



Brussels, 19.12.2018
C(2018) 9118 final

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

of 19.12.2018

amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP

(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 margin requirements that were 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. The triggering of those requirements 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 existing Commission Delegated Regulation 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.

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

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.

withdrawal of the United Kingdom without an agreement, where counterparties decide to do so, in accordance with Article 10(1) of the ESMA Regulation, 10(1) of the EBA Regulation and 10(1) of the EIOPA Regulation, the European Supervisory Authorities ('the ESAs') have not conducted any open public consultation.

Together with the draft technical standards, the ESAs 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 the existing RTS on the margin requirements:

Article 1 modifies Article 35 of Commission Delegated Regulation (EU) 2016/2251, allowing contracts with a counterparty established in the United Kingdom currently subject to risk-management procedures established prior to the relevant dates of application of that Regulation 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 11(15) 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 requirement to exchange collateral set out in Regulation (EU) No 648/2012 in respect of over-the-counter ('OTC') derivative contracts not cleared by a central counterparty ('CCP') 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) No 2016/2251⁵ specifies different dates of application of the procedures to exchange collateral for non-centrally cleared OTC derivative contracts, 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.

⁴ OJ L 201, 27.7.2012, p. 1.

⁵ Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 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 for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

- (5) Before Regulation (EU) No 648/2012 and Delegated Regulation (EU) 2016/2251 applied, counterparties to non-centrally cleared OTC derivative contracts were not required to exchange collateral, and bilateral trades were therefore not collateralised or they were collateralised on a voluntary basis. If counterparties were required to exchange collateral as a result of novating their contracts to address the withdrawal of the United Kingdom from the Union, the remaining counterparty may not be able to agree to the novation.
- (6) 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 in a Member State without being required to exchange collateral in respect of those novated contracts. The date from which they should be required to exchange collateral for the novation of those contracts should be 12 months after the date of application of this amending Regulation.
- (7) Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority to the Commission.
- (9) It is necessary to facilitate the implementation of efficient solutions by market participants as quickly as possible. Therefore, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority have analysed the potential related costs and benefits but have not conducted any open public consultation in accordance with the second subparagraph of Article 10(1) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council⁶, the second subparagraph of Article 10(1) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council⁷ and the second subparagraph of Article 10(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁸. For the same reason, this Regulation should enter into force on the day following that of its publication.
- (10) 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,

⁶ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

⁷ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

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) 2016/2251

Article 35 of Delegated Regulation (EU) No 2016/2251 is replaced by the following:

“Article 35

Transitional provisions

Counterparties referred to in Article 11(3) of Regulation (EU) No 648/2012 may continue to apply the risk-management procedures that they have in place at the date of application of this Regulation in respect of non-centrally cleared OTC derivative contracts entered into or novated between 16 August 2012 and the relevant dates of application of this Regulation.

Counterparties referred to in Article 11(3) of Regulation (EU) No 648/2012 may also continue to apply the risk-management procedures that they have in place at [*OP: Please insert the date of entry into force of the amending Regulation*] in respect of non-centrally cleared OTC derivative contracts fulfilling all of the following conditions:

- (a) the non-centrally cleared OTC derivative contracts have been entered into or novated before either the relevant dates of application of this Regulation as set out in Articles 36, 37 and 38 of this Regulation or [*OP: Please insert the date of entry into force of this amending Regulation*], whichever is earlier;
- (b) the non-centrally cleared OTC derivative contracts are novated for the sole purpose of replacing a counterparty established in the United Kingdom with a counterparty established in a Member State;
- (c) the non-centrally cleared OTC derivative contracts are novated between the date following that on which Union law ceases to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union and either of the following, whichever is later:
 - (i) the relevant dates of application set out in Articles 36, 37 and 38 of this Regulation; or
 - (ii) 12 months from the date following that on which Union law ceases to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union.”

Article 2

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