referred to in its second Response should have been made known to the Applicant already in the Contested Decision.
- 41 Furthermore, neither the Contested Decision nor the Responses ESMA submitted within the appeal procedure mention if and how any assessment was made of the reasons why the termination of the business relationship with the clearing member established in the Netherlands was deemed feasible with reasonable costs for the DCCC in three months.
- 42 Second, DCCC relies on the fact that ESMA did not take adequate measures to consult or at least inform it before setting the adaptation period.
- 43 The Board of Appeal observes that 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 withdrawal Decision. In this regard, ESMA reports that they have consulted the relevant authorities and entities referred to in Article 25(3) EMIR, as required by Article 25p(1) EMIR.
- 44 It is true that Article 25(3), which Article 25p cross-refers to, does not expressly mention the CCP among the entities ESMA should consult. This however does not preclude the CCP from enjoying the right to be heard on a different legal basis, such as Article 41(2)(a) of the Charter. The reference in Article 25p(1) EMIR may not be exhaustive to this extent. The reason why the relevant CCP is not mentioned in Article 25(3) EMIR seems to be related to the fact that, in Article 25 EMIR, the CCP is the applicant and, therefore, it has by definition in that capacity the opportunity to express its views in the recognition process. In this case, the most reasonable interpretation of Article 25p EMIR seems to be that the reference to the list of entities mentioned in Article 25(3) EMIR should be considered as non-exhaustive to this extent.
- 45 Therefore, the Board of Appeal believes it is arguable that DCCC should have been heard on the determination of the adaptation period.
- 46 The Board of Appeal therefore finds that there is a *prima facie* case and the condition regarding the *fumus boni iuris* is satisfied.

2. The urgency requirement

- 47 In determining whether the interim measures sought are urgent, it should be borne in mind that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to prevent a lacuna in the legal protection afforded. To attain that objective, urgency must, generally, be assessed in light of the need for an interlocutory order to avoid serious and irreparable damage to the party requesting the interim measure. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.¹³
- 48 Damage of a pecuniary nature in principle cannot, otherwise than in exceptional circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that existed before the damage occurred. However, harm of a financial nature may be considered to be irreparable if the harm cannot be quantified.¹⁴
- 49 In the context of the present proceedings, the Board of Appeal considers that the likely harm to DCCC cannot be quantified. By way of consequence, damages from a subsequent action for non-contractual liability could not provide an adequate remedy.
- 50 The Board of Appeal notes that, having been expressly invited to take a position as to whether damage caused could be reliably quantified, ESMA declined to take a position, merely arguing that it could not second-guess future business impact.
- 51 The difficulty in quantifying the likely harm to DCCC arises notably out of the fact that the harm in question also relates to the quantification of decreases in revenue arising out of the removal of the EU clearing member, as well as significant reputational damage.
- 52 It is important to stress that the harm at hand is not the one that inevitably flows as such from the withdrawal of recognition and the connected loss of reputation. This harm is a direct consequence of Commission Delegated Regulation (EU) 2023/410, which ESMA must follow up automatically and with no discretion.
- 53 Rather, the harm at hand is the one that DCCC can be expected to suffer from a range of sources such as the disconnection of clients and loss of market share, as well as the loss of reputation vis-à-vis its clients for the prejudice they will suffer because of a quick termination of the business relationship. Abrupt disconnection may have an

¹³ Order of the President of the General Court of 29 October 2020, *Facebook Ireland v Commission*, T-451/20 R, ECLI:EU:T:2020:515, paragraph 70.

¹⁴ Order of the Vice-President of the Court of Justice of 10 September 2013, *Commission v Pilkington Group*, C-278/13 P(R), paragraphs 50 and 52; and see the Order of the Vice-President of the Court of Justice of 2 March 2016, *Evonik Degussa v Commission*, C-162/15 P-R, EU:C:2016:142, paragraph 92.

irreversible impact on DCCC's ability to retain its customer base and preserve market confidence. This damage cannot be quantified.

54 Consequently, the condition relating to urgency is satisfied in the present case.

3. Balancing of interests

55 According to the case law, the risks associated with each of the possible disposals of the case must be weighed in the proceedings for interim measures. In practical terms, that means examining whether or not the interest of the party seeking interim measures in obtaining suspension of the operation of the contested act outweighs the interest in its immediate implementation. In that examination, it must be determined whether the possible annulment of that act by the judgment on the substance would make it possible to reverse the situation that would have been brought about by its immediate implementation and, conversely, whether suspension of its operation would be such as to impede the objectives pursued by the contested act in the event of the main action being dismissed.¹⁵

56 In this regard the Board of Appeal accepts DCCC's arguments that entry into effect of the withdrawal of recognition would deprive the future decision of the Board of Appeal on the merits of the Appeal of most substantial use as it would be highly impractical and unlikely that a disconnection would subsequently be reversed for a time-limited period between any Board of Appeal decision on the Appeal and the subsequent expiry of any extended adaptation period set in any amended decision adopted by the ESMA Board of Supervisors.

57 A further interest which the Board of Appeal considers relevant in this balancing exercise consists in the interests of third parties, such as market participants generally, to enjoy a stable and reliable regulatory environment. Indeed, any precipitated withdrawal of recognition is likely to have an impact on the confidence of market participants and increase (perceived) volatility.

58 Conversely, the Board of Appeal does not consider that their interests are outweighed by the general public interest in avoiding the use of recognised CCPs for money laundering, the financing of terrorism or sanctions evasion. It is relevant to note in this context that EMIR specifically foresees adaptation periods in circumstances such as those of the present case, and that ESMA moreover felt able, first, to wait more than four months from the entry into force, on 16 March 2023, of the Commission Delegated Regulation (EU) 2023/410, before adopting the Contested Decision, and then to, second, accord an adaptation period of three months. That seven-months interlude came, moreover, after Regulation 2023/410, while adopted on 19 December 2022 had been published in the Official Journal only on 24 February 2023, also indicating that the institutions concerned did not consider urgent action to be required.

¹⁵ Order of the President of the General Court of 29 October 2020, Facebook Ireland v Commission, T-451/20 R, ECLI:EU:T:2020:515, paragraph 115.

- 59 Against this timeline, the impact of the likely required duration of a suspension will be relatively minor only, notably considering the framework set out in paragraph 26 above.
- 60 By way of consequence, it must be concluded that the weighing up of interests lies in favour of the Appellant.
- 61 In the light of all the foregoing, the request for suspension should be granted.
- 62 The Board of Appeal has further considered whether to make the grant of a suspension dependent on compliance, by DCCC, with any specific conditions that might reduce risks surrounding money laundering, terrorist financing and sanctions compliance.
- 63 On this point, as ESMA has noted, by contrast with the position of the Court of Justice and the General Court, which are specifically empowered by virtue of Article 279 TFEU to prescribe any necessary interim measures, the Board of Appeal has only been granted the power to suspend the application of the contested act, mirroring Article 278 TFEU but not Article 279 TFEU. The Board of Appeal accordingly does not consider itself able to impose any conditions on DCCC as a corollary of a suspension.
- 64 The Board of Appeal also notes that, if it were to dismiss the Appeal on the merits, DCCC would have to cease its activities in the European Union immediately once the decision on the Appeal is rendered. This prospect itself might deprive the suspension of its *effet utile* and DCCC of an effective remedy, unless an adequate adaptation period is accorded to DCCC, even after its Appeal is dismissed. This is because of the uncertainty linked to the decision and the very nature of clearing activities, collateral management, impact on markets and market stability might force DCCC and the clearing member (and relevant national competent authorities) to anticipate a negative appeal decision from DCCC's perspective.
- 65 DCCC has in its Notice of Appeal requested the "suspension of the [Contested Decision] until the outcome of the [A]ppeal ... is concluded". The Board of Appeal will consider the appropriate duration of the suspension pursuant to Article 60(3) of the ESMA Regulation in the light of further submissions from the parties.

V – Decision

66 On those grounds, the Board of Appeal hereby unanimously decides:

The operation of 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, is suspended.

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)

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. A signed copy of the decision is held by the Secretariat.