



Brussels, 19.12.2018
C(2018) 9122 final

COMMISSION DELEGATED REGULATION (EU) .../...

of 19.12.2018

amending Commission Delegated Regulation (EU) 2015/2205, Commission Delegated Regulation (EU) 2016/592 and Commission Delegated Regulation (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date at which the clearing obligation takes effect for certain types of contracts

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The United Kingdom submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. This means that, if the Withdrawal Agreement¹ is not ratified, the Unions' primary and secondary law will cease to apply to the United Kingdom from 30 March 2019 ('the withdrawal date'). The United Kingdom will then become a third country.

As of the withdrawal date, counterparties established in the United Kingdom will no longer be able to perform certain so-called "life-cycle events" (such as novations, unwinding by entering into an offsetting transaction, compression with new replacement contracts, etc.) in the EU under the current passport regime². The performance of those "life-cycle events" on certain cross-border (UK-EU27) contracts may require authorisation in Member States, in line with national third country regimes that still prevail today under Regulation (EU) No 600/2014. These counterparties established in the United Kingdom could then face up to 27 different national third-country regimes.

In order to address this situation, counterparties to these transactions might choose to novate their contracts to entities established and authorised in the EU27. However, the new contracts resulting from these novations might be subject to a clearing obligation that was not applicable at the time the original contracts were entered into and for which, in the absence of the UK's withdrawal from the EU, they might have continued benefiting from the exemption. Since centrally cleared contracts are subject to a different collateral regime than non-centrally cleared contracts, the triggering of the clearing obligation may force certain counterparties to discontinue those transactions, leaving certain risks unhedged.

The proposed amendments address this disincentive to transfer contracts to firms established in the EU27 by extending the current exemptions envisaged in the three existing Commission Delegated Regulations for a fixed period of time thus ensuring the smooth functioning of the market and a level playing field between counterparties established in the Union.

The Commission Communication on 'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan'³ has set out the contingency measures it plans to take for the case that no withdrawal agreement will enter into force on the withdrawal date. In this Communication, the Commission has announced measures to facilitate the transfer of long term contracts to the EU by ensuring that such contracts remain subject to the same regulatory treatment.

The European Council (Article 50) reiterated its call, on 13 December 2018, for work on preparedness at all levels for the consequences of the United Kingdom's withdrawal to be intensified, taking into account all possible outcomes. This act is part of a package of measures which the Commission is adopting in response to this call.

¹ https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

² Freedom to provide investment services and activities under Article 34 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

³ COM(2018)880 final, 13.11.2018.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Given the urgency with which it is necessary to provide this regulatory solution in order to facilitate the transfer of contracts to counterparties located in the EU in view of the withdrawal of the United Kingdom without an agreement, where counterparties decide to do so, in accordance with Article 10(1) of ESMA Regulation, ESMA has not conducted any open public consultation.

Together with the draft technical standards, ESMA submitted a report detailing the rationale used in the development of the final draft regulatory technical standards submitted to the Commission.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The delegated act introduces a modification to three existing RTS on the clearing obligation:

Article 1 modifies Article 3 and 4 of Commission Delegated Regulation (EU) 2015/2205 regarding interest rate derivative classes, allowing contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.

Article 2 modifies Article 3 and 4 of Commission Delegated Regulation (EU) 2016/592 regarding credit derivative classes, allowing contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.

Article 3 modifies Article 3 and 4 of Commission Delegated Regulation (EU) 2016/1178 regarding interest rate derivative classes, allowing contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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 repositories⁴, and in particular Article 5(2) thereof,

Whereas:

- (1) On 29 March 2017, the United Kingdom submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. The Treaties will cease to apply to the United Kingdom from the date of entry into force of a withdrawal agreement, or failing that, two years after that notification, i.e. from 30 March 2019, unless the European Council, in agreement with the United Kingdom, unanimously decides to extend that period.
- (2) The clearing obligation laid down in Regulation (EU) No 648/2012 does not take into account the eventuality of a Member State withdrawing from the Union. The challenges faced by those parties to an OTC derivative contract whose counterparties are established in the United Kingdom are a direct consequence of an event that is beyond their control and may put them at a disadvantage compared to other counterparties in the Union.
- (3) Commission Delegated Regulation (EU) 2015/2205⁵, Commission Delegated Regulation (EU) 2016/592⁶ and Commission Delegated Regulation (EU) 2016/1178⁷ specify the dates from which the clearing obligation is to take effect for contracts pertaining to certain classes of OTC derivatives. In addition, those Regulations

⁴ OJ L 201, 27.7.2012, p. 1.

⁵ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

⁶ Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 103, 19.4.2016, p. 5).

⁷ Commission Delegated Regulation (EU) 2016/1178 of 10 June 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 195, 20.7.2016, p. 3).

provide for different dates depending on the category of counterparty to those contracts.

- (4) Counterparties cannot foresee what the status of a counterparty established in the United Kingdom might become or to what extent that counterparty would be able to continue providing certain services to counterparties established in the Union. To address that situation, counterparties may want to novate the contract by replacing the counterparty established in the United Kingdom with a counterparty in a Member State.
- (5) If, due to the withdrawal of the United Kingdom from the Union, the parties decide to replace a counterparty established in the United Kingdom with a new counterparty established in the Union, the novation of the contracts will trigger the clearing obligation if such novation occurs on or after the date from which the clearing obligation takes effect for that type of contract. As a result, the parties will have to clear that contract in an authorised or recognised CCP.
- (6) Centrally cleared contracts are subject to a different collateral regime than non-centrally cleared contracts. The triggering of the clearing obligation may thus force certain counterparties to discontinue their transactions, leaving certain risks unhedged.
- (7) In order to ensure the smooth functioning of the market and a level playing field between counterparties established in the Union, counterparties should be able to replace counterparties established in the United Kingdom with counterparties established in a Member State without triggering the clearing obligation. In order to allow for sufficient time to replace such counterparties, the date from which the clearing obligation takes effect for the novation of those contracts should be 12 months after the date of application of this Regulation.
- (8) Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 should therefore be amended accordingly.
- (9) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (10) It is necessary to facilitate the implementation of efficient solutions by market participants as quickly as possible. Therefore, the European Securities and Markets Authority has analysed the potential related costs and benefits but has not conducted any open public consultation in accordance with the second subparagraph of Article 10(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁸.
- (11) This Regulation should enter into force as a matter of urgency and should only apply from the day following that on which the Treaties cease to apply to and in the United Kingdom unless a withdrawal agreement concluded with the United Kingdom has entered into force by that date or the two-year period referred to in Article 50(3) of the Treaty on European Union has been extended,

⁸ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2015/2205

Delegated Regulation (EU) 2015/2205 is amended as follows:

- (1) in Article 3, the following paragraph is added:

“3. By way of derogation from paragraphs 1 and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect 12 months from the date of application of this Regulation where the following conditions are fulfilled:

 - (a) the clearing obligation has not been triggered by [*OP: Insert the date of entry into force of this amending Regulation*];
 - (b) the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.”;
- (2) in Article 4, paragraph 3 is replaced by the following:

“3. For financial counterparties in Category 3 and for transactions referred to in paragraphs 2 and 3 of Article 3 of this Regulation concluded between financial counterparties, the minimum remaining maturity referred to in point (ii) of Article 4(1)(b) of Regulation (EU) No 648/2012, at the date the clearing obligation takes effect, shall be:

 - (a) 50 years for contracts that belong to the classes of Table 1 or Table 2 of the Annex;
 - (b) 3 years for contracts that belong to the classes of Table 3 or Table 4 of the Annex.”.

Article 2

Amendment to Delegated Regulation (EU) 2016/592

Delegated Regulation (EU) 2016/592 is amended as follows:

- (1) in Article 3, the following paragraph is added:

“3. By way of derogation from paragraphs 1 and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect 12 months from the date of application of this Regulation where the following conditions are fulfilled:

 - (a) the clearing obligation has not been triggered by [*OP: Insert the date of entry into force of this amending Regulation.*];
 - (b) the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.”;
- (2) in Article 4, paragraph 3 is replaced by the following:

“3. For financial counterparties in Category 3 and for transactions referred to in paragraphs 2 and 3 of Article 3 of this Regulation concluded between financial counterparties, the minimum remaining maturity referred to in point (ii) of

Article 4(1)(b) of Regulation (EU) No 648/2012, at the date the clearing obligation takes effect, shall be 5 years and 3 months.”.

Article 3

Amendment to Delegated Regulation (EU) 2016/1178

Delegated Regulation (EU) 2016/1178 is amended as follows:

(1) in Article 3, the following paragraph is added:

“3. By way of derogation from paragraphs 1 and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect 12 months from the date of application of this Regulation where the following conditions are fulfilled:

- (a) the clearing obligation has not been triggered by [*OP: Insert the date of entry into force of this amending Regulation.*];
- (b) the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.”;

(2) in Article 4, paragraph 3 is replaced by the following:

“3. For financial counterparties in Category 3 and for transactions referred to in paragraphs 2 and 3 of Article 3 of this Regulation concluded between financial counterparties, the minimum remaining maturity referred to in point (ii) of Article 4(1)(b) of Regulation (EU) No 648/2012, at the date the clearing obligation takes effect, shall be:

- (a) 15 years for contracts that belong to the classes in Table 1 set out in Annex I;
- (b) 3 years for contracts that belong to the classes in Table 2 set out in Annex I.”.

Article 4

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall apply from the date following that on which the Treaties cease to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union.

However, this Regulation shall not apply in any of the following cases:

- (a) a withdrawal agreement concluded with the United Kingdom in accordance with Article 50(2) of the Treaty on European Union has entered into force by that date;
- (b) a decision has been taken to extend the two year period referred to in Article 50(3) of the Treaty on European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19.12.2018

For the Commission
The President
Jean-Claude JUNCKER