

DECISION OF THE BOARD OF SUPERVISORS

to adopt supervisory measures and impose fines in respect of infringements committed by REGIS-TR S.A.

The Board of Supervisors ('Board') of the European Security and Markets Authority ('ESMA')

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

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories¹, and in particular Articles 65, 73 and 81 thereof,

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

¹ OJ L 201/1 27.07.2012, p. 1

Whereas:

1. Following preliminary investigation, the Supervision Department within ESMA concluded, in a report submitted to the Executive Director on 22 March 2018, that with respect to REGIS-TR S.A. ('REGIS-TR') there were serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in Annex I, Section III, Point (b) to Regulation (EU) No 648/2012.
2. On 28 March 2018 ESMA's Executive Director appointed an independent investigating officer ('IIO') pursuant to Article 64(1) of Regulation (EU) No 648/2012.
3. On 10 August 2018, the IIO sent her Initial Statement of Findings to REGIS-TR as the person subject to investigation ('PSI'). In her Statement of Findings, the IIO concluded that the PSI had committed with negligence the infringement set out at Point (b) Section III of Annex I of the Regulation (EU) No 648/2012.
4. By written submissions dated 10 September 2018, the PSI responded to the Initial Statement of Findings of the IIO, raising a limited set of issues for consideration by the IIO.
5. The IIO amended the Initial Statement of Findings, taking into account the PSI's Response to the Initial Statement of Findings.
6. On 19 October 2018, the IIO submitted to the Board her Amended Statement of Findings together with the file relating to the case.
7. On 28 February 2019, the Panel established by the Board to assess the completeness of the file submitted by the IIO adopted a ruling of completeness in respect of that file².
8. The Board discussed the case further at its meeting on 23 May 2019 and adopted its Initial Statement of Findings.
9. On 28 May 2019, on behalf of the Board, ESMA sent the Board's Initial Statement of Findings to the PSI.
10. On 11 June 2019, the Board received written submissions by the PSI.
11. The Board discussed the case further at its meeting on 11 July 2019.
12. On the basis of the complete file submitted by the IIO containing, inter alia, the IIO's findings and having considered the written submissions made by the PSI, the Board found that REGIS-TR negligently did not comply with its obligations set out in paragraph 2 of Article 81 of the

² Ruling of the Enforcement Panel (ESMA/CONF/2019/5)

Regulation (EU) No 648/2012 and therefore committed with negligence the infringement set out at Point (b) of Section III of Annex I of the same Regulation (EU).

13. Pursuant to Article 65 of the Regulation (EU) No 648/2012, where ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine.

14. Pursuant to Article 73 of the Regulation (EU) No 648/2012, where ESMA finds that a trade repository has committed one of the infringements listed in Annex I, it shall take a supervisory measure, taking into account the nature and seriousness of the infringement.

HAS ADOPTED THIS DECISION:

Article 1

Infringement

REGIS-TR negligently committed the infringement set out at Point (b) of Section III of Annex I of the Regulation (EU) No 648/2012 for the reasons stated in the Annex to this Decision.

Article 2

Public Notice

The Board of Supervisors of ESMA adopts a supervisory measure in the form of a public notice to be issued in respect of the infringement referred to in Article 1.

Article 3

Fine

The Board of Supervisors of ESMA imposes on REGIS-TR the following fine, as calculated in the Annex to this Decision:

EUR 56 000 for the infringement set out at Point (b) of Section III of Annex I of the Regulation (EU) No 648/2012.

Article 4

Remedies

REGIS-TR may avail itself of the remedies of Chapter V of Regulation (EU) No 1095/2010 against this Decision.



Article 5
Addressee

This Decision is addressed to **REGIS-TR S.A.** – 42, Avenue John F. Kennedy, L-1855, Luxembourg, Luxembourg.

Article 6
Entry into force

This Decision shall enter into force on the date of its adoption.

Done at Paris, on 11 July 2019

[PERSONAL SIGNATURE]

For the Board of Supervisors

Steven Maijoor

The Chair

ANNEX STATEMENT OF FINDINGS OF THE BOARD OF SUPERVISORS

1. The Board notes that on 28 May 2019 ESMA sent the Board's Initial Statement of Findings dated 23 May 2019 to the PSI.
2. By email dated 11 June 2019, the PSI acknowledged receipt of the Board's findings and stated that it did not intend to make submissions in respect of its content, with the exception of limited suggestions regarding the draft Public Notice attached to it.
3. These suggestions were considered by the Board, together with the submissions previously made by the PSI.

EXECUTIVE SUMMARY

REGIS-TR S.A. ('REGIS-TR') committed with negligence the infringement set out at Point (b) of Section III of Annex I of EMIR, by failing to comply with the requirements of Article 81(2) of EMIR.

4. REGIS-TR is a trade repository registered with ESMA since 14 November 2013 to provide trade repository services for all derivative asset classes.
5. According to Article 81(2) of Regulation (EU) No 648/2012 ('EMIR'), a trade repository must ensure that Regulators have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.
6. From 12 February 2014 to 24 October 2016, REGIS-TR did not provide, in its reports to Regulators, certain data regarding reported transactions.
7. In particular, from 12 February 2014 to 24 October 2016, REGIS-TR did not provide direct and immediate access to Regulators to the 85,46% of the trade terminations and to the 1,63% of the trade modifications reported to it by counterparties and CCPs.
8. In addition, during the period between 12 August 2014 and 24 October 2016, REGIS-TR did not provide the Regulators with all the information regarding valuations and collateral updates, representing 100% of the data reported to it by counterparties and CCPs.
9. The Board agrees with the IIO and considers that trade modifications, terminations, valuations and collateral updates are part of the details of derivative contracts, to which Regulators must have direct and immediate access. This reading is supported, among others, by the text of EMIR and of relevant Commission Delegated Regulations as well as by the Board's analysis of the context and purpose of the applicable provision.
10. The Board agrees with the IIO and considers that REGIS-TR did not provide direct and immediate access to the details of derivative contracts. In its defensive submissions, REGIS-TR raised the point that the Regulators had anyway access to the information through the daily "Trade Status Reports". However, the Board finds that the "Trade Status

Reports” did not provide direct and immediate access to the details of derivative contracts, as they only provide a consolidated view of the daily state of trades and certain information regarding trade modifications, terminations, valuations and collateral updates is missing from them.

11. Consequently, based on the assessment of the complete file submitted by the IIO and having considered the submissions made by REGIS-TR, the Board finds that REGIS-TR failed to comply with the requirements of Article 81(2) of EMIR, and thus committed the infringement set out at Point (b) of Section III of Annex I of EMIR.
12. In addition, based on the facts, REGIS-TR must be considered to have acted negligently (but not intentionally) when it committed the infringement.
13. In accordance with the relevant EMIR provisions, taking into account applicable aggravating factors (the infringement has been committed for more than six months, has revealed systemic weaknesses in the organisation of the trade repository, and had a negative impact on the quality of the data that the trade repository maintains) and mitigating factors (the trade repository has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future), the fine to be imposed for such a negligent infringement would amount to EUR 56 000. Furthermore, the infringement would require the adoption of a supervisory measure in the form of a public notice.

ESMA's Board of Supervisors has considered the following facts:

14. REGIS-TR is a Trade Repository registered with ESMA since 14 November 2013 to provide trade repository services for all derivative asset classes.
15. REGIS-TR is a limited liability company established in Luxembourg. REGIS-TR's registered office is at 42, Avenue John F. Kennedy, L-1855, Luxembourg.
16. REGIS-TR is a joint venture between Clearstream Banking S.A. (CBL) and Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores, S.A. (Iberclear), each holding 50% of the shares of the company.
17. CBL is a public limited liability company, owned by Clearstream International S.A., a member of the Deutsche Börse Group. CBL is an International Central Securities Depository and subject to the supervision of the Commission de Surveillance du Secteur Financier (CSSF); CBL is also authorised to operate a securities settlement system. Its registered office is at 42, avenue JF Kennedy, L-1855 Luxembourg.
18. Iberclear is a public limited liability company, owned by Bolsas y Mercados Españoles, Sociedad Hólding de Mercados y Sistemas Financieros, S.A. (BME), a member of the Bolsas y Mercados Españoles Group (BME Group). Iberclear is the Spanish Central Securities Depository, subject to the supervision of the Comisión Nacional del Mercado de Valores (CNMV); Iberclear is also a securities settlement system. Its registered office is at Plaza de la Lealtad 1, Madrid, 28014, Spain.
19. As regards the provision of trade repository services in the EU, REGIS-TR ranks second among the EU registered trade repositories in terms of reports received by reporting participants. REGIS-TR, therefore, holds a significant share of reports available to Regulators under EMIR.
20. On 20 July 2016, the Autoriteit Financiële Markten (AFM), one of the Authorities on-boarded to REGIS-TR's reporting system, notified ESMA that REGIS-TR had been providing AFM with no other Message Reports than those with action type "N", i.e. new trades.
21. From the investigation conducted by ESMA's Supervision Department and subsequently by the appointed IIO it emerges clearly that REGIS-TR did not provide certain data regarding reported transactions to the Regulators from 12 February 2014 to 24 October 2016.
22. In particular:
 - a) From 12 February 2014 to 24 October 2016, the PSI did not provide direct and immediate access to Regulators to the 85,46% of the trade terminations and to the 1,63% of the trade modifications reported to it by counterparties and CCPs;
 - b) From 12 August 2014 to 24 October 2016, the PSI did not provide the Regulators with all the information regarding valuations and collateral updates (i.e. representing the 100% of the data reporting to it by counterparties and CCPs).

Regulators' Access to transaction Data

Format of the Regulators' Access to transaction Data described in the registration application

23. The application for the registration of the PSI under EMIR was filed on 8 April 2013³. On 14 November 2013, the PSI was registered under EMIR⁴. The PSI is registered to provide trade repository services for all derivative asset classes⁵.
24. During the registration process, the PSI proposed to provide the following access to Regulators on-boarded to its system regarding transaction level reports:
 - a) Transactions Report: a unique report containing all the elements of all inbound transactions, for listed and OTC derivatives. All transactions, except valuation updates, were to be included in this report (i.e. new trades, modifications, backloaded trades, cancellations, early terminations and full terminations); and
 - b) Valuation Update Report: a report containing valuation update transactions⁶.

Actual format of Access to transactional Data for the Regulators put in place

25. However, following the start of the reporting obligation by counterparties and CCPs on 12 February 2014, the PSI used a different approach. It generated the following two transactional reports types addressed to the Regulators:
 - a) Message Reports: containing data on new trades as well as the changes to the contracts (trade modifications, terminations, collateral and valuations) submitted by market participants to REGIS-TR; and
 - b) Trade Status Reports: containing updated trade details resulting from the processed messages on the query date per Trade ID. This report represented a consolidation of all action types referred to a Trade ID (comparing a trade state on 'T' versus the trade state on 'T+1'), showing the last state of the trade, but not containing the details of the transaction (the details were to be provided via the Message Reports).

³ Supervisory Report, Exhibit 37, ESMA Registration Decision (ESMA/2013/1596), 7 November 2013, p. 1.

⁴ Supervisory Report, Exhibit 37, ESMA Registration Decision (ESMA/2013/1596), 7 November 2013, p. 2.

⁵ Exhibit 6, PSI's Comments on the Supervisory Report, p. 2.

⁶ Supervisory Report, Exhibit 32, Document 1: Exhibit 35 of the PSI's application for registration as a TR where the functionality for the Regulators' Portal is described, p. 7.

Failures of the system in place

26. The system in place allowed counterparties and CCPs to submit trade terminations, valuations and collateral updates by using either a full or a partial reporting mechanism. As explained by the PSI, counterparties and CCPs reporting an update could either send once more the full details of the trade, including the relevant modification (the PSI calls this a snapshot report), or report the modifications by simply populating and updating the fields that corresponded to the reported modification (partial reporting).
27. As a result of the provided options, where counterparties and CCPs chose the partial reporting method (i.e. using only the modified fields in the updating message), the PSIs system failed to filter the reported modifications and classify them to the relevant Regulator. Consequently, those trade modifications were not included in the message reports and thus not provided to the Regulators.

Certain data missing from “Message Reports” to Regulators

28. From the relevant date of entry into force of the requirement (12 February 2014) until 24 October 2016, the PSI did not provide Regulators with immediate and direct access to trade modifications, terminations, valuations and collateral updates in its transaction level reports called Message Reports. This was acknowledged by the PSI⁷.
29. The percentage of trade modifications, terminations, valuations and collateral updates received by the PSI, but not reported to Regulators (missing data) is reflected in the table below⁸.

	Number of records not reported to Regulators in the “messages reports”	Number of records reported to the PSI	Percentage of records not included in the “messages reports”
Modifications	15 470 184	946 803 851	1,63%
Terminations	3 719 011 631	4 351 869 402	85,46%
Valuations	2 898 122 455	2 898 122 455	100%
Collateral	22 154 249	22 154 249	100%

Certain data missing from “Trade Status Reports” to Regulators

30. According to the PSI, the Trade Status Report is a consolidated version of a transaction and “the daily snapshot and examination of the Trade Status Report provides, at a transactional level, the evolution of a trade. All the messages sent to a Trade ID as of a given date, are consolidated to show the latest state of the trade”, as the PSI clarified in its response to the first Request for Information (RFI)⁹.

⁷ Exhibit 6, PSI’s Comments on the Supervisory Report, p. 2.

⁸ Supervisory Report, Exhibit 6, Regis’ response to second RFI (report), pp 9 and 10

⁹ Exhibit 7, ESMA/2018/CONF/24, RFI, 23 April 2018 (“IIO’s First RFI”)

31. The PSI acknowledged that “certain information was generally not included in Trade Status Reports (in particular, termination messages were not included in the status reports as the terminated trade ID ceased to be listed). In addition, in the (rarely in practice) event that two or more modifications for the same trade ID were reported in the course of the same day, these intra-day movements would not have been reflected in the comparison of two status reports (as status reports only reflect the end of day status)¹⁰.”
32. The PSI submitted a table with the estimated percentages of records received, which were not reported in the “Trade Status Reports” are as follows¹¹:

	Number of records not reported to Regulators in the “Trade Status Reports”	Number of records reported to the PSI	Percentage of records not included in the “Trade Status Reports”
Modifications	69 864 255	946 803 851	7%
Terminations	4 351 869 402	4 351 869 402	100%
Valuations	368 991 721	2 898 122 455	13%
Collateral	4 706 895	22 154 249	21%

Phased – in approach used by the PSI.

33. As regards the original cause and the chain of events that lead to the non-inclusion of trade modifications, terminations, valuation and collateral updates in the Reports, the PSI referred to its decision to implement its system using a “phased¹²”.
34. However, this was a fact that the PSI had not mentioned when applying for registration. In fact, as confirmed by the PSI, “The implementation was not defined in a phase-in approach in the documentation provided for the application for registration as TR¹³”.
35. The PSI was aware (because ESMA had confirmed) that “As discussed during the conference call [on 13 March 2014], the transaction level access shall provide access to the individual trade details. These details include all the data required in table 1 and table 2 of the Annex to the Commission Delegated Regulation (EU) No 148/2013, i.e. common data and counterparty data, during the entire life cycle of the trade¹⁴”.
36. Nonetheless, the PSI decided to phase-in the access to transaction data by Regulators. From March 2014, the PSI also set out its plan to implement the functionality in a phase-in process. It initially planned to include trade modifications, terminations, valuations and

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

¹¹ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 8 and Exhibit 12, PSI’s Response to the IIO’ Second RFI, p. 9-10.

¹² Exhibit 6, Supervisory Report, REGIS-TR’s response to second RFI, p. 8.

¹³ Exhibit 6, Supervisory Report, REGIS-TR’s response to second RFI, p. 5.

¹⁴ Exhibit 21, PSI’s Response to the IIO’s First RFI, Document 2.2, Email “RE REGIS-TR Regulators Portal-QUERY”, p. 5.

collateral updates in the “Messages Reports” in the so-called phase 2.2 of the Regulators’ access, which was to be finalised in January 2016¹⁵.

37. However, this phase 2.2 was never implemented as the PSI’s IT “system that generated the reports for the Regulators did not include a functionality that completed the partial reports with the filterable fields of the consolidated contract. Additionally, the data model of the system that generated the reports did not include any type of feature that enhanced the relations between messages and consolidated trades during the extraction process. Due to these facts the system was not capable of providing such functionalities and a redesign of the components and definitions used was required¹⁶”.
38. The PSI ultimately solved this problem by building a new Database in which the last status of a trade was linked with its corresponding messages and allowed the extraction of all the information.
39. On 24 October 2016, the transactional level Message Reports started to include all trade types reported by participants¹⁷.

Regulators affected

40. All Regulators on-boarded to the PSI’s system (29 Regulators) were affected by the non-inclusion of certain data pertaining to trade modifications, terminations, valuations and collateral updates as demonstrated in the following table submitted by the PSI¹⁸:

Name of the Regulator	Number of reports affected (that did not include all action types)*
European Securities and Markets Authority (ESMA) – TR Supervisor	693
Comisión Nacional del Mercado de Valores (CNMV)	494
Autorité des marchés financiers (AMF)	614
Financial Conduct Authority	596
Austrian Financial Market Authority (FMA)	594
ESMA - Economics and Financial Stability - Market Supervisor	605
Autoriteit Financiële Markten (AFM)	562
Sweden Financial Supervisor	430
Bundesanstalt für Finanzdienstleistungsaufsicht	490
Czech National Bank	317
Commissione Nazionale per le Società e la Borsa (CONSOB)	429
European Central Bank (ECB)	486
Komisja Nadzoru Finansowego (KNF)	440
Financial Supervisory Authority (FIN-FSA)	361
Central Bank of Ireland	341
Financial Services and Markets Authority (FSMA)	345
Commission de Surveillance du Secteur Financier	344
Comissão do Mercado de Valores Mobiliários (CMVM)	379
Financial Supervisory Authority of Rumania	330

¹⁵ Exhibit 12, PSI’s Response to the IIO’s Second RFI, p. 4. Please also see Exhibit 22, PSI’s Response to the IIO’s Second RFI, Document 1_ IIO-RFI-2_2.1_RTR_Planning_Roadmap_v3.24, 17 February 2015, p. 2, field no. 1.

¹⁶ Exhibit 6, Supervisory Report, REGIS-TR’s response to second RFI (report), p. 8.

¹⁷ Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI (report), p. 6.

¹⁸ Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI, p. 9-11.

Name of the Regulator	Number of reports affected (that did not include all action types)*
Croatian Financial Services Supervisory Agency	67
European Systemic Risk Board (ESRB)	240
Central Bank of Hungary	371
Malta Financial Services Authority (MFSA)	274
Bank of Slovenia	209
De Nederlandsche Bank N.V.	162
Hellenic Capital Market Commission- CMC	213
National Bank of Slovakia	146
Cyprus Securities and Exchange Commission	47
Deutsche Bundesbank - General Office	25

*The PSI calculated the figures based on the number of week days between the on-boarding of the Regulator and the enhancement of the "messages reports".

41. In addition, following a request of the ESMA Investigation Team, the PSI submitted the following table, which includes “the name of the Authority, the date the Authority completed the on-boarding process to REGIS-TR, and the approximate number of transactional level Messages Reports affected per Authority¹⁹”.

Name of the Regulator	Date Regulator's on-boarding process completed	Period of time during which the PSI did not give access to all records regarding modifications and terminations	Period of time during which the PSI did not give access to all records regarding valuations and collateral updates
European Securities and Markets Authority (ESMA) – TR Supervisor	26/02/2014	26/02/2014 – 24/10/2016	12/08/2014 – 24/10/2016
Comisión Nacional del Mercado de Valores (CNMV)	02/12/2014	02/12/2014 – 24/10/2016	02/12/2014 – 24/10/2016
Autorité des marchés financiers (AMF)	17/06/2014	17/06/2014 – 24/10/2016	12/08/2014 – 24/10/2016
Financial Conduct Authority	11/07/2014	11/07/2014 – 24/10/2016	12/08/2014 – 24/10/2016
Austrian Financial Market Authority (FMA)	15/07/2014	15/07/2014 – 24/10/2016	12/08/2014 – 24/10/2016
ESMA - Economics and Financial Stability - Market Supervisor	30/06/2014	30/06/2014 – 24/10/2016	12/08/2014 – 24/10/2016
Autoriteit Financiële Markten (AFM)	28/08/2014	28/08/2014 – 24/10/2016	28/08/2014 – 24/10/2016
Sweden Financial Supervisor	02/03/2015	02/03/2015 – 24/10/2016	02/03/2015 – 24/10/2016
Bundesanstalt für Finanzdienstleistungsaufsicht	08/12/2014	08/12/2014 – 24/10/2016	08/12/2014 – 24/10/2016
Czech National Bank	13/08/2015	13/08/2015 – 24/10/2016	13/08/2015 – 24/10/2016
Commissione Nazionale per le Società e la Borsa (CONSOB)	03/03/2015	03/03/2015 – 24/10/2016	03/03/2015 – 24/10/2016
European Central Bank (ECB)	12/12/2014	12/12/2014 – 24/10/2016	12/12/2014 – 24/10/2016
Komisja Nadzoru Finansowego (KNF)	16/02/2015	16/02/2015 – 24/10/2016	16/02/2015 – 24/10/2016
Financial Supervisory Authority (FIN-FSA)	05/06/2015	05/06/2015 – 24/10/2016	05/06/2015 – 24/10/2016
Central Bank of Ireland	15/07/2015	15/07/2015 – 24/10/2016	15/07/2015 – 24/10/2016
Financial Services and Markets Authority (FSMA)	29/06/2015	29/06/2015 – 24/10/2016	29/06/2015 – 24/10/2016
Commission de Surveillance du Secteur Financier	30/06/2015	30/06/2015 – 24/10/2016	30/06/2015 – 24/10/2016
Comissão do Mercado de Valores Mobiliários (CMVM)	12/05/2015	12/05/2015 – 24/10/2016	12/05/2015 – 24/10/2016
Financial Supervisory Authority of Rumania	20/07/2015	20/07/2015 – 24/10/2016	20/07/2015 – 24/10/2016
Croatian Financial Services Supervisory Agency	20/07/2016	20/07/2016 – 24/10/2016	20/07/2016 – 24/10/2016
European Systemic Risk Board (ESRB)	24/11/2015	24/11/2015 – 24/10/2016	24/11/2015 – 24/10/2016
Central Bank of Hungary	09/10/2015	09/10/2015 – 24/10/2016	09/10/2015 – 24/10/2016
Malta Financial Services Authority (MFSA)	06/10/2015	06/10/2015 – 24/10/2016	06/10/2015 – 24/10/2016
Bank of Slovenia	06/01/2016	06/01/2016 – 24/10/2016	06/01/2016 – 24/10/2016

¹⁹ Exhibit 3, Supervisory Report, REGIS-TR's response to first RFI, p. 11-13.

Name of the Regulator	Date Regulator's on-boarding process completed	Period of time during which the PSI did not give access to all records regarding modifications and terminations	Period of time during which the PSI did not give access to all records regarding valuations and collateral updates
De Nederlandsche Bank N.V.	09/03/2016	09/03/2016 – 24/10/2016	09/03/2016 – 24/10/2016
Hellenic Capital Market Commission- CMC	31/12/2015	31/12/2015 – 24/10/2016	31/12/2015 – 24/10/2016
National Bank of Slovakia	01/04/2016	01/04/2016 – 24/10/2016	01/04/2016 – 24/10/2016
Cyprus Securities and Exchange Commission	18/08/2016	18/08/2016 – 24/10/2016	18/08/2016 – 24/10/2016
Deutsche Bundesbank - General Office	19/09/2016	19/09/2016 – 24/10/2016	19/09/2016 – 24/10/2016

42. The PSI did not notify Regulators on-boarded to its system about the missing data until the problem had been resolved²⁰.
43. The PSI informed ESMA that issue was permanently solved on 24 October 2016 and that its transactional level reports included on this date trade modifications, terminations, valuations and collateral updates.

The Board has considered the following applicable legal provisions:

44. Article 9(1) of EMIR provides that: *“Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.”*
45. Commission Delegated Regulation (EU) No 148/2013²¹ sets regulatory technical standards on the minimum details of the data to be reported to TRs. Article 1(1) of the mentioned Delegated Regulation provides that “Reports to a trade repository shall include:
- (a) the details set out in Table 1 of the Annex which contains information relating to the counterparties to a contract;
 - (b) the information set out in Table 2 of the Annex which contains details pertaining to the derivative contract concluded between the two counterparties”.
46. Article 4 of the same Commission Delegated Regulation reads as follows: “Modifications to the data registered in trade repositories shall be kept in a log identifying the person or persons that requested the modification, including the trade repository itself if applicable, the reason or reasons for such modification, a date and timestamp and a clear description

²⁰ Exhibit 39, Supervisory Report, REGIS-TR’s response of 13 February 2018, document entitled “Request for Information (ESMA-2017-153) Further clarifications”, p. 5. See also Supervisory Report, Exhibit 7, Document 1: Communication, dated 18 October 2016, “MS-0055 - REGIS-TR - COMMUNICATION - Regulators - CHANGES ON DELIVERABLE REGULATOR REPORTS”, p. 1 and Supervisory Report, Exhibit 28, Document 22: Communication, dated 27 March 2017, “(RG-0011) REGIS-TR – Regulators - ENHANCEMENT IN THE CONTENT OF THE REGULATOR’S REPORTS”, p. 1.

²¹ Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, OJ L 52, 23.2.2013, p. 1.

of the changes, including the old and new contents of the relevant data as set out in fields 58 and 59 of Table 2 of the Annex”. Fields 58 and 59 are set out below:

Section 2i — Modifications to the report	
58	<p>Action type</p> <p>Whether the report contains:</p> <ul style="list-style-type: none"> — a derivative contract or post-trade event for the first time, in which case it will be identified as ‘new’; — a modification of details of a previously reported derivative contract, in which case it will be identified as ‘modify’; — a cancellation of a wrongly submitted report, in which case, it will be identified as ‘error’; — a termination of an existing contract, in which case it will be identified as ‘cancel’; — a compression of the reported contract, in which case it will be identified as ‘compression’; — an update of a contract valuation, in which case it will be identified as ‘valuation update’; — any other amendment to the report, in which case it will be identified as ‘other’.
59	<p>Details of action type</p> <p>Where field 58 is reported as ‘other’ the details of such amendment should be specified here.</p>

47. Moreover, the Commission Implementing Regulation (EU) No 1247/2012²² also specifies the format and frequency of reporting new trades, their subsequent life-cycle events and their terminations.

48. Article 81(2)-(3) of EMIR reads as follows:

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

3. A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

- (a) ESMA;
- (b) the ESRB;
- (c) the competent authority supervising CCPs accessing the trade repository;
- (d) the competent authority supervising the trading venues of the reported contracts;

²² Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, OJ L 352, 21.12.2012, p. 20.

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

49. Following Regulation (EU) 2015/2365²³, Article 81(3) has been amended to include further relevant regulators²⁴.
50. In addition, Commission Delegated Regulation (EU) No 151/2013²⁵ provides that a trade repository shall provide to Regulators with access to all transaction data for the purpose of fulfilling their respective mandates and responsibilities.
51. Article 2 of the mentioned Commission Delegated Regulation (EU) No 151/2013 stipulates:

²³ Regulation (EU) No 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, OJ L 337, 23.12.2015, p. 1.

²⁴ Article 81(3) has been amended to state “A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

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

²⁵ Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data, OJ L 52, 23.2.2013, p. 33.

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

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

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

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

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

- (a) it is admitted to trading on a regulated market within their jurisdiction;
- (b) it has its registered office or, where it has no registered office, its head office, in their jurisdiction;
- (c) it is an offeror for the entities provided for in points (a) or (b) and the consideration it offers includes securities.

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

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

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

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

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

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

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

52. Finally, Point (b) of Section III of Annex I of EMIR sets the infringement as follows:

“III. Infringements relating to transparency and the availability of information:

[...]

(b) a trade repository infringes Article 81(2) by not allowing the entities referred to in Article 81(3) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.”

Also, the following Recitals have been considered to clarify the meaning of the relevant provisions:

53. Recital (41) of EMIR reads as follows: “It is important that market participants report all details regarding derivative contracts they have entered into to trade repositories. As a result, information on the risks inherent in derivatives markets will be centrally stored and easily accessible, inter alia, to ESMA, the relevant competent authorities, the European Systemic Risk Board (ESRB) and the relevant central banks of the ESCB.”
54. Recital (45) of EMIR states: “Counterparties and CCPs that conclude, modify, or terminate a derivative contract should ensure that the details of that contract are reported to a trade repository. [...]”
55. Recital (75) of EMIR states: “Given that regulators, CCPs and other market participants rely on the data maintained by trade repositories, it is necessary to ensure that those trade repositories are subject to strict operational, record-keeping and data-management requirements.”
56. Recital (13) of the CDR (EU) No 151/2013 provides additional context: “The access to data should be considered within three aggregation levels. Transaction data should include individual trade details; position data should regard aggregate position data by underlying/product for individual counterparties; and aggregate notional data should correspond to overall positions by underlying/product with no counterparty details. Access to transaction data would also grant access to position level and aggregate data. Access to position data would also grant access to aggregate data, but not transaction level data. Conversely, access to aggregate notional data should be the less granular category and should not enable access to position or transaction level data.”

Having considered the IIO’s Amended Statement of Findings, the submissions made by Regis-TR S.A. in connection therewith, and the material in the file, the Board sets out its findings under the following heading.

Findings of the Board of Supervisors with regard to the infringements at Point (b) of Section III of Annex I of the Regulation (EU) No 648/2012 (‘EMIR’).

57. The present section analyses whether Regis-TR breached Article 81(2) of EMIR, which requires a trade repository to ensure ‘direct and immediate access’ for ESMA, the ESRB, and other specified Regulators, to ‘the details of derivatives contracts which those bodies need to fulfil their respective responsibilities and mandates’.

58. If this requirement is not met, this would constitute the infringement set out at Point (b) of Section III of Annex I of EMIR.
59. The Board notes that Regis-TR had to ensure that Regulators on-boarded on its system had direct and immediate access to the reported modifications, terminations, valuations and collateral updates.
60. However, from the factual outcome of ESMA's investigation emerges that there were important omissions both regarding trade modifications and terminations and regarding valuations and collateral updates.
61. The PSI did not contest the fact of the above-mentioned omissions. The PSI explained that the omissions were due to the way the PSI had set up its IT system and to the design of the Regulators' access to reports, as a result of which the PSI was unable to filter the information correctly and attribute it to the Regulators.

Board's legal analysis

62. The Board has assessed, first of all, whether modifications, terminations, valuations and collateral updates constitute "details of derivative contract" pursuant to Article 81(2) of EMIR. To do so, it conducted – with regards to the concept of "details of derivative contract" - three levels of legal analysis: literal, contextual and based on objectives.

Meaning of "details of derivatives contracts"

63. The Board notes that ESMA's Supervision Department expressed the view in its Supervisory Report that "the details that are to be reported to Regulators pursuant to Article 81(2) of EMIR are those listed by the CDR (EU) No 148/2013".
64. The Board also notes that in the comments to the Supervisory Report the PSI objected that "whilst the position has evolved into great clarity, what was required under Article 81(2) was not as clear at the time and for the duration of the alleged infringement"²⁶.
65. Therefore, based on the analysis conducted by the IIO in her (Amended) Statement of Findings, the Board has conducted its own legal analysis of the relevant provision of EMIR.
66. The wording of Article 81(2) of EMIR is clear: the TR has an obligation to provide Regulators with "direct and immediate access to the **details of derivative contracts** they need to fulfil their respective responsibilities and mandates".
67. The Board notes that Article 81(2) of EMIR does not make any difference between initial contracts and updates and this is in line with the purpose of the provision, which is allowing

²⁶ Exhibit 6, PSI's Comments of the Supervisory Report, p. 3.

the Regulators “to fulfil their respective responsibilities and mandates”. It is evident from the wording of the provision of Article 81(2) that it covers the contracts from their starting point to their termination. Thus, Article 81(2) captures derivative contracts throughout their life-cycle, including all modifications, terminations, valuations and collateral updates as the IIO concludes.

68. The view that the “details of the derivatives contract” include all the transaction data that concern a derivatives contract, including modifications, terminations, valuation and collateral updates is also supported by the systematic interpretation of “details” as stated in Article 81(2) in context to Article 9(1) of EMIR aimed at preserving internal coherence when interpreting the Articles that are included in the same Regulation.
69. From the context, a comparison between Article 81(2) and Article 9(1), describing the content of the reporting obligations of counterparties and CCPs to trade repositories, allows further clarity on the meaning of “details of the derivative contracts”. Indeed, Article 9(1) of EMIR differentiates between new contracts and updates, requiring counterparties and CCPs to report to a TR “details of any derivative contract they have concluded and of any modification or termination of the contract”. In this way, the trade repositories will receive reports at the beginning and throughout the life-cycle of derivative contracts.
70. Moreover, Commission Delegated Regulation (EU) No 148/2013 confirms the Board’s reading: the Delegated Regulation, supplementing EMIR with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, provides in Article 1 (b) that reports to trade repositories must contain “the information set out in Table 2 of the Annex which contains details pertaining to the derivative contract concluded between two counterparties”. The mentioned Table 2 includes (in section 2i – modifications to the reported contract) modifications, terminations and updates of the contract valuation (including collateral updates).
71. In addition, Article 2 of Commission Delegated Regulation (EU) No 151/2013, specifies that trade repositories are obliged to “provide access to all transaction data” to the Regulators. Recital (13) of the mentioned Delegated Regulation explains that “Transaction data should include individual trade details”.
72. Moreover, according to Article 5(2) (a) of the Commission Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories, as of 12 February 2014, counterparties and CCPs were required to report valuations, trade modifications and terminations to a trade repository (of their choice).
73. In this context the Board has examined the wording considering also the purpose pursued by the relevant requirements. It concludes that the same reporting requirements that are applicable to Article 9(1) are applicable as well in the case of Article 81(2) of EMIR.
74. Indeed, the details needed for supervisory purposes are evidently those referred to the complete life-cycle of the derivatives contract, that allow initial and on-going supervision. Each message, containing information on a given action type, needs to be reported in a way to enable the Regulator to identify the exact number and details of the changes, their sequence and timing. This means that the same data reported to a TR should also be made available to Regulators including modifications, terminations, collateral updates and valuation updates.

75. The Board notes that given the role of trade repositories as “intermediaries” between the source of information and the final recipients of the information, it is expected that they provide the same information and moreover on the detailed data of every derivative contract they receive from counterparties and CCPs. The reporting obligation for these persons explicitly includes any modification or termination of the contract.
76. The details to be transmitted to the Regulators are those that allow them to fulfil their responsibilities and mandates. It follows logically that if a Regulator has the right to be informed of the initial details of a contract, the Regulator will in the same way need to be updated on any contract modifications, terminations, valuations and collateral updates of the same contract as these are elements of its life cycle events. Therefore, in the Board’s view they are essential and necessary information that must be made available to Regulators to enable them to successfully fulfil their respective responsibilities and mandates.
77. The Board, on this basis, considers clear the meaning, stemming from the relevant legal provisions, of the concept “details of derivatives contracts” and observes that such legal provisions were all in force in the period of the alleged infringement.
78. The Board therefore agrees with the IIO and considers trade modifications, terminations, valuations and collateral updates included in the meaning of details of derivatives contracts.

Meaning of “direct and immediate access”

79. The Board, in order to assess whether the PSI provided the Regulators with “**direct and immediate access**” to the details of the derivative contracts, has analysed the concept of “direct and immediate access”.
80. The Board considers that the obligation to ensure direct and immediate access to Regulators encompassed in Article 81(2) of EMIR is a key requirement under EMIR for improving transparency and facilitating access to information that is submitted to trade repositories. The direct and immediate access to the data of the derivatives contracts kept by trade repositories is particularly important for Regulators to fulfil their respective mandates. The accessibility to information, centrally stored in the trade repositories, enables them to assess risks inherent in derivatives’ markets and take appropriate action (see Recital 41 of EMIR mentioned above). Once registered, a trade repository must always comply with this requirement, because Regulators rely on the data maintained by trade repositories.
81. Based on the review of EMIR relevant provisions and of the relevant provisions of the mentioned relevant Commission Delegated Regulations, the Board considers necessary that Regulators are given access, at a disaggregated level, to all the details of a derivative contract as analysed above and to all individual updates to a reported trade (i.e. trade modifications, terminations, valuations and collateral updates).
82. In the Board’s reading, also in agreement with the IIO, giving “direct access” to the contract details means giving the Regulators access to individual data in a way that would enable them to identify the exact number and details of the changes, their sequence and timing i.e. in a disaggregated form, without the need of other manoeuvre from the Regulators’ side. Giving “immediate access” means giving access to the data as soon as they are available to the trade repositories.

Board's legal qualification of the facts and assessment

83. The PSI acknowledged, as also evidenced in the Table under paragraph 29 above, the fact that it “did not provide certain transaction data in the form of Messages Reports”²⁷. It is therefore clear that the requirement of direct and immediate access to the details of derivative contracts was not met through the Message Reports.
84. The Board, on the basis of the IIO's file, turns to the “Trade Status Report”, to assess if the PSI, through the said report, met the requirement.
85. The PSI argued that between 12 February 2014 and 24 October 2016 it “provided transaction data in the form of Trade Status Reports”²⁸. In this respect, the PSI claimed that “the daily snapshot and examination of the Trade Status Report (transactional access level) provides the tracking of all the action types sent to a trade. The comparison of a trade state on ‘T’ versus the trade state on ‘T+1’ provides the full evolution of the trade during a complete reporting session. All of the Authorities onboarded on REGIS-TR from the Start Date to the Termination Date had to be reported of trade modifications, termination, valuations and collateral updates”²⁹.
86. Conversely, ESMA's Supervision Department explained that in its view, “the consolidation of all action types in a report reflecting the last status of a given trade and the tracking of the evolution of the trade during its lifetime through a daily snapshot of its latest status is not sufficient to comply with EMIR. In this respect, the Trade Status Report provides information on the latest state of a given trade at a given time. By comparing trade status at time T and trade status at time T+1, a Regulator will be able to derive changes on a given trade occurred in the time span. Importantly, however, the Regulator will not be able to identify the exact number and details of the changes, their sequence and timing”³⁰.
87. The PSI recognised that there are some drawbacks for Regulators on-boarded to its system to purely rely on the Trade Status Reports” as “certain information was generally not included in status reports (in particular termination messages were not included in the status reports as the terminated trade ID ceased to be listed). In addition, in the (in practice rare) event that two or more modifications for the same trade ID were reported in the course of the same day, these intra-day movements would not have been reflected in the comparison of two status reports (as status reports only reflect the end of day status). Finally, certain fields such as the “timestamp” or the “action type” fields were affected by an intra-day update, as these fields were updated upon receipt of each report”³¹.
88. Based on the description of the Trade Status Report's characteristics, the Board considers that it is not sufficient to meet the requirement set by Article 81 (2) of EMIR. As clarified above, the Board's reading of the provision requires the trade repositories to give the Regulators access to individual data, in a disaggregated form, as soon as they are available to the trade repository itself.
89. The Board focuses, in particular, on the fact that the Trade Status Report does not allow a direct access. In order to assess the data provided by the PSI, the Regulators needed

²⁷ Exhibit 6, PSI's Comments on Supervisory Report, p. 2.

²⁸ Exhibit 6, PSI's Comments on the Supervisory Report, p. 2.

²⁹ Supervisory Report, Exhibit 3, REGIS-TR's response to first RFI (report), p. 8.

³⁰ Exhibit 1, Supervisory Report, p. 32, paras. 105-106.

³¹ Exhibit 10, PSI's Response to the IIO's First RFI, p. 9.

to compare a trade state on 'T' versus the trade state on 'T+1' in order to get the full evolution of the trade during a complete reporting session. This is contradictory to the wording and meaning of direct and immediate access as required under Article 81(2) of EMIR.

90. Moreover, as the PSI admitted, termination messages were not included in the Status Reports, as terminated ID ceased to be listed, concerning the "Trade Status Reports" only "active" trades.
91. Finally, Regulators could not have access to all intra-day modifications of the same trade ID as these intra-day movements would not have been reflected in the comparison of the two Trade Status Reports. Comparing Trade Status Reports from one day to the next day, could theoretically have allowed a Regulator to understand which trades had been terminated on the previous day. However, this comparison would not allow a Regulator to know at what time this action was reported.
92. Based on this, a Regulator relying on the PSI's Trade Status Report did not have neither direct nor immediate access to all individual details of the contracts regarding trade modifications, terminations, valuations and collateral updates. During the period under investigation, a Regulator on-boarded to the PSI's system looking at both "Messages Reports" and "Trade Status Reports" would not have had access to all trade modifications, terminations, valuations and collateral updates, as illustrated in the relevant tables above³².
93. To conclude, on the basis of an assessment of the complete file submitted by the IIO and having taken into account the written submissions made by the PSI, the Board finds that the PSI failed to comply with the requirements set by Article 81(2) of EMIR, by not providing the Regulators on-boarded to the PSI's system with direct and immediate access to all details of derivative contracts they need to fulfil their respective responsibilities and mandates. This constitutes the infringement set out at Point (b) of Section III of Annex I of EMIR.

Intent or negligence

94. Article 65(1) of EMIR provides as follows:

"Where, in accordance with Article 64(5), ESMA finds that a trade repository has, intentionally or negligently, committed one of the infringements listed in Annex I, it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article.

An infringement by a trade repository shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that the trade repository or its senior management acted deliberately to commit the infringement."

³² Please see tables in paragraphs 24, 27, 35 and 36.

95. In accordance with Article 65(1) of EMIR, a finding that an infringement has been committed by a trade repository with intention or negligence will lead to the imposition of a fine by the Board.
96. The Board notes that the findings submitted by the IIO included also her considerations regarding whether the relevant infringement has been committed by the PSI intentionally or negligently.
97. A review of the minutes of the meetings of the PSI's board during the period of 12 February 2014 to 24 October 2016³³ did not reveal any elements indicating intent in relation to the subject matter of the current investigation.
98. Thus, the factual background as set out in the IIO Statement of Findings does not establish that there are objective factors which demonstrate that the PSI, its employees or senior managers acted deliberately to commit the infringement.
99. It should therefore be assessed whether the PSI acted with negligence.

Preliminary considerations regarding negligence

100. EMIR provides no explicit guidance with regard to the concept of "negligence". However, it follows from the provisions of Articles 73 and 65 of EMIR that the term "negligence" as referred to in EMIR requires more than a determination that there has been the commission of an infringement.
101. In addition, it is clear from the second subparagraph of Article 65(1) of EMIR that a negligent infringement is not one which was committed deliberately or intentionally. This position is further supported by the case-law of the CJEU which ruled that negligence may be understood as entailing an unintentional act or omission³⁴.

³³ ESMA's Supervision Department raised the point that the PSI's board was informed that the "*current Regulators access is not 100% compliant with technical standards*" and that this situation poses the "*risk of being fined*", see Supervisory Report, Exhibit 35, Document 4, Minutes of REGIS-TR Board of Directors' of meetings held between 12 February 2014 and 26 October 2016, document entitled "ReGIS-TR_board_March2014(Draft) (2)", p. 9. The IIO notes that this could constitute an element to be taken into account when assessing whether the infringement had been committed intentionally. However, on the basis of the file, this point was not substantiated in this case because these quotes do not refer to the infringement, which is the subject matter of this investigation. See Exhibit 6, PSI's Comments on the Supervisory Report, p. 2. The PSI explained that "*these comments did not refer to the functioning of the Messages Reports. The board was informed that the initial reporting system immediately after the entry into force of the EMIR reporting requirement on 12 February 2014 did not provide access to any Regulators other than national competent authorities. The extracts do not establish that senior management was made aware of any possible infringement of Article 81(2) by not allowing the relevant authorities direct and immediate access to the details of derivative contracts due to the data included in the Message Reports.*" Please also see the documents provided by the PSI, showing that the information was indeed only filtered by the country of the Regulator or the underlying derivative contract, Exhibit 24, PSI's Response to the IIO's First RFI, Document 11.1, FSD v3 (Q11 IIO), in particular pp. 13, 21, 25, 29, 34, 35, 37 and Exhibit 25, PSI's Response to the IIO's First RFI, Document 11.2, Email "RV Acceso a Reguladores en el Entorno de TEST – Queries msg".

³⁴ See for instance CJUE, Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I- 4057, where the CJEU noted at para. 75 of its judgment that all of the Member States' legal systems "*have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care.*"

102. It should be added that “negligence” in the context of EMIR is an EU law concept – albeit one which is familiar to and an inherent part of the 28 Member States’ legal systems – which must be given an autonomous, uniform interpretation.
103. Having regard to the CJEU jurisprudence³⁵, the concept of a negligent infringement of EMIR is to be understood to denote a lack of care on the part of a trade repository when it fails to comply with this EMIR.
104. Negligence can thus be considered to be established in circumstances where the trade repository, as a professional firm in the financial services sector subject to stringent regulatory requirements, is required to take special care in assessing the risks that its acts or omissions entail and has failed to take that care. As result of that failure, the trade repository has not foreseen the consequences of its acts or omissions, including particularly its infringement of EMIR, in circumstances where a person in such a position who is normally informed and sufficiently attentive could not have failed to foresee those consequences.
105. Regarding the standard of care to be expected of a trade repository, the following elements are relevant and must be taken into consideration.
106. The first is the position taken by the General Court in the Telefónica case, where the General Court referred to persons “carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can, on that account, be expected to take special care in assessing the risks that such an activity entails”³⁶. Similarly, it is considered that, operating within the framework of a regulated industry, a trade repository which holds itself out as a professional entity and carries out regulated activities should be expected to exercise special care in assessing the risks that its acts and omissions may entail.
107. This means that where a trade repository does not understand the requirements of EMIR or has any doubts concerning their interpretation, the standard of care expected from it requires that, for example, it takes (before performing a given act) “appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given act may entail”³⁷.
108. As a second element, regard should be given to the nature and significance of the objects and provisions of EMIR. Of particular note, Recitals (4), (5)³⁸ and (75) of EMIR

³⁵ See for instance CJUE, Case C-48/98, *Firma Söhl & Söhlke v Hauptzollamt Bremen* [1999] ECR I-7877, para. 58; Case C-64/89, *Deutscher Fernsprecher* [1990] ECR I-2535, para. 19.

³⁶ CJUE, Case T-336/07, *Telefónica SA and Telefónica de España SA v Commission* [2012] ECLI:EU:T:2012:172, para. 323.

³⁷ *Ibidem*

³⁸ See Recitals 4 and 5 of the Regulation: “Over-the-counter derivatives (‘OTC derivative contracts’) lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved. The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and, accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.

(5) At the 26 September 2009 summit in Pittsburgh, G20 leaders agreed [...] that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 leaders in Toronto reaffirmed their commitment

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

109. Therefore, on this basis, the standard of care to be expected of a trade repository is high.

Assessment of whether there is negligence in the present case

110. The Board has considered the following arguments of the PSI – highlighted in the IIO' Statement of Findings – and has assessed the relevant facts in order to verify whether the PSI has been negligent when committing the infringement.

111. Firstly, the PSI refuted any negligence from its part or from its staff in what concerns the reporting of transaction data. It constantly claimed the lack of clarity of EMIR's provisions at the moment when the infringement took place.

112. Secondly, the PSI claimed to have carried out its activity in the belief that the reporting obligations incumbent on it were satisfied by the content of Message Reports and Trade Status reports taken together.

113. Thirdly, the PSI stressed about the dialogue in which it was actively engaged with ESMA to receive guidance on the implementation of EMIR's reporting obligations and to meet ESMA's reporting standards³⁹. The PSI strongly considered that it always acted in good faith, being in an enhanced communication with ESMA to be complaint with EMIR's provisions. According to the PSI "the reporting framework set out under the EMIR was new and highly technical and no entity (including REGIS-TR) had any practical experience in relation to its implementation⁴⁰". In addition, it indicated that "it did not, in the absence of the relevant instruction from ESMA, remedy the issue with the Message Reports"⁴¹.

114. With regards to the first PSI's argument that the relevant requirements of EMIR were not clear at the time they came into force, the Board restates as set out above (see above under paragraphs 62 - 78) that the relevant provisions of EMIR, read in conjunction with the applicable provisions of the CDRs, are clear on a simple reading. Complying with

and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of OTC derivative contracts in an internationally consistent and non-discriminatory way."

³⁹ Exhibit 6, PSI's Comments on the Supervisory Report, p. 3.

⁴⁰ Exhibit 62, PSI's Response to the IIO's Statement of Findings, p. 2.

⁴¹ Exhibit 10, PSI's Response to the IIO's First RFI, p. 2.

Article 81(2) of EMIR was not a question of practical experience; an attentive reading of the relevant applicable provisions would have been sufficient.

115. The Board recalls that the legislator did not foresee a phase-in period for trade repositories to gain practical experience. In accordance with Article 55(2) and (4) of EMIR, trade repositories were under a legal obligation to be fully operational and in compliance with the applicable rules set out in Title VII (including Article 81(2)) of EMIR from the first day of their registration.
116. A diligent trade repository, as a professional entity carrying out regulated activities and operating within the framework of a regulated industry, is expected to carefully assess the requirements of EMIR. The Board would expect a trade repository to pay particular attention to the wording of EMIR and the relevant Commission Delegated Regulations and, based on the case-law of the CJEU, in case it remained some uncertainty on aspects of its obligations, seek legal advice in this regard.
117. In this respect, it should also be noted that during the drafting process for Commission Delegated Regulation (EU) No 148/2013⁴² and Commission Delegated Regulation (EU) No 151/2013⁴³ (among others), ESMA consulted with the industry and the PSI participated in these consultations and did not raise any issues with respect to the reporting details. As explained, the various interactions of the PSI with ESMA before the reporting start date demonstrate that a normally informed and sufficiently attentive trade repository, in the PSI's position, could not have failed to foresee the requirements of Article 81(2) of EMIR. Even in the text of the Consultation Papers issued before the adoption of the earlier mentioned Delegated Regulations and to which the PSI had participated, it was also already stated that Regulators would have access to "all transaction data".
118. Therefore, it is more than evident that the PSI, having participated in the consultation discussions organised by ESMA with market participants, as a trade repository who is normally informed and sufficiently attentive, could not have failed to foresee that the appropriate access level for Regulators constituted access to all the details of derivative contracts, including changes to these details.
119. With regards to the second PSI's argument, the Board takes into account that the PSI claimed to have carried out its activity in the belief that the reporting obligations incumbent on it were satisfied by the content of Message Reports and Trade Status reports taken together.
120. In this regard, the Board, first of all, notes that this could not be the case, as analysed in paras. 85-93. Moreover, the documents submitted by the PSI to ESMA in its application for registration foresaw to grant access to Regulators to all the individual details of a derivative contract. In September 2013, the PSI described the access for Regulators in the following way: "The following levels of detail, describing the granularity of authorities' access to the Trade Repository data, have been defined by ESMA: Transaction: Full details on individual records"⁴⁴.

⁴² Exhibit 26, ESMA/2012/95, Discussion Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories, 16 February 2012, p. 56, p. 63

⁴³ Exhibit 28, ESMA/2012/379, Consultation Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories, 25 June 2012, p. 55, p.62, p. 142-147,

⁴⁴ Exhibit 32, Supervisory Report, Document 1, p. 4

121. The PSI was fully aware of its own proposals for the Regulator's access, as well as of the missing information in the Message Reports and in the Trade Status Reports. Within the second request for information conducted by the ESMA Supervision department, the PSI confirmed that on 12 February 2014 it was aware that the transactional level reports did not include trade modifications and terminations and that on 12 August 2014 it was aware that transactional level reports did not include valuations and collateral updates. Certainly, a normally informed and sufficiently attentive TR in the PSI's situation could not have failed to foresee the consequences of its deviation from the original approach, considering that the PSI was not complying with its own proposals as set out in its application for registration.
122. Moreover, regarding the PSI's interpretation "that the reporting obligations incumbent on it were satisfied by the content of the Message Reports and Trade Status Reports taken together ⁴⁵", the Board notes that the PSI did not provide any evidence on how it came to this conclusion. The Supervisory Department of ESMA specifically asked the PSI to submit internal documents that show its assessment of the "all transaction data" as set out in Article 2 of Commission Delegated Regulation (EU) No 151/2013⁴⁶. However, the documents provided by the PSI did not show evidence of an in-depth assessment by the PSI before the reporting start date, which would explain the PSI's exclusion of individual trade modifications, terminations, valuations and collateral updates from the scope of the Regulators' access⁴⁷. Instead, one of the documents (the Regulator's access status as discussed above) for example refers to the fact that "Transaction level: [...] grants the access to all messages and trade status affecting the Trade IDs under the scope of a regulator ⁴⁸".
123. The Board takes also into account that in March 2014, following the entry into force of the requirements related to trade modifications and terminations, but before the entry into force of the requirements regarding valuations and collateral updates of 12 August 2014, ESMA informed the PSI in an email that "the transaction level access shall provide access to the individual trade details. These details include all the data required in table 1 and table 2 of the Annex to the Commission Delegated Regulation (EU) No 148/2013, i.e. common data and counterparty data, during the entire life cycle of the trade ⁴⁹". The PSI explained, regarding how it had identified the issue, that further to this email "the need to offer all message types in the transactions report was raised, even if the fields used for filtering were not informed by the counterparty ⁵⁰". In these circumstances, a normally informed and sufficiently attentive trade repository in the PSI's situation could not have failed to foresee the consequences of its acts. Therefore, although a trade repository

⁴⁵ Exhibit 12, PSI's Response to the IIO's Second RFI, p. 6.

⁴⁶ Exhibit 7, IIO's First RFI, p. 6.

⁴⁷ Exhibit 31, PSI's Response to the IIO's First RFI, Document 12.1, Analysis of Q 37 (Q12 IIO), 19 January 2015, Exhibit 32, PSI's Response to the IIO's First RFI, Document 12.2, Regulators access status - Hoja de calculo de Microsoft Office Excel, 25 April 2014, and Exhibit 33, PSI's Response to the IIO's First RFI, Document 12.2, Regulators access status, 25 April 2014.

⁴⁸ Exhibit 33, PSI's Response to the IIO's First RFI, Document 12.2, Regulators access status, 25 April 2014, p. 2. See also, Supervisory Report, Exhibit 9, Document 3: E-mail, dated 23 July 2014, "REGULATOR'S ACCESS", providing internally the status of the Regulators' Access and Supervisory Report, Exhibit 9.1, Attachment to Document 3: Regulator's Access, p. 5.

⁴⁹ Exhibit 21, PSI's Response to the IIO's First RFI, Document 2.2, Email "RE REGIS-TR Regulators Portal-QUERY", p. 5.

⁵⁰ Exhibit 3, Supervisory Report, REGIS-TR's response to first RFI (report), p. 5.

cannot wait for “instructions” from ESMA to remedy infringements under EMIR, ESMA did provide clear guidance to the PSI.

124. Finally, the Board considers the third argument put forward by the PSI: the PSI claims not having acted negligently, because it “has always engaged in close dialogue with ESMA, receiving guidance on the requirements and placing importance on the priorities and timelines agreed with ESMA”⁵¹. In addition, it indicated that it “did not, in the absence of the relevant instruction from ESMA, remedy the issue with the Message Reports”⁵².
125. In this regard, the Board considers that the exchange of emails described in para. 123 already constitutes a clear guidance to the PSI on ESMA’s expectations. In particular, in the email of 12 August 2014, ESMA clarified that the transaction level access shall provide access to the individual trade details and provided also clarifications on the individual details.
126. Moreover, the Board considers relevant the participation of the PSI in the consultation process related to the Delegated Regulations, described above in para. 117. Indeed, in the course of the consultation, the PSI did not raise any issues with respect to the reporting details. Considering that also in the text of the Consultation Paper it was already stated that the Regulators would need to have access to all transaction data, it can be easily argued that the PSI could not have any doubt regarding the guidance given by ESMA.
127. Last but not least, the Board states that in any case, a trade repository cannot wait for instructions from ESMA in the application of clear provisions, especially in order to remedy infringements under EMIR. This is within the scope of a TR’s duties pursuant to Article 78(3) of EMIR.
128. Overall, on the basis of the elements described above, the Board considers that the PSI failed to take the special care expected of a trade repository. As a professional firm in the financial services sector subject to stringent regulatory requirements, the PSI is constantly required to take special care in assessing the risks that its acts or omissions entail, and in the present case has failed to take that care. As the result of that failure, it has not foreseen the consequences of its acts or omissions, including particularly its infringement of Article 81(2) of EMIR, in circumstances where a trade repository in such a position that is normally informed and sufficiently attentive could not have failed to foresee those consequences.
129. Therefore, the Board finds that the PSI has been negligent when committing the infringement of Point (b) of Section III of Annex I of EMIR.

⁵¹ Exhibit 12, PSI’s Response to the IIO’s Second RFI, p. 6.

⁵² Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 2.

Fines

Determination of the basic amount

130. Article 65(2) of EMIR provides as follows:

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

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

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

131. It has been established that the PSI committed the infringement set out at Point (b) of Section III of Annex I of EMIR, by not providing the Regulators on-boarded to the PSI’s system with direct and immediate access to all details of derivative contracts they need to fulfil their respective responsibilities and mandates.

132. The PSI remedied the infringement by including all the information reported by counterparties and CCPs in the transaction level “Messages Reports” from 24 October 2016.

133. To determine the basic amount of the fine, the Board has regard to the PSI’s annual turnover in the preceding business year.

134. In 2015, the PSI had a turnover of EUR [...].

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

Aggravating factors

136. Annex II of EMIR lists the aggravating factors to be taken into consideration for the adjustment of the fine. Their application to the present case is assessed below.

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

137. The infringement set out at Point (b) of Section III of Annex I of EMIR was committed continuously; the repetition is therefore excluded.

138. This aggravating factor is thus not applicable to the infringement.

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

139. The infringement set out at Point (b) of Section III of Annex I of EMIR was committed for more than six months regarding trade modifications and terminations, as the PSI did not provide certain transaction data to Regulators from 12 February 2014 (reporting start date) to 24 October 2016. Regarding valuations and collateral updates, the infringement was also committed for more than six months, as the PSI did not provide certain transaction data from 12 August 2014 (reporting start date for valuations and collateral) to 24 October 2016.

140. This aggravating factor is thus applicable to the infringement.

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

141. The Board notes that this aggravating factor is intended to distinguish situations where a given infringement, such as the one set out in Point (b) of Section III of Annex I of EMIR, has occurred in a context that evidences systemic weaknesses in the organisation of a trade repository, from situations where this same infringement can be considered the result of an individual or isolated instance of malfunction.

142. The Board, in its analysis on whether the aggravating factor applies, considers the type and the level of seriousness of the PSI's failure that led to the infringement.

143. To assess whether the infringement revealed systemic weaknesses, the Board considers the design and testing of the PSI' system regarding Regulators' access to information, and its ability to detect and to remedy the infringement.

144. First, the Board notes that the infringement stemmed from the design of the Regulators' access to reports. As clarified by the PSI, the system "allowed participants to use partial reporting to modify the information regarding a trade: the system was not able to filter the information for the fields not provided in case the participant updated the information via partial reporting. The system that generated the reports for the Regulators did not include a functionality that completed the partial reports with the filterable fields of the consolidated contract. Additionally, the data model of the system that generated the reports did not include any type of feature that enhanced the relations between messages and consolidated trades during the extraction process. Due to these facts the system was no[t] capable of providing such functionalities and a redesign of the components and definitions used was required, hence that a solution for such requirements was described as complex. [...] REGIS held several conversations with the IT supplier on regards of the complexity of the system where several other options were provided, including different filtering options

(e.g. filter by Trade ID) and where the limitations of the system prevented the required functionality to be offered”⁵³.

145. Further, the Board takes into consideration the context surrounding the implementation of the PSI’s IT system and the contested lack of experience of the market. However, it finds that it does not change the misinterpretation of a clear obligation which finally led to the faulty set-up of the infrastructure of an essential part of the PSI’s organisation. The IT system is a key element for the good functioning of a trade repository. Moreover, the consequences were wide-reaching.
146. The PSI, when establishing the access of Regulators to data under EMIR, had designed a system, which was inherently incapable of including all the details of derivative contracts reported to the PSI. Thus, the infringement was not due to a temporary error in the IT system, but it was due to the erroneous set-up of the processing of the received data. The Board considers this to reveal systemic weaknesses in the PSI’s organisation.
147. Regarding the testing of the system, the PSI claimed that before implementing the access for Regulators, it had “verified and tested that business requirements and functional specification in relation to the implementation of the Regulators’ access, as defined in 2013, was implemented in the system code, although it admits that not supporting documentation has been retrieved so far”⁵⁴.
148. The Board notes that the IIO requested the PSI to provide evidence to support its claims that it had verified and tested the set-up of its IT system providing Regulators with direct and immediate access to the details of derivatives contracts. However, the evidence provided by the PSI is only partial (as recognised by the PSI itself⁵⁵) and does not highlight appropriate testing of the PSI’s IT system. As such, it leads to doubts on the adequacy of the verification and testing undertaken.
149. In this respect, the infringement reveals systemic weaknesses also in the organisation of the PSI in relation to its procedures and management system regarding the verification and testing of the functional specifications of Regulators’ access to information on derivative contracts. Providing access to data for regulators is the key function of trade repositories. Regulators shall be able to access data that they are entitled to and trade repositories should be able to filter it in accordance with their mandates.
150. The Board further notes that the PSI did not resolve the infringement until 24 October 2016. This even though the PSI was aware that Regulators did not receive all the information in the Messages Reports from 12 February 2014 for trade modifications and terminations and from 12 August 2014 for valuations and collateral updates⁵⁶.
151. However, it seems that resource constraints were an issue at the time of the implementation of the access for Regulators. The PSI acknowledged in a Board Meeting

⁵³ Exhibit 6, Supervisory Report, REGIS-TR’s response to second RFI (report), p. 8.

⁵⁴ Exhibit 6, Supervisory Report, REGIS-TR’s response to second RFI (report), p. 9.

⁵⁵ The PSI again recognised this in its Response to the IIO’s Statement of Findings. See Exhibit 62, PSI’s Response to the IIO’s Statement of Findings, p. 5: “*the evidence which it has been able to recover in relation to the testing of the system is only partial*”.

⁵⁶ Supervisory Report, Exhibit 6, REGIS-TR’s response to second RFI (report), p. 5.

in March 2014 that “ESMA requires deadlines but we cannot provide them - Lack of resources on Concept design and IT”.

152. Based on this, the Board identifies significant weaknesses regarding the PSI’s design and testing of its IT system providing access to information by Regulators, as well as its IT resources, expertise and skills. Given the importance of a trade repository’s IT infrastructure and resources, these defects constitute “systemic weaknesses in the organisation” of the PSI. Indeed, the IT systems are crucial for the operation of a trade repository and therefore it is expected that any significant issue in their functioning would cause systemic deficiencies.

153. Thus, the aggravating factor is applicable.

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

154. In assessing this aggravating factor, the Board notes the submission of the PSI that “the data quality is exclusively set by the reporting participants. REGIS-TR does not change in any way any data reported to it, but rather filters and extracts the data relevant to the on-boarded Regulators. Against that background, REGIS-TR is of the view that the alleged infringement of Article 81(2) of EMIR, if it were determined, would not have had a negative impact on the quality of the data maintained by REGIS-TR⁵⁷”.

155. Conversely, the Board considers that “quality of data” operates within the context of the principal objective of introducing the reporting requirement under EMIR, which is to ensure that Regulators have timely and complete access to the relevant data to be able to perform their mandates and ensure financial stability. Delays in providing Regulators prevent them from fulfilling their mandates.

156. In particular, the timing of access to data is one of the characteristics of the quality of the data. The non-inclusion of certain data in relation to trade modifications, terminations, valuations and collateral updates in the reports accessible by the Regulators until 24 October 2016, is a *de facto* delay of this information of more than two years. Delays such as the one experienced by Regulators in relation to the PSI’s data significantly reduce the quality of the data which is accessed and the use that can be made of this data. The data is deficient and incomplete.

157. Only for example, when it informed the PSI about the non-inclusion of trade modifications, terminations, valuations and collateral updates in the “messages reports”, the AFM indicated that this “is seriously affecting fulfilment of our supervisory duties and we would like to see this issue solved as soon as possible⁵⁸”.

158. Based on the considerations above, the Board considers that the aggravating factor is applicable.

⁵⁷ Exhibit 10, PSI’s Response to the IIO’s First RFI, p. 11.

⁵⁸ Exhibit 54, PSI’s Response to the IIO’s First RFI, Document 3.3, Email “RE Missing records in our files msg 3”, p. 6.

Annex II, Point I (e): if the infringement has been committed intentionally, a coefficient of 2 shall apply

159. The Board finds no evidence that the infringement set out at Point (b) of Section III of Annex I of EMIR was committed intentionally by the PSI. This aggravating factor is thus not applicable.

Annex II, Point I (f): if no remedial action has been taken since the breach has been identified, a coefficient of 1.7 shall apply

160. The PSI has taken a number of actions, primarily resolving the issues in relation to the infringement by including all data on trade modifications, terminations, valuations and collateral updates in the “messages reports”. In this respect, the Board notes the following:

161. The PSI confirmed that since 24 October 2016 its “reports include trade modifications, terminations, valuations and collateral updates⁵⁹”. The PSI also indicated that the issue was “permanently solved”⁶⁰.

162. Further, the PSI explained that it created “a new Database in which the last status of a trade was linked with its corresponding messages [...] This database would be created daily and would allow the extraction of all the information⁶¹”, “combining the information of several sources to extract collaterals, valuations and modification messages that could not be filtered before⁶²”.

163. Moreover, the PSI has offered to grant access as of 30 April 2018 to historical data to the Regulators⁶³.

164. Based on the above, the Board concludes that remedial actions have been taken by the PSI and therefore this aggravating factor is not applicable.

Annex II, Point I (g): if the trade repository’s senior management has not cooperated with ESMA in carrying out its investigations, a coefficient of 1,5 shall apply

165. The Board finds no evidence that the PSI (including its senior management⁶⁴) have not cooperated with the IIO during her investigation. Similarly, in the file there is no sign of lack of cooperation of the PSI at the stage of the investigation by ESMA’s Supervision Department.

⁵⁹ Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI (report), p. 15. See also Exhibit 7, Supervisory Report, Document 1: Communication, dated 18 October 2016, “MS-0055 - REGIS-TR - COMMUNICATION - Regulators - CHANGES ON DELIVERABLE REGULATOR REPORTS” and Exhibit 54, PSI’s Response to the IIO’s First RFI, Document 3.3, Email “RE Missing records in our files msg 3”, p. 1.

⁶⁰ Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI (report), p. 15.

⁶¹ Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI (report), p. 15.

⁶² Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI (report), p. 15-16.

⁶³ Exhibit 3, Supervisory Report, REGIS-TR’s response to first RFI (report), p. 17, see also Exhibit 28, Supervisory Report, Document 22: Communication, dated 27 March 2017, “(RG-0011) REGIS-TR – Regulators - enhancement in the content of the regulator’s reports”.

⁶⁴ The IIO’s RFIs were sent to and the responses were received from the PSI’s contact person as designated by the PSI’s legal representative.

166. Therefore, the Board considers that the aggravating factor relating to a lack of cooperation is not applicable.

Mitigating factors

167. Annex II of EMIR lists the mitigating factors to be taken into consideration for the adjustment of the fine. The Board's assessment regarding their application to the present case is developed below.

Annex II Point II(a): if the infringement has been committed for less than 10 working days, a coefficient of 0,9 shall apply

168. The infringement has been committed for more than 10 working days. This mitigating factor is thus not applicable.

Annex II Point II (b): if the trade repository's senior management can demonstrate to have taken all the necessary measures to prevent the infringement, a coefficient of 0,7 shall apply

169. The Board notes that in her First RFI⁶⁵, the IIO requested the PSI to provide any documentation showing specifically the measures taken by the PSI's senior management to prevent the infringements.

170. In this respect, the PSI provided some documents⁶⁶ and explained that its senior management had taken actions regarding the "Regular follow-up on actions raised by ESMA during its on-site inspection in 2015 related to Regulators' access, evidenced by the status of action table dated September 2015 [and the] Approval of the Regulators' access procedure⁶⁷".

171. The Board notes however that these actions relate to specific remedial actions in response to a number of precise concerns raised by ESMA following an on-site inspection in 2015. Thus, they cannot be considered as measures (amounting to all the necessary measures) taken by the senior management to prevent the infringement, which is the subject of this investigation and which started from the reporting start dates in 2014.

172. On that basis, the Board considers that there is no evidence in the file that the PSI's senior management has taken all the necessary measures to prevent the infringement.

173. Consequently, the Board considers that this mitigating factor is not applicable.

Annex II Point II (c): if the trade repository has brought quickly, effectively and completely the infringement to ESMA's attention, a coefficient of 0,4 shall apply

⁶⁵ Exhibit 7, IIO's First RFI, p. 6.

⁶⁶ Exhibit 56, PSI's Response to the IIO's First RFI, Document 16.1, STATUS OF ACTIONS FROM ESMA ON-SITE INSPECTION FINAL REPORT as of September 2016, and Exhibit 57, PSI's Response to the IIO's First RFI, Document 16.2, REGIS-TR BoD Meeting, 18 February 2015.

⁶⁷ Exhibit 10, PSI's Response to the IIO's First RFI, p. 12.

174. The Board notes that on 20 July 2016, one of the Regulators, the AFM, notified ESMA's Supervision Department about the fact that it had only received action type "N", i.e. new trades, in the "messages reports" from the PSI⁶⁸.
175. Before this date, the PSI claimed that it had raised the issue of non-inclusion of certain trade modifications, terminations, valuations and collateral updates in the "messages reports" for the first time "In the email to ESMA dated 3 November 2014 [...]: "REGIS-TR has already defined the second part of the implementation of the Portal to include the Reporting Log and the filtering of all trade types reported over a trade, where the filtering criteria/fields are not included. This change would probably impact the existing definition/specifications to filter and display the trade types, which needs to be studied"⁶⁹".
176. The PSI further expanded on this in later emails of the same email chain⁷⁰ and referred to this exchange in its response to ESMA's Supervision Department's request for explanations further to the issue being raised by the AFM⁷¹: "Please note that the situation communicated by AMF is related to one of the Regulator's Portal functionality that, as previously discussed with ESMA, is pending to be enhanced⁷²".
177. In this respect, the PSI argued that "ESMA was aware or could have been aware of the issue with the Message Reports before the issue was raised by AFM in July 2016"⁷³.
178. Moreover, in its Response to the IIO's Statement of Findings the PSI further expands on its "view that the applicability of the mitigating factor at Point II(c) of Annex II should be viewed in the context of its ongoing dialogue with ESMA over improvements to its systems. [... In particular], the continued dialogue with ESMA raised the issue of relevant updates to the Portal as early as November 2014. In REGIS-TR's view, the resolution of the issue with the Message Reports should be part of the overall package of updates to the system that were being implemented in discussion with ESMA. As such, it maintains that the deficiencies in the system in this respect were brought to ESMA's attention as part of this ongoing dialogue⁷⁴".
179. The Board notes however that, regarding these exchanges, ESMA's Supervision Department stated that while "the PSI provided information as to its planning to implement the functionality for the reporting required by Question 37 [of the Q&As of 24 October 2014 ⁷⁵] making also reference to other pending functionalities which included specifications for the inclusion of all trade types in the transactional level reports [...],

⁶⁸ Exhibit 54, PSI's Response to the IIO's First RFI, Document 3.3, Email "RE Missing records in our files msg 3", p. 8.

⁶⁹ Exhibit 55, PSI's Response to the IIO's First RFI, Document 3.1, Email "RV Clarification on TR Question 37 QA 24 Oct", p. 11.

⁷⁰ Exhibit 10, PSI's Response to the IIO's First RFI, p. 7. Please also see Exhibit 55, PSI's Response to the IIO's First RFI, Document 3.1, Email "RV Clarification on TR Question 37 QA 24 Oct".

⁷¹ Exhibit 54, PSI's Response to the IIO's First RFI, Document 3.3, Email "RE Missing records in our files msg 3", p. 8.

⁷² Exhibit 54, PSI's Response to the IIO's First RFI, Document 3.3, Email "RE Missing records in our files msg 3", p. 4.

⁷³ Exhibit 10, PSI's Response to the IIO's First RFI, p. 2.

⁷⁴ Exhibit 62, PSI's Response to the IIO's Statement of Findings, p. 6.

⁷⁵ Exhibit 50, Response of the Supervision Department, ESMA/2014/1300, Questions and Answers, Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), 24 October 2014, pp. 82-83.

during these interactions, ESMA's TR Supervision focus was on the implementation of Question 37. ESMA's TR Supervision became fully aware of the non-inclusion issue upon AFM's notification of 20 July 2016 and the subsequent request to the PSI to provide information on the nature and scope of the issue⁷⁶".

180. However, while the Board can accept that before the AFM's notification the PSI might have alluded to some elements of the infringements in its exchanges with ESMA's relevant supervisory team, this cannot be considered as being a complete and effective notification for the purpose of the application of this mitigating factor.

181. Moreover, the Board considers that the notification was not "quick". The infringement occurred from 12 February 2014 and from 12 August 2014. Thus, a delay in the notification of more than a year cannot be considered as "quickly", bringing the infringement to ESMA's attention.

182. For the above considerations, the Board considers that this mitigating factor is not applicable.

Annex II Point II (d): if the trade repository has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future, a coefficient of 0,6 shall apply

183. As explained above regarding the aggravating factor set out in Annex II, Point I(f) of EMIR, for the infringement by the PSI, the Board considers that a number of remedial actions have been taken. The Board considers that these remedial actions should ensure that a similar infringement cannot be committed in the future.

184. The Board turns to the assessment of whether these measures were taken voluntarily, which would imply that the mitigating factor provided by Annex II, Point II(d) of EMIR would be applicable.

185. The Board notes that there is no definition of what "voluntarily" ("de son plein gré" in the French version of EMIR) precisely means within the context of this mitigating factor. Nevertheless, there are clear-cut examples. It is clear that a trade repository has voluntarily taken measures when it has taken them spontaneously without any solicitation from its supervisor. It is also obvious that when there is a specific obligation to take these measures, it can no longer be considered that the measures are taken voluntarily. The situation is to a certain extent less clear-cut when the trade repository takes measures only after a number of requests and interactions with its supervisor aiming at ensuring that the said measures are implemented by the trade repository, for example, through an action plan defined and monitored by the supervisor.

186. In the present case the Board notes the following:

⁷⁶ Exhibit 16, Supervision Department's Response to the IIO's Request, p. 2.

187. First, the PSI started planning to remedy the issue in March 2014⁷⁷. Originally, it had foreseen⁷⁸ to include trade modifications, terminations, valuations and collateral updates by the end of January 2016⁷⁹. The infringement was remedied on 24 October 2016.
188. Second, following the AFM's notification to ESMA on 20 July 2016, ESMA's Supervision Department requested further information on the incident and the proposed resolution of the issue. While the PSI implemented the solution following this email and had further discussions with ESMA's staff⁸⁰, the decision of whether to take these measures was still within the PSI's remit.
189. Therefore, the Board considers that the PSI has voluntarily taken measures to ensure that a similar infringement cannot be committed in the future. The mitigating factor is thus applicable.
190. For completeness, the Board notes that, further to remedying the infringement on 24 October 2016, the PSI also informed the IIO in its Response to the IIO's First RFI of further enhancements it took on its own "initiative and without ESMA's interaction: Introduction of enhanced internal controls on the Regulators filters setup [... and] Introduction of internal controls in respect of regulator service monitoring⁸¹". Moreover, as part of ESMA's on-going supervision and interactions with the PSI, on 15 April 2015, at the request of ESMA, the PSI automated the Regulators' access filtering process and removed the manual intervention steps at the PSI's level⁸².
191. The Board considers these steps are tangential to ensuring that similar infringements cannot be committed in the future, as they concern the on-boarding of Regulators rather than the specific issue under investigation.

Determination of the adjusted fine

192. In accordance with Article 65(3) of EMIR, considering the applicable aggravating and mitigating factors, the basic amount of EUR 20 000 must be adjusted as follows.
193. The difference between the basic amount and the amount resulting from the application of each individual coefficient linked to the aggravating factors set out in Annex II, Point I(b), Point I(c) and Point I(d) and the mitigating factor set out in Annex II, Point II(d) is added to the basic amount in the case of the aggravating factor and subtracted from the basic amount in the case of the mitigating factor:

⁷⁷ Exhibit 10, Supervisory Report, Document 4: "E-mail, dated 31 March 2014, "RE REGULATOR'S ACCESS - SECOND PHASE TRADE TYPE CLASSIFICATION". See also e.g. Exhibit 21, PSI's Response to the IIO's First RFI, Document 2.2, Email "RE REGIS-TR Regulators Portal-QUERY", p. 6 and Exhibit 20, Supervisory Report, Document 14: FSD Regulator's Portal Phase 2 Part 2, dated March 2014.

⁷⁸ Exhibit 3, Supervisory Report, REGIS-TR's response to first RFI (report), p. 6.

⁷⁹ Exhibit 12, PSI's Response to the IIO's Second RFI, p. 4. Please also see Exhibit 22, PSI's Response to the IIO's Second RFI, Document 1_IIO-RFI-2_2.1_RTR_Planning_Roadmap_v3.24, 17 February 2015, p. 2, field no 1.

⁸⁰ Exhibit 54, PSI's Response to the IIO's First RFI, Document 3.3, Email "RE Missing records in our files msg 3".

⁸¹ Exhibit 10, PSI's Response to the IIO's First RFI, p. 12.

⁸² Exhibit 10, PSI's Response to the IIO's First RFI, pp. 11-12.

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

$$\text{EUR } 20\,000 \times 1.5 = \text{EUR } 30\,000$$

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

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

$$\text{EUR } 20\,000 \times 2.2 = \text{EUR } 44\,000$$

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

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

$$\text{EUR } 20\,000 \times 1.5 = \text{EUR } 30\,000$$

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

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

$$\text{EUR } 20\,000 \times 0.6 = \text{EUR } 12\,000$$

$$\text{EUR } 20\,000 - \text{EUR } 12\,000 = \text{EUR } 8\,000$$

Adjusted fine considering applicable aggravating and mitigating factors:

$$\text{EUR } 20\,000 + \text{EUR } 10\,000 + \text{EUR } 24\,000 + \text{EUR } 10\,000 - \text{EUR } 8\,000 = \text{EUR } 56\,000$$

194. Consequently, following adjustment by considering the applicable aggravating and mitigating factors, the amount of the fine to be imposed on Regis amounts to EUR 56 000.

Supervisory measures

195. Article 73 paras. 1 and 2 of EMIR provide that when the Board finds that a trade repository has committed one of the infringements listed in Annex I, it shall take one or more supervisory measures, taking into account the nature and seriousness of the infringement.

196. Given the factual findings of the present case and in particular the fact that the PSI permanently solved the issue on 24 October 2016, only the supervisory measure set out in Article 73(1) (c) of EMIR can be considered appropriate with regard to the nature and the seriousness of the infringement.

197. In its Response to the IIO's Statement of Findings, the PSI provided observations given that "in determining whether to issue a public notice under Article 73 (1) (c), ESMA is required to take into account the nature and seriousness of the infringement, having regard

to the criteria under Article 73(2)⁸³. The PSI asked ESMA to take into account the updates to its IT system to resolve the problem and its implementation of ESMA's ongoing requirements regarding the duration and frequency of the infringement. It also referred to its remarks regarding whether the infringement had revealed serious or systemic weaknesses in the PSI's procedures or in its management systems or internal controls. The PSI requested ESMA to take "these observations into consideration when deciding whether to issue a public notice under Article 73 (1) of EMIR⁸⁴".

198. The Board has considered all the PSI's observations in this respect. However, on the basis of the relevant provisions and of the findings, the Board considers that in the present case the issuance of a public notice would be the proportionate supervisory measure.

199. The Appendix to this Statement of Findings of the Board contains a draft of the Public Notice to be adopted.

Conclusion

200. In its Statement of Findings, the Board agrees with the IIO and concludes that the PSI negligently breached the requirements of Article 81(2) of EMIR.

201. In particular, from 12 February 2014 to 24 October 2016, the PSI did not provide direct and immediate access to Regulators to the 85,46% of the trade terminations and to the 1,63% of the trade modifications reported to it by counterparties and CCPs.

202. In addition, during the period between 12 August 2014 and 24 October 2016, the PSI did not provide the Regulators with all the information regarding valuations and collateral updates, representing 100% of the data reported to it by counterparties and CCPs.

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

204. In accordance with the relevant provisions of EMIR, taking into account the applicable aggravating and mitigating factors, the overall fine to be imposed on the PSI for negligently committing this infringement amounts to EUR 56 000.

205. In addition, this infringement requires the adoption of a supervisory measure taking the form of a public notice concerning the PSI.

206. The Appendix of this Statement of findings of the Board contains a draft of the public notice to be issued.

⁸³ Exhibit 62, PSI's Response to the IIO's Statement of Findings, p. 6-7.

⁸⁴ Exhibit 62, PSI's Response to the IIO's Statement of Findings, p. 7.

APPENDIX – [DRAFT] Public Notice

REGIS-TR S.A. ('REGIS-TR') is a registered trade repository ('TR'), having its headquarters in Luxembourg and a branch in Spain.

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 ('EMIR') lays down obligations for a TR in the conduct of its activities. In conjunction with its role of supervisor of TRs under EMIR, the European Securities and Markets Authority ("ESMA") has functions and powers to take enforcement actions in relation to infringements of EMIR by TRs.

EMIR provides that in order to ensure transparency and the availability of information, that TR's shall ensure that specified Authorities and Regulators have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

In March 2018, ESMA's Supervisory Department formed the view that there were serious indications of possible infringements of EMIR by REGIS-TR.

The matter was then referred to an Independent Investigating Officer ('the IIO') who, after having conducted an investigation, submitted her findings to the Board of Supervisors ('the Board').

Having considered the evidence, the Board of Supervisors has found that REGIS-TR negligently committed one infringement of EMIR as follows.

Infringement

REGIS-TR negligently committed the infringement set out set out at Point (b) of Section III of Annex I of EMIR by not ensuring that the entities referred in Article 81(3) of EMIR have direct and immediate access to the details of derivatives contracts they need to fulfil their respective supervisory responsibilities and mandates.

A) Relevant legal provisions

EMIR

Article 81(2) – (3) (*Transparency and data availability*)

(...)

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

(3) A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

(a) ESMA;

(b) the ESRB;

(c) the competent authority supervising CCPs accessing the trade repository;

(d) the competent authority supervising the trading venues of the reported contracts;

(e) the relevant members of the ESCB;

(f) the relevant authorities of a third country that has entered into an international agreement with the Union as referred to in Article 75;

(g) supervisory authorities appointed under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids;

(h) the relevant Union securities and market authorities;

(i) the relevant authorities of a third country that have entered into a cooperation arrangement with ESMA as referred to in Article 76;

(j) the Agency for the Cooperation of Energy Regulators;

(k) the resolution authorities designated under Article 3 of Directive 2014/59/EU of the European Parliament and the Council.

Annex I (List of infringements)

Section III Infringements relating to transparency and the availability of information

Point (b). A trade repository infringes Article 81(2) by not allowing the entities referred to in Article 81(3) direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates.

According to Article 81(2) – (3) of EMIR, a TR has the obligation to ensure that specified Authorities and Regulators have direct and immediate access to the details of derivatives contracts they need to fulfil their respective responsibilities and mandates

B) Factual findings and analysis of the Board

In April 2013, REGIS-TR filed its application for registration under EMIR. On 14 November 2013, REGIS-TR was registered to provide trade repository services for all derivative asset classes.

During the registration process, REGIS-TR assured ESMA that it will provide direct and immediate access to the details of derivatives contracts reported to it in the form of transaction level reports.

Starting from 12 February 2014⁸⁵, counterparties and CCPs had to report **modifications and terminations** to a trade repository of their choice. Starting from 12 August 2014, counterparties and CCPs had to report **valuations and collateral updates** to a trade repository of their choice. ESMA and the other Regulators mentioned in Article 81 (3) of EMIR should have direct and immediate access to all these transactional data reported to REGIS-TR.

The Board found that between 12 February 2014 until 24 October 2016, REGIS-TR did not provide direct and immediate access to Regulators to:

Trade Terminations: 3.719.011.631 (out of 4.351.869.402) – which represents 85,46% of the data reported to REGIS-TR by counterparties and CCPs

Trade Modifications: 15.470.184 (out of 946.803.851) – which represents 1,63% of the data reported to REGIS-TR by counterparties and CCPs

In addition, during the period between 12 August 2014 and 24 October 2016, REGIS-TR did not provide to Regulators access to:

Valuations: 2.898.122.455, which represents 100% of the data reported to REGIS-TR by counterparties and CCPs

Collateral updates: 22.154.249, which represents 100% of the data reported to REGIS-TR by counterparties and CCPs.

⁸⁵ See Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories to Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories, OJ L 352, 21.12.2012, P.29

C) Finding of the infringement

On the basis of the assessment of the complete file submitted by the IIO, the Board found that REGIS-TR failed to comply with the requirements of Article 81(2) of EMIR, and thus, it committed the infringement set out at Point (b) of Section III of Annex I of EMIR.

Furthermore, the Board found that REGIS-TR did not meet the special care expected from a TR as a professional firm in the financial services sector. Therefore, the Board found that REGIS-TR had committed the infringement negligently and was liable to a fine. In calculating the fine, the Board took account of the applicable aggravating and mitigating factors provided for in EMIR and has therefore fined REGIS-TR EUR 56 000.

D) Supervisory measure and fine

Public notice

Pursuant to Article 73 of EMIR, the Board decided that the infringements warranted a supervisory measure in the form of the publication of this public notice.

Fine

The fine imposed on REGIS-TR is EUR 56 000.