



Brussels, 21.12.2020  
C(2020) 9147 final

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

**of 21.12.2020**

**amending technical standards laid down in Delegated Regulation (EU) 2016/2251 as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral**

(Text with EEA relevance)

## **EXPLANATORY MEMORANDUM**

### **1. CONTEXT OF THE DELEGATED ACT**

Article 11 of Regulation (EU) No 648/2012 (EMIR) introduced an obligation to have risk-management techniques requiring the timely, accurate and appropriate segregated exchange of collateral (together ‘the margin requirements’). That obligation is imposed on financial counterparties engaged in over-the-counter (‘OTC’) derivative contracts not cleared by a central counterparty (‘CCP’) as well as those non-financial counterparties that are above the clearing threshold defined under Article 10. The Commission Delegated Regulation (EU) 2016/2251 on risk-mitigation techniques for OTC derivatives not centrally cleared, specifies further those risk-management techniques.

In view of the progress made globally towards the implementation of the international framework, and in accordance with the latest updates made to the internationally agreed framework set by the Basel Committee on Banking Supervision (‘BCBS’) and the International Organisation of Securities Commissions (‘IOSCO’), in particular in the context of the Covid-19 pandemic, it is necessary to make a number of adjustments in the EU legislative rulebook in order to better facilitate international consistency. These adjustments relate to the treatment of physically settled foreign exchange (‘FX’) forward and swap contracts, intragroup contracts, equity option contracts and the implementation of the initial margin requirements.

The draft RTS of the European Supervisory Authorities (ESAs)<sup>1</sup> includes amendments to the Commission Delegated Regulation (EU) 2016/2251 in order to facilitate further international consistency towards the implementation of the international framework.

The draft RTS also addresses the treatment of OTC derivative contracts novated from a counterparty established in the United Kingdom (UK) to a counterparty established in a Member State as a consequence of the withdrawal of the UK from the EU.

After the United Kingdom exits the transition period provided by the Withdrawal Agreement, counterparties established in the United Kingdom will no longer be able to provide certain so-called “life-cycle events” in the EU under the EU Single market rules.<sup>2</sup> The performance of those “life-cycle events” on certain cross-border (UK-EU) contracts may require authorisation in Member States, in line with national third country regimes 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 EU. 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. In the absence of the UK’s withdrawal from the EU, they would normally have continued to benefit 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 EU by extending the current exemptions envisaged in the existing Commission

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<sup>1</sup> 23 November 2020 ESAs 2020 20

<sup>2</sup> Notably the 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

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.

## **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

The proposed amendments are an adaptation of the timelines and rules to facilitate the current implementation of the Commission Delegated Regulation, and more broadly of the international framework. Moreover, each of the proposed amendments are limited in scope. Therefore, with a view to facilitate as soon as possible a consistent implementation of the bilateral margin requirements, in accordance with Article 10(1) of the EBA, EIOPA and ESMA Regulations respectively, the ESAs have not conducted any open public consultation. However, the stakeholder groups of each of the ESAs have been consulted.

The feedback was overall positive, expressing full support to introduce these amendments. One respondent explained that *“it addresses the outstanding concerns in terms of alignment with developments in the international framework for margining of non-cleared derivatives: timing and implementation of the final phases for smaller users, targeted exemptions for physically-settled FX forwards and FX swaps for non-systemic entities, and targeted exemptions for intragroup transactions and certain equity options.”*

The ESAs took note of the full support to introduce these amendments quickly.

With regard to the amendments related to the end of the United Kingdom’s participation in the Single market, 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 to the United Kingdom, 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 have not conducted any open public consultation.

## **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

The Delegated Act is based on the draft proposal from the ESAs.

The Delegated Act proposes six targeted amendments to Delegated Regulation (EU) 2016/2251:

A new Article 31a is introduced, giving a permanent exemption to posting and collecting variation margin for physically settled foreign exchange forward contracts and physically settled foreign exchange swap contracts where one of the counterparties is a counterparty other than an institution as defined in point (3) of Article 4(1) of Regulation (EU) No 575/2013, or where one of the counterparties is a counterparty established in a third country, which would not qualify as an institution as defined in point (3) of Article 4(1) of that Regulation if it were established in the Union.

Article 35 is modified, 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.

Article 36 is amended in the following way:

- In accordance with the internationally agreed modified calendar a new implementation phase is introduced for counterparties with an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 50 billion threshold. Consequently the last phase of implementation, for counterparties with an

aggregate average notional amount of non-centrally cleared derivatives that is above EUR 50 billion threshold, is delayed one extra year. The new phase and the last phase were due to start applying from 1 September 2020 and 1 September 2021 respectively but are shifted by one extra year due to the effect of the Covid-19 pandemic. The new phase will therefore apply from 1 September 2021 and the last phase from 1 September 2022.

- The exemption for cross-border intragroup transactions is extended to 20 June 2022 for jurisdictions where no equivalence has been adopted by the Commission pursuant to Article 13(2) of EMIR for the purpose of Article 11(3).
- The exemption for non-centrally cleared OTC derivatives which are single-stock equity options or index options is extended to 4 January 2024.

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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 repositories<sup>3</sup>, and in particular Article 11(15) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2016/2251<sup>4</sup> specifies, among others, the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in Article 11(3) of Regulation (EU) 648/2012, that financial counterparties are required to have for the exchange of collateral, with respect to their OTC derivative contracts not cleared by a central counterparty. Delegated Regulation (EU) 2016/2251 implements the international framework for the exchange of collateral that has been agreed at the global level by the Basel Committee on Banking Supervision (BCBS) and the International Organisation of Securities Commissions (IOSCO).
- (2) Many counterparties enter into physically settled foreign exchange forward and physically settled foreign exchange swap contracts to hedge their risks associated with their currency risk exposures. In view of the specific risk profile of these contracts and the need for international regulatory convergence, it is appropriate to restrict the mandatory exchange of variation margin for those contracts between the most systemic counterparties. A permanent exemption should be introduced for these contracts when entered into with non-institutions.
- (3) Delegated Regulation (EU) 2016/2251 provides for a phase-in over a number of years which reflects the implementation schedule agreed by the BCBS and the IOSCO. That phase-in aims at ensuring international consistency and thus at minimising possibilities for regulatory arbitrage. The phase-in also aims at facilitating a proportionate and effective implementation of the requirements concerned by giving counterparties, depending on the category of counterparty, on the type of contract and on when the contract was entered into or novated, sufficient time to adapt their internal systems and processes to the requirements concerned. Finally, the phase-in provided for in

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<sup>3</sup> OJ L 201, 27.7.2012, p.1.

<sup>4</sup> 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).

Delegated Regulation (EU) 2016/2251 takes into account the scope and level of implementation for the requirements concerning the exchange of collateral that was agreed by the BCBS and the IOSCO for other jurisdictions, thus avoiding market fragmentation and ensuring a global level playing field for counterparties established in the Union. In particular, Delegated Regulation (EU) 2016/2251 provides for more time for certain products that are not subject to equivalent margin requirements in other jurisdictions.

- (4) The BCBS and IOSCO have now amended their schedule for the implementation of the requirements concerning the exchange of collateral to support the smooth and orderly implementation of the margin requirements at the international level, and in particular because smaller counterparties were not able to meet the originally envisaged deadline. In addition, there are still third countries in which certain products are not subject to equivalent margin requirements. That amendment to the implementation schedule the BCBS and the IOSCO should therefore be reflected in the phase-in provided for in Delegated Regulation (EU) 2016/2251.
- (5) The European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (the ESAs) have monitored the progress that counterparties have made implementing the initial margin requirements for non-centrally cleared derivatives. The ESAs are aware that in the final phase of implementation, the initial margin requirements will apply to a large number of entities for the first time. In the interest of supporting the smooth and orderly implementation of the margin requirements across members of the BCBS and the IOSCO and to avoid market fragmentation, the deadline for the implementation of the initial margin requirements should be extended by an extra year for counterparties with an aggregate average notional amount of non-centrally cleared derivatives between €8 billion and €50 billion.
- (6) The ESAs have also monitored the impact of the Covid-19 outbreak on the financial markets, and in particular with respect to the significant challenges posed to counterparties by Covid-19, including the displacement of staff and the need to focus resources on managing risks associated with the related market volatility. The BCBS-IOSCO framework was also amended to take into account those effects of the Covid-19 outbreak and to postpone the implementation of the of the initial margin requirements. That amendment needs to be reflected in the implementation schedule laid down in Delegated Regulation (EU) 2016/2251. Such further extension of the deadline for the implementation of the initial margin requirements would result in counterparties with an aggregate average notional amount of non-centrally cleared derivatives above €50 billion being subject to the initial margin requirements from 1 September 2021, and counterparties with an aggregate average notional amount of non-centrally cleared derivatives above €8 billion being subject to the initial margin requirements from 1 September 2022.
- (7) Delegated Regulation (EU) 2016/2251 provides for a deferred date of application of the bilateral margin requirements for non-centrally cleared OTC derivative contracts concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union. That deferred date of application was necessary to ensure that such OTC derivative contracts were not subject to the bilateral margin requirements before the adoption of an implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012. Despite the efforts invested to analyse third country jurisdictions in relation to which any such implementing act may be warranted, to date, only two such

implementing acts have been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 in relation to non-centrally cleared OTC derivative transactions. The application of the bilateral margin requirements for non-centrally cleared OTC derivative intragroup contracts should therefore be further deferred to avoid the unintended detrimental economic impact that the expiry of that exemption would have on Union firms.

- (8) To avoid market fragmentation and to ensure a global level playing field for counterparties established in the Union, international regulatory convergence should also be ensured with regard to risk-management procedures for other classes of OTC derivatives that are not subject to equivalent margin requirements. In particular, acknowledging the fact that in some jurisdictions single-stock equity options and index options are not subject to equivalent margin requirements, and that it is unlikely, especially in the current context, that those jurisdictions will move anytime soon towards more regulatory convergence with regard to those products, the treatment of those products should be further phased-in. That further phase-in period should provide time for monitoring regulatory developments in other jurisdictions and should ensure that appropriate requirements are in place in the Union to mitigate counterparty credit risk in respect of such contracts whilst avoiding scope for regulatory arbitrage.
- (9) The United Kingdom became a third country on 1 February 2020 and Union law will cease to apply to and in the United Kingdom on 31 December 2020. 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 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. Commission Delegated Regulation (EU) 2016/2251 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. Counterparties cannot predict 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.
- (10) To address that situation, counterparties may want to novate their contract by replacing the counterparty established in the United Kingdom with a counterparty in a Member State. 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 to be required to exchange collateral as a result of novating their contracts to address the withdrawal of the United Kingdom from the Union, the other counterparty may not be able to agree to the novation. 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.
- (11) In addition, counterparties should be given sufficient time to replace their counterparties established in the United Kingdom. The date from which the

requirement to exchange collateral may be triggered for the novation of those contracts should therefore be deferred.

- (12) Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly.
- (13) This Regulation is based on the draft regulatory technical standards submitted by the ESAs to the Commission.
- (14) The amendments to Delegated Regulation (EU) 2016/2251 are limited adjustments of the existing regulatory framework in line with international developments. Given the limited scope of the amendments and the urgency of the matter, it would be disproportionate for the ESAs to conduct open public consultations or analyses of the potential related costs and benefits. The ESAs nevertheless requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council<sup>5</sup>, the opinion of the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council<sup>6</sup>, and the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>7</sup>.
- (15) It is necessary to provide market participants legal certainty as quickly as possible so that they can adequately prepare for complying with the requirements laid down in Regulation (EU) No 648/2012, the application of which will be affected by this Delegated Regulation, in particular with respect to the requirements for which the current applicable deadline is approaching rapidly. This Regulation should therefore enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Amendment to Delegated Regulation (EU) 2016/2251**

Delegated Regulation (EU) 2016/2251 is amended as follows:

- (1) the following Article 31a is inserted:

#### *“Article 31a*

#### **Treatment of physically settled foreign exchange forwards and physically settled foreign exchange swaps**

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<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

By way of derogation from Article 2(2), counterparties may provide in their risk management procedures that variation margins are not required to be posted or collected for physically settled foreign exchange forward contracts and physically settled foreign exchange swap contracts where one of the counterparties is not an institution as defined in Article 4(1), point (3), of Regulation (EU) No 575/2013 of the European Parliament and of the Council\* or would not qualify as such an institution if it were established in the Union.

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\* Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (*OJ L 176, 27.6.2013, p. 1*).”;

- (2) 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 on [OP: Please insert the date of entry into force of this Amending 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 on [OP: Please insert the date of entry into force of this 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 either before 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 1 January 2021 and either of the following, whichever is the later:
  - (a) the relevant dates of application set out in Articles 36, 37 and 38 of this Regulation; or
  - (b) 1 January 2022.”;

- (3) Article 36 is amended as follows:

- (a) paragraph 1 is amended as follows:
  - (i) point (e) is replaced by the following:
    - “(e) from 1 September 2021, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 50 billion;”;

- (ii) the following point is added:
  - “(f) from 1 September 2022, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 8 billion.”;
- (b) in paragraph 2, point (a) is replaced by the following:
  - “(a) from 30 June 2022 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;”;
- (4) in Article 37(3), point (a) is replaced by the following:
  - “(a) from 30 June 2022 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;”;
- (5) in Article 38, paragraph 1 is replaced by the following:
  - “1. By way of derogation from Article 36(1) and Article 37, in respect of all non-centrally cleared OTC derivatives which are single-stock equity options or index options, the Articles referred to in Articles 36(1) and 37 shall apply from 4 January 2024.”.

## *Article 2*

### **Entry into force**

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

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

Done at Brussels, 21.12.2020

*For the Commission*  
*The President*  
*Ursula VON DER LEYEN*