



European Securities and
Markets Authority

Final Report

EMIR RTS on the clearing obligation regarding intragroup transactions as well as on novations from UK to EU counterparties



Table of Contents

| | | |
|-------|--|----|
| 1 | Executive Summary | 2 |
| 2 | Final report | 5 |
| 2.1 | Introduction | 5 |
| 2.2 | Intragroup OTC derivative contracts | 6 |
| 2.2.1 | Background..... | 6 |
| 2.2.2 | Proposed amendments..... | 6 |
| 2.3 | Novations from UK counterparties to EU counterparties | 8 |
| 2.3.1 | Background..... | 8 |
| 2.3.2 | Rationale..... | 9 |
| 2.3.3 | Renewed need for amendments..... | 9 |
| 2.3.4 | Proposed amendments..... | 10 |
| 2.4 | Reflecting the removal of the frontloading requirement | 11 |
| 2.5 | Way forward..... | 12 |
| 3 | Annexes | 13 |
| 3.1 | Commission mandate to develop technical standards..... | 13 |
| 3.2 | Draft technical standards | 14 |

1 Executive Summary

Reasons for publication

This final report presents a new set of draft regulatory technical standards (RTS) on the clearing obligation that ESMA has developed under Article 5(2) of Regulation (EU) No 648/2012 of the European Parliament and Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

The draft RTS relate to two main aspects, the treatment of certain intragroup transactions concluded with a third-country group entity, as well as 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.

There are currently three Commission Delegated Regulations on the clearing obligation. They mandate a range of interest rate and credit derivative classes to be cleared. With regards to the first aspect covered in the draft RTS, the treatment of certain intragroup transactions concluded with a third-country group entity, these Commission Delegated Regulations contain a deferred date of application of the clearing obligation for intragroup transactions satisfying certain conditions and where one of the counterparties is established in a third country, in the absence of the relevant equivalence decision. However, the deferred date is soon approaching and there have not been any equivalence decisions to date with regards to the clearing obligation. The draft RTS include amendments to extend the deferred date of application.

With regards to the second aspect covered in the draft RTS, the treatment of OTC derivative contracts novated from a counterparty established in the United Kingdom (UK) to a counterparty established in the EU, the provisions have been developed following a similar reasoning as with:

- Commission Delegated Regulation (EU) 2019/396, based on the draft RTS developed by ESMA and submitted¹ to the European Commission on 8 November 2018, which were adopted by the European Commission on 19 December 2018 and which were published in the Official Journal² on 13 March 2019 ('the first Delegated Regulation), and
- Commission Delegated Regulation (EU) 2019/565, dated 28 March 2019 and published in the Official Journal on 10 April 2019³ ('the second Delegated Regulation').

The application of the above two Delegated Regulations was conditional. However, as a result of (i) for the first Delegated Regulation, the decision of the European Council of 21 March 2019 to extend the two-year period referred to in Article 50(3) of the Treaty on European Union ('TEU') following a request from the UK, and (ii) for the second Delegated

Regulation, the withdrawal agreement signed on 24 January 2020 with regards to the conditions for the UK's departure from the EU (which entered into force on 1 February 2020 and which introduced a transition period running until 31 December 2020), none of them has applied.

The UK informed the EU on 12 June 2020 that an extension of the transition period would not be sought and thus such an extension is not envisaged. The probability of having a scenario where no agreement, which would cover the above-mentioned issues, is reached before the end of the transition period, is very high, and therefore the reasons underlying the first two abovementioned Delegated Regulations remain valid today. ESMA hereby proposes a new amending RTS mirroring the content of Commission Delegated Regulations 2019/396 and 2019/565, that takes into account this new situation.

In the context of the withdrawal of the UK from the EU, stakeholders have asked for a general grandfathering for legacy OTC derivative contracts between UK and EU counterparties, but ESMA does not consider it to be appropriate to provide for a general grandfathering and it is not in its mandate.

However, ESMA considers it to be appropriate to preserve the characteristics of contracts for which clearing was not required, and which contracts are subsequently novated from one counterparty established in the UK to another counterparty established in a Member State, in order to address the situation whereby the original UK counterparty may no longer be able to provide certain services across the EU after the end of the transition period.

ESMA's proposal includes an amendment of the three Commission Delegated Regulations, in order to facilitate certain Brexit-related novations of OTC derivative contracts to EU counterparties during a specific time-window.

Lastly, it should also be noted that ESMA is taking the opportunity of these amending RTS to also update the Delegated Regulations on the clearing obligation in line with the changes introduced by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 (Refit) to EMIR. Specifically here, Refit has amended EMIR such that the frontloading requirement has been removed. The draft RTS include amendments to remove the minimum remaining maturities' requirements from the three Commission Delegated Regulations bringing them in line with the updated mandate under Article 5(2) of EMIR.

The proposed amendments are an adaptation of the timelines and rules to facilitate the current implementation of the Commission Delegated Regulations on the clearing obligation and are limited in nature. Moreover, the current temporary exemption for intragroup OTC

¹ Link to the Final report: https://www.esma.europa.eu/sites/default/files/library/esma70-151-1854_final_report_on_the_co_regarding_novated_trades_to_the_eu.pdf

² [Commission Delegated Regulation \(EU\) 2019/396 of 19 December 2018 amending Delegated Regulation \(EU\) 2015/2205, Delegated Regulation \(EU\) 2016/592 and 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, OJ L 71, 13.3.2019, p. 11–14](#)

³ [Commission Delegated Regulation \(EU\) 2019/565 of 28 March 2019 amending Delegated Regulation \(EU\) 2015/2205, Delegated Regulation \(EU\) 2016/592 and 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, OJ L 99, 10.4.2019, p. 6–8](#)

derivative transactions from the clearing obligation is scheduled to expire soon. It could also be noted that the measures regarding the novation of contracts from UK counterparties to EU counterparties had already been adopted but never took effect, whereas the same reasoning for which they were adopted the first time is still valid, and are thus simply reintroduced in this report. In addition, there is urgency to provide this regulatory solution in order to facilitate the transfer of contracts to counterparties located in the EU in view of the the upcoming end of the transition period. Therefore, with a view to provide clarity as soon as possible on the overall timelines regarding the implementation of the clearing obligation requirements, in accordance with Article 10(1) of the ESMA Regulation, ESMA has not conducted any open public consultation. However, the Securities and Markets Stakeholder Group has been informed. ESMA consulted the European Systemic Risk Board, which indicated having no objection from a macro prudential perspective.

Contents

This paper provides explanations on the draft RTS amending the current Commission Delegated Regulations on the clearing obligation with respect to the deferred date of application for certain intragroup transactions with a third country group entity, with respect to the treatment of novated contracts from a counterparty established in the UK to a counterparty which is established in a Member State, as well as on the amendments to reflect in the Commission Delegated Regulations that the frontloading requirement has been removed from EMIR as amended by Refit.

Next Steps

The final report is sent to the European Commission in order to submit the draft RTS presented in Annex for endorsement, in the form of a Commission Delegated Regulation, i.e. a legally binding instrument directly applicable in all Member States of the European Union. Following the endorsement, they are then subject to non-objection by the European Parliament and the Council.

ESMA cannot disapply EU law. However, in view of the remaining steps mentioned above that the draft RTS need to go through before being finalised and to enter into force, and in light of the relevant deadline for intragroup OTC derivatives as well as the end of the transition period with the UK and the treatment of OTC derivative contracts novated from the UK to the EU, ESMA expects competent authorities to apply the EU framework with regards to the clearing obligation and the treatment of intragroup OTC derivative contracts and OTC derivative contracts novated from the UK to the EU in a risk-based and proportionate manner until the amended RTS enter into force.

2 Final report

2.1 Introduction

1. With the overarching objective of reducing systemic risk, EMIR provides for the obligation to clear certain classes of OTC derivatives in Central Counterparties (CCPs) that have been authorised (for European CCPs) or recognised (for third-country CCPs) under the EMIR framework. Ensuring that the clearing obligation reduces systemic risk requires a process of identification of classes of derivatives that should be subject to mandatory clearing.
2. EMIR foresees two possible processes for the identification of the relevant classes of OTC derivatives:
 - a. The “bottom-up” approach described in Article 5(2) of EMIR, according to which the determination of the classes to be subject to the clearing obligation will be done based on the classes which are already cleared by authorised or recognised CCPs; and
 - b. The “top-down” approach described in Article 5(3) of EMIR, according to which ESMA will on its own initiative identify classes which should be subject to the clearing obligation but for which no CCP has yet received authorisation.
3. ESMA has followed the bottom-up clearing obligation procedure, which is based on the classes that are already offered for clearing by authorised or recognised CCPs. The Public Register lists all the CCPs authorised (and their extensions of authorisations in the case they extended their scope) or recognised that clear OTC derivatives⁴.
4. The determination process described above has led to three Commission Delegated Regulations on the clearing obligation⁵, which are based on the corresponding three draft RTS developed by ESMA. They cover a range of OTC derivative classes in the interest rate and credit derivative asset classes. The details of the classes subject to the clearing obligation and the associated implementation calendar are maintained in the Public Register referenced above.
5. This final report presents a set of draft RTS proposing to amend the three Commission Delegated Regulations on the clearing obligation, with regards to the treatment of certain intragroup transactions concluded with a third-country group entity, the treatment of OTC derivative contracts novated from a counterparty established in the

⁴ The “Public Register for the Clearing Obligation under EMIR” is available under the post-trading section of : <http://www.esma.europa.eu/page/Registries-and-Databases>

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 (Text with EEA relevance) OJ L 314, 1.12.2015, p. 13–21; 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 (Text with EEA relevance) OJ L 103, 19.4.2016, p. 5–11; 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 (Text with EEA relevance) OJ L 195, 20.7.2016, p. 3–10.

United Kingdom (UK) to a counterparty established in a Member State as a consequence of the withdrawal of the UK from the EU, and the removal of the minimum remaining maturities' requirements.

2.2 Intragroup OTC derivative contracts

2.2.1 Background

6. In 2018, due to the absence of any equivalence decision with respect to the clearing obligation, ESMA reviewed these three Commission Delegated Regulations with respect to the treatment of certain intragroup transactions concluded with a third country group entity.
7. This review led to the submission and the publication⁶ of a draft RTS on 27 September 2018 proposing to amend the three Commission Delegated Regulations on the clearing obligation in order to postpone until 21 December 2020 the date or dates from when the requirements are due to apply for these intragroup transactions. Commission Delegated Regulation (EU) 2019/6677 based on ESMA's RTS was then adopted on 19 December 2018 and then published in the Official Journal.
8. Similarly to 2018, due to the absence of any equivalence decision with respect to the clearing obligation, ESMA has reviewed again these three Commission Delegated Regulations with respect to the treatment of certain intragroup transactions concluded with a third country group entity. This Final report presents new amendments and the rationale to propose to postpone further the date from when the requirements are due to apply for these intragroup transactions.

2.2.2 Proposed amendments

9. The first set of amendments relate to the deferred date of application of the clearing obligation requirements with respect to certain intragroup transactions with a third country entity in the absence of an equivalence decision adopted by the European Commission pursuant to Article 13(2) of EMIR. The requirements for these intragroup transactions are currently deferred until 21 December 2020 in the three Commission Delegated Regulations on the clearing obligation.
10. As mentioned in paragraph 6, ESMA already looked at this question from the perspective of the clearing obligation in 2018, which led to the submission of draft RTS to postpone a first time the deferred date to 21 December 2020⁸.

⁶ Link to the Final report on the clearing obligation with regards to intragroup transactions published on 27 September 2018: <https://www.esma.europa.eu/press-news/esma-news/esma-publishes-final-report-amending-rts-clearing-obligation-intragroup>

⁷ Link to Commission Delegated Regulation 2019/667: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R0667&from=EN>

⁸ See Final Report EMIR RTS on various amendments to the bilateral margin requirements in view of the international framework https://www.esma.europa.eu/sites/default/files/library/esas_2020_09_-_final_report_-_bilateral_margin_amendments.pdf

11. In addition, the ESAs also looked at this question from the perspective of the bilateral margin requirements in 2019, which led to the submission of draft RTS to also postpone the bilateral margin related deferred date to the same date of 21 December 2020.
12. The rationale for the exemption from the clearing obligation and from the bilateral margin requirements were similar, i.e. broadly speaking that those deferred dates were necessary to ensure that such intragroup OTC derivative contracts were not subject to the EMIR clearing or bilateral margin requirements before the adoption of the relevant equivalence decisions.
13. At the time of this final report, there is still no equivalence decision with respect to the clearing obligation, and only two with respect to bilateral margining (the US CFTC⁹ in 2017 and Japan¹⁰ in 2018). It should thus be noted that a similar amendment to the one being covered in this report is being considered in parallel by the ESAs with regards to the temporary exemption from the bilateral margin requirements for certain OTC derivative intragroup transactions with a third country group entity.
14. The ESAs were thus of the view that in light of this common rationale for a temporary exemption, it was proportionate to also extend the temporary exemption for bilateral margin and to align it with the exemption for the clearing obligation, i.e. until 21 December 2020. The draft RTS submitted in December 2019 and again in May 2020 thus contained such proposal.
15. Focusing here on the clearing obligation, the deadline of 21 December 2020 is now getting closer. Although a batch of equivalence decisions could still be possible in time for the end of the deferral, there is a risk that these decisions could in fact not be adopted in time and that the scope of this batch would not be sufficient for EU firms to properly manage their intragroup risk management. This would thus limit the ability of some EU counterparties to properly manage their intragroup risk management.
16. At this stage, subjecting EU counterparties to clearing obligation requirements for certain of their intragroup OTC derivative transactions by 21 December 2020 would be operationally difficult, would add undue costs and introduce a level playing field issue for EU counterparties.
17. Following from this, ESMA has discussed with the European Commission the need to introduce a new amendment to extend the deferred date of application to 30 June 2022. The draft RTS included in the Annex contains this proposed amendment.
18. It should also be noted that a similar amendment is being considered in parallel by the ESAs with regards to the temporary exemption from the bilateral margin requirements for OTC derivative intragroup transactions.

⁹ OJ L 265, 14.10.2017, p. 23–27.

¹⁰ OJ L 115, 2.5.2019, p. 11–15.

2.3 Novations from UK counterparties to EU counterparties

2.3.1 Background

19. As explained in the Final Report related to the first Delegated Regulation on the treatment of OTC derivative contracts novated from a counterparty established in the UK to a counterparty established in the EU (Commission Delegated Regulation (EU) 2019/396), in the context of the withdrawal of the UK from the EU¹¹, stakeholders have asked for a general grandfathering for OTC derivative contracts, and an exemption from certain requirements stemming from EMIR.
20. When EU law would cease to apply post-withdrawal and once the transition period has ended, counterparties established in the UK will no longer be able to provide investment services in the EU under the current passport regime, so they might not be in a position to execute certain operations in relation to derivative contracts they have with EU clients, in particular certain so-called “life-cycle events” that can be construed in certain jurisdictions as the entering into new transactions (such as novations, unwinding by entering into an offsetting transaction, compression with new replacement contracts, etc.).
21. This means that after the withdrawal of the UK from the EU and the end of the transition period, the performance of certain restructuring operations on certain contracts could require authorisation in some Member States, in line with national third country regimes. Those counterparties established in the UK would then face 27 national third country regimes.
22. In order to address this situation, these counterparties might have to novate their contracts to counterparties established in the EU, which would benefit from the single passport in financial services.
23. However, the resulting new contracts might be subject to new obligations that were not applicable at the time the original contracts were signed and for which, in the absence of such withdrawal, they might have continued enjoying an exemption (please see the Section on the rationale for the proposed amendments below for more details).
24. This would represent a clear disincentive to transfer contracts to firms established in the EU and ESMA has thus considered some actions aiming at facilitating the transfer of contracts by the private sector to counterparties established in the EU (please see the Section on the proposed amendments below for more details), to ensure that the regulatory characteristics of the original contracts are preserved. Indeed, ESMA would like to stress again the need and importance for counterparties to prepare for when the

¹¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ C 384 I, 12.11.2019, p. 1).

transition period ends, which could include a number of actions, including this potential transfer of contracts.

2.3.2 Rationale

25. This final report focuses on bilateral non-centrally cleared OTC derivative contracts currently benefitting or that would benefit from the grandfathering arrangements under EMIR, i.e. contracts which, to this date, have not become subject to the clearing obligation, either because the respective dates of taking effect set out in the three Commission Delegated Regulations on the clearing obligation for each type of derivative contracts had not occurred yet, or because the contracts have not been novated after those dates (often referred to as “legacy contracts”).
26. If, due to the withdrawal from the EU of the UK in which one of the counterparties is established, the parties decide to novate their legacy contracts from that counterparty to a new counterparty established in the EU, the novation of the contracts will trigger the clearing obligation set out in Article 4(1) of EMIR 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.
27. Therefore, the novation of such legacy contracts in the EU would make, *ceteris paribus*, the overall performance of the contracts more costly for the parties, due to the application of the clearing obligation.
28. Given that these shortcomings are a direct consequence of the withdrawal of the UK from the EU, an event that is beyond the control of the parties, and that this may put the EU counterparties facing UK counterparties at a disadvantage compared to EU counterparties facing other EU counterparties, ESMA considers that it is relevant to maintain a level playing field and is proposing amendments to the existing Commission Delegated Regulations on the clearing obligation that would allow these counterparties to novate their contracts to EU counterparties without triggering the EMIR clearing obligation.

2.3.3 Renewed need for amendments

29. This situation was first addressed in late 2018 and in the first part of 2019 when the UK was expected to leave the EU in March 2019 and then in April 2019. Indeed, ESMA developed a first draft RTS in relation to this issue, which was submitted¹² to the European Commission on 8 November 2018, and which were endorsed by the European Commission on 19 December 2018. Commission Delegated Regulation (EU)

¹² Link to the Final report: https://www.esma.europa.eu/sites/default/files/library/esma70-151-1854_final_report_on_the_co_regarding_novated_trades_to_the_eu.pdf

2019/396, based on the draft RTS developed by ESMA, was then published in the Official Journal¹³ on 13 March 2019.

30. The application of this first Delegated Regulation was conditional. One of the conditions for the application of the first RTS was that a decision had not been taken to extend the two-year period referred to in Article 50(3) of the Treaty on European Union ('TEU') and it did therefore not apply following the decision of the European Council of 21 March 2019 to extend that period following a request from the UK.
31. Nevertheless, the reasons underlying the first Delegated Regulation remained and thus a second Delegated Regulation was adopted, Commission Delegated Regulation (EU) No. 2019/565, dated 28 March 2019, was published in the Official Journal on 10 April 2019¹⁴. It mirrored the content of the first Delegated Regulation but amending the condition related to the extension of the two-year period referred to in Article 50(3) of the TEU.
32. One of the conditions for the application of the second Delegated Regulation was that no withdrawal agreement concluded with the UK in accordance with Article 50(2) of the TEU would have entered into force by the date the UK would have left the EU.
33. The Withdrawal Agreement was signed on 24 January 2020 and entered into force on 1 February 2020 with regards to the conditions for the UK's departure from the EU and introduced a transition period until 31 December 2020. It entered into force as of the following day after the UK left the EU on 31 January 2020. Therefore, the second Delegated Regulation did not become applicable.
34. The UK informed the EU on 12 June 2020 that an extension of the transition period would not be sought and thus such an extension is not envisaged. However, the reasons underlying the first two Delegated Regulations mentioned above remain. ESMA therefore proposes in this new Final Report new provisions mirroring the content of Delegated Regulations (EU) 2019/396 and 2019/565 that take into account the new situation.

2.3.4 Proposed amendments

35. ESMA had investigated in the final report of 8 November 2018¹⁵, the possibility to set out an exemption from the clearing obligation under EMIR, which would create a time-

¹³ [Commission Delegated Regulation \(EU\) 2019/396 of 19 December 2018 amending Delegated Regulation \(EU\) 2015/2205, Delegated Regulation \(EU\) 2016/592 and 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, OJ L 71, 13.3.2019, p. 11–14](#)

¹⁴ [Commission Delegated Regulation \(EU\) 2019/565 of 28 March 2019 amending Delegated Regulation \(EU\) 2015/2205, Delegated Regulation \(EU\) 2016/592 and 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, OJ L 99, 10.4.2019, p. 6–8](#)

¹⁵ Final Report EMIR RTS on the novation of contracts for which the clearing obligation has not yet taken effect: https://www.esma.europa.eu/sites/default/files/library/esma70-151-1854_final_report_on_the_co_regarding_novated_trades_to_the_eu.pdf

window to relocate trades in the EU27 without triggering the relevant EMIR obligations. In view of the similar issue to address and building on this first set of RTS, this final report thus contains a similar set of proposed amendments to each of the three Commission Delegated Regulations on the clearing obligation.

36. ESMA's proposal (see Annex II) is again to create de facto:

- a. a transversal sub-class of contracts, in respect of which the clearing obligation has not been triggered at the time of entry into force of this amending regulation, and
- b. a time window for the counterparties to novate such contracts to a counterparty established in the EU without triggering the application of the clearing obligation.

37. Nonetheless, this exemption should not allow parties to fully restructure their transactions to take advantage of a pure business opportunity without ever being subject to the clearing obligation. To this end, such exemption is proposed:

- a. For a limited scope: it would only apply to the novation from a UK to an EU counterparty, which would not trigger EMIR clearing obligation, and would not extend to other life-cycle events performed by the parties in relation to such contract, and
- b. For a limited period of time, which we have defined as going from the date of application of this amending regulation until twelve months after that date, in order to allow for the repapering.

38. In order to benefit from this exemption, parties should thus start negotiating the novations of their transactions which are in the scope of this amending regulation as soon as possible, given the limited time period to benefit from it. Should the parties agree on the terms of a novation before the date of application of this amending regulation, they should provide that these novations would take effect upon the date of application of this amending regulation to benefit from the exemption.

2.4 Reflecting the removal of the frontloading requirement

39. Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 (Refit)¹⁶ has amended EMIR with respect to a range of provisions, including with regards to the clearing obligation provisions. In line with ESMA's views detailed in the EMIR Review Report No.4¹⁷ published in August 2015, the frontloading requirement was removed.

¹⁶ Regulation (EU) 2019/834 of the European Parliament and the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (Text with EEA relevance). OJ L 141, 28.5.2019, p.42.

¹⁷ EMIR Review Report no.4 ESMA input as part of the Commission consultation on the EMIR Review: https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1254_-_emir_review_report_no.4_on_other_issues.pdf

40. In order to align the three Commission Delegated Regulations with the version of EMIR as amended by Refit, the draft RTS include amendments to remove the minimum remaining maturities' requirements from the three Commission Delegated Regulations on the clearing obligation, in line with the updated mandate under Article 5(2) of EMIR.

2.5 Way forward

41. From a process point of view, it is important to note that the adjustments introduced in the proposed draft RTS are limited in nature. The proposed amendments are an adaptation of the timelines and rules to facilitate the current implementation of the Commission Delegated Regulations on the clearing obligation and are limited in scope.
42. Moreover, the current temporary exemption for intragroup OTC derivative transactions from the clearing obligation is scheduled to expire soon. Similarly, there is urgency to provide this regulatory solution in order to facilitate novations from UK counterparties to EU counterparties and to reduce some of the legal uncertainty attached to the situation described in this document, given that the transition period is due to expire on 31 December 2020.
43. Furthermore, market participants would benefit in knowing as early as possible on whether and how to prepare for these requirements. Finally, these changes have also been called for by a large range of market participants.
44. As a result, ESMA is of the view that it would be disproportionate to conduct open public consultations and analyses of the potential related costs and benefits, taking into account the scope and impact of the changes concerned in the draft RTS and the urgency of the matter for the related requirements. Therefore, in accordance with Article 10(1) of the ESMA Regulation, ESMA has not conducted any open public consultation. However, the Securities and Markets Stakeholder Group has been informed. ESMA consulted the European Systemic Risk Board, which indicated having no objection from a macro prudential perspective.
45. These amendments are thus submitted directly to the European Commission for review and endorsement. The process that follows the adoption of draft RTS by the European Commission without significant amendments is a review period by the European Parliament and Council before they can then be published in the Official Journal and subsequently enter into force.
46. ESMA cannot disapply EU law. However, in view of the remaining steps that the draft RTS need to go through before being finalised and to enter into force, and in light of the soon approaching deadlines, ESMA expects competent authorities to apply the EU framework with regards to the clearing obligation and the treatment of intragroup OTC derivative contracts with a third country group entity as well as the treatment of OTC derivative contracts novated from a UK counterparty to an EU counterparty in a risk-based and proportionate manner until the amended RTS enter into force.

3 Annexes

3.1 Commission mandate to develop technical standards

Article 5(2) of Regulation (EU) No 648/2012

Clearing obligation procedure

Within six months of receiving notification in accordance with paragraph 1 [of Article 5] or accomplishing a procedure for recognition set out in Article 25, ESMA shall, after conducting a public consultation and after consulting the ESRB and, where appropriate, the competent authorities of third countries, develop and submit to the Commission for endorsement draft regulatory technical standards specifying the following:

- (a) the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;
- (b) the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies.

Power is delegated to the Commission to adopt regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

In the developing of the draft regulatory technical standards under this paragraph ESMA shall not prejudice the transitional provision relating to C6 energy derivative contracts as laid down in Article 95 of Directive 2014/65/EU.

3.2 Draft technical standards

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

amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation, to specify the date at which the clearing obligation takes effect for certain types of contracts and to remove the minimum remaining maturities

of []

(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 repositories⁽¹⁸⁾, and in particular Article 5(2) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2015/2205⁽¹⁹⁾, Commission Delegated Regulation (EU) 2016/592⁽²⁰⁾ and Commission Delegated Regulation (EU) 2016/1178⁽²¹⁾ specify, among others, the effective dates of the clearing obligation for contracts pertaining to the classes of OTC derivatives set out in the Annexes to those Regulations.
- (2) Those Regulations laid down deferred dates of application of the clearing obligation for 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. As stated in the relevant recitals of those Regulations, those deferred dates were necessary to ensure that such OTC derivative contracts were not subject to the clearing obligation before the adoption of an implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012.
- (3) As of 2018, no implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012 had been adopted in relation to the clearing obligation. Therefore, the application of the clearing obligation to OTC derivative contracts had been further deferred a first time by Commission Delegated Regulation (EU) 2019/667⁽²²⁾, for a defined period of time, i.e. until 21 December 2020, or until the adoption of implementing acts pursuant to Article 13(2) of Regulation (EU) No

¹⁸ OJ L 201, 27.7.2012, p. 1.

¹⁹ 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).

²⁰ 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).

²¹ 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).

²² Commission Delegated Regulation (EU) 2019/667 of 19 December 2018 amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 to extend the dates of deferred application of the clearing obligation for certain OTC derivative contracts (OJ L 113, 29.4.2019, p. 1).

648/2012. To date, no implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012 has still been adopted in relation to the clearing obligation. Therefore, the application of the clearing obligation to OTC derivative contracts should be further deferred.

(4) On 29 March 2017, the United Kingdom of Great Britain and Northern Ireland (the 'United Kingdom') submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. On 17 October 2019, the Union and the United Kingdom reached an agreement on the Withdrawal Agreement²³, with a revised Protocol on Ireland and Northern Ireland and a revised Political Declaration²⁴. Pursuant to that agreement and following its ratification by the House of Commons in the United Kingdom, its adoption by the European Parliament and its conclusion by the Council, 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..

(5) Commission Delegated Regulation (EU) 2019/396²⁵ provided for an amendment to Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts. Pursuant to Article 4 of Delegated Regulation (EU) 2019/396, that Regulation was to 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, unless a withdrawal agreement had entered into force by that date or the two-year period referred to in Article 50(3) of the Treaty on European Union had been extended.

(6) By letter of 20 March 2019, the United Kingdom submitted a request for an extension of the period provided for in Article 50(3) of the Treaty on European Union until 30 June 2019, with a view to finalising the ratification of the Withdrawal Agreement. On 21 March 2019, the European Council agreed to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons in the following week. If that is not the case, the European Council agreed to an extension until 12 April 2019. Consequently, Delegated Regulation (EU) 2019/396 did not apply.

(7) Commission Delegated Regulation (EU) 2019/565 provides for an amendment to Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts. Pursuant to Article 4 of Delegated Regulation (EU) 2019/565 that Regulation was to 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, unless a withdrawal agreement had entered into force by that date or a decision had been taken to extend the two year period referred to in Article 50(3) of the Treaty on European Union beyond 31 December 2019.

(8) The application of Delegated Regulation (EU) 2019/565 was conditional on the absence of a withdrawal agreement, thus that Delegated Regulation did not apply. However, the reasons underlying Delegated Regulations (EU) 2019/396 and 2019/565 will remain relevant also following the expiry of the transition period. In particular, the risks to the smooth functioning of the market and a level playing field between counterparties established in the Union will persist in the case of the United Kingdom's withdrawal from the Union without an agreement establishing relationships with the European Union after the transition period, addressing the risks in question. Those risks are expected to remain for the foreseeable future.

²³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ C 384 I, 12.11.2019, p. 1)

²⁴ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (OJ C 384I, 12.11.2019, p. 178).

²⁵ Commission Delegated Regulation (EU) 2019/396 of 19 December 2018 amending Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and 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, OJ L 71, 13.3.2019, p. 11–14

- (9) Regulation (EU) No 648/2012, as amended by Regulation (EU) 2019/834 of the European Parliament and of the Council⁽²⁶⁾, no longer requires to clear certain OTC derivative contracts concluded before the clearing obligation takes effect, nor to specify in the draft regulatory technical standards on the clearing obligation the minimum remaining maturities of the OTC derivative contracts referred to in Article 4 of Regulation (EU) No 648/2012. Therefore, Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 should no longer specify minimum remaining maturities.
- (10) Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 should therefore be amended accordingly.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) The amendments to Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 are limited adjustments of the existing regulatory framework. Given the limited scope of the amendments and the urgency of the matter, it would be disproportionate for ESMA to conduct open public consultations or analyses of the potential related costs and benefits. For the same reasons ESMA has not consulted the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁽²⁷⁾ of which it was informed accordingly.
- (13) It is necessary to provide market participants legal certainty as quickly as possible so that they can adequately prepare for complying with the requirements under EMIR the application of which will be affected by this 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) 2015/2205

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

(1) Article (3) is amended as follows:

i. in paragraph 2, the first subparagraph is replaced by the following:

‘2. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and 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, the clearing obligation shall take effect on:

(a) 30 June 2022 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of

²⁶ Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L 141, 28.5.2019, p. 42).

²⁷ 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).

- that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country; or
- (b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:
- (i) 60 days after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country;
- (ii) the date when the clearing obligation takes effect pursuant to paragraph 1.’;
- ii. 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) Article 4 is deleted.

Article 2

Amendment to Delegated Regulation (EU) 2016/592

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

- (1) Article 3 is amended as follows:
- i. in paragraph 2, the first subparagraph is replaced by the following:
- ‘2. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and 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, the clearing obligation shall take effect on:
- (a) 30 June 2022 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country; or
- (b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:
- (i) 60 days after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts

referred to in the Annex to this Regulation in respect of the relevant third country;

(ii) the date when the clearing obligation takes effect pursuant to paragraph 1.’;

ii. 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) Article 4 is deleted.

Article 3

Amendment to Delegated Regulation (EU) 2016/1178

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

(1) Article 3 is amended as follows:

i. in paragraph 2, the first subparagraph is replaced by the following:

‘2. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and 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, the clearing obligation shall take effect on:

(a) 30 June 2022 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country; or

(b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:

(i) 60 days after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country;

(ii) the date when the clearing obligation takes effect pursuant to paragraph 1.’;

ii. 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) Article 4 is deleted.

Article 4

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,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]