Council of the
European Union

Brussels, 1 March 2019
(OR. en)

6913/19
ADD 1

Interinstitutional File:
2017/0090 (COD)

EF 88
ECOFIN 249
CODEC 538

'I' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	COM(2017) 208 final
Subject:	Regulation (EU) 2019/of the European Parliament and of the Council of 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 derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories - *Confirmation of the final compromise text with a view to agreement*

2017/0090(COD)

REGULATION (EU) 2019/…
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

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 derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with the ordinary legislative procedure[3],

1 OJ C , , p. .
2 OJ C , , p. .
3 Position of the European Parliament of ... (OJ ...) and decision of the Council of ...

Whereas:

(1) Regulation (EU) No 648/2012 of the European Parliament and of the Council[4] was published in the Official Journal of the European Union (EU) on 27 July 2012, and entered into force on 16 August 2012. The requirements it contains, namely central clearing of standardised over-the counter (OTC) derivative contracts; margin requirements; operational risk mitigation requirements for OTC derivative contracts that are not centrally cleared; reporting obligations for derivative contracts; requirements for central counterparties (CCPs) and requirements for trade repositories contribute to reducing the systemic risk by increasing the transparency of the OTC derivatives market and reducing the counterparty credit risk and the operational risk associated with OTC derivatives.

[4] 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 (OJ L 201, 27.7.2012, p. 1).

(2) A simplification of certain areas covered by Regulation (EU) No 648/2012, and a more proportionate approach to those areas, is in line with the Commission's Regulatory Fitness and Performance (REFIT) programme which emphasises the need for cost reduction and simplification so that Union policies achieve their objectives in the most efficient way, and aims in particular at reducing regulatory and administrative burdens. This should, however, be without prejudice to the overarching objectives of preserving financial stability and reducing systemic risks in line with the statement by G-20 leaders at the 26 September 2009 Summit in Pittsburgh.

(3) Efficient and resilient post-trading systems and collateral markets are essential elements for a well-functioning Capital Markets Union and they deepen the efforts to support investments, growth and jobs in line with the political priorities of the Commission.

(4) In 2015 and 2016, the Commission carried out two public consultations on the application of Regulation (EU) No 648/2012. The Commission also received input on the application of that Regulation from the European Supervisory Authority (European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[5], the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council[6] and the European System of Central Banks (ESCB). It appeared from those public consultations that the objectives of Regulation (EU) No 648/2012 were supported by stakeholders and that no major overhaul of that Regulation was necessary. On 23 November 2016, the Commission adopted a review report in accordance with Regulation (EU) No 648/2012. Although not all the provisions of Regulation (EU) No 648/2012 were fully applicable and therefore a comprehensive evaluation of that Regulation was not possible, that report identified areas for which targeted action was necessary to ensure that the objectives of Regulation (EU) No 648/2012 were reached in a more proportionate, efficient and effective manner.

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5 *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).*

6 *Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).*

(5) Regulation (EU) No 648/2012 should cover all financial counterparties that may present an important systemic risk for the financial system. The definition of financial counterparties should therefore be amended.

(5a) Employee share purchase plan are usually established by an undertaking, by which persons can, directly or indirectly, subscribe, purchase, receive or own shares of that undertaking or of another undertaking within the same group, provided that this scheme benefits at least to the employees, or the former employees, of that undertaking or of another undertaking within the same group, or to members or former members of the board of that undertaking or of another undertaking within the same group. The Commission's Communication on Mid-Term Review of the Capital Markets Union Action Plan identifies measures relating to employee share purchase plan as a possible measure to strengthen the Capital Markets Union with a view to fostering retail investment. As such and in accordance with the principal of proportionality, undertaking for collective investment in transferable securities (UCITS) or an alternative investment fund (AIF), set up exclusively for the purpose of serving one or more employee share purchase plans, should not be defined as financial counterparty.

(6) Certain financial counterparties have a volume of activity in OTC derivatives markets that is too low to present an important systemic risk for the financial system and -too low for central clearing to be economically viable. Those counterparties, commonly referred to as small financial counterparties, should be exempted from the clearing obligation while remaining subject to the requirement to exchange collateral to mitigate any systemic risk. The excess of the clearing threshold for at least one class of OTC derivatives by a financial counterparty, calculated at the group level, should however trigger the clearing obligation for all classes of OTC derivatives given the interconnectedness of financial counterparties and the possible systemic risk to the financial system that may arise if those derivative contracts were not centrally cleared. The financial counterparty may at any time demonstrate that its position no longer exceeds the clearing threshold in which case the clearing obligation should cease to apply.

(7) Non-financial counterparties are less interconnected than financial counterparties. They are also often predominantly active in only one class of OTC derivatives. Their activity therefore poses less of a systemic risk to the financial system than the activity of financial counterparties. The scope of the clearing obligation for non-financial counterparties that choose to calculate their position every twelve months against the clearing thresholds should therefore be narrowed. These non-financial counterparties should be subject to the clearing obligation only with regard to the classes of OTC derivatives that exceed the clearing threshold, while retaining their requirement to exchange collateral when any of the clearing thresholds is exceeded. Non-financial counterparties that choose not to calculate their position against the clearing thresholds, should be subject to the clearing obligation in all classes of OTC derivatives. The non-financial counterparty may at any time demonstrate that its position no longer exceeds the clearing threshold for a class of OTC derivatives in which case the clearing obligation for that class of OTC derivatives should cease to apply.

(7a) In order to take into account any development of financial markets, the clearing threshold should be periodically reviewed and, where necessary, updated. That periodic review should be accompanied by an ESMA report.

(8) The requirement to clear certain OTC derivative contracts concluded before the clearing obligation takes effect creates legal uncertainty and operational complications for limited benefits. In particular, that requirement creates additional costs and burden for the counterparties to those contracts and may also affect the smooth functioning of the market without resulting in a significant improvement of the uniform and coherent application of Regulation (EU) No 648/2012 or of the establishment of a level playing field for market participants. That requirement should therefore be removed.

(9) Counterparties with a limited volume of activity in the OTC derivatives markets face difficulties in accessing central clearing, be it as a client of a clearing member or through indirect clearing arrangements. Clearing members and clients of clearing members that provide clearing services directly to other counterparties or indirectly by allowing their own clients to provide those services to other counterparties should therefore be r equired to do so under fair, reasonable, non-discriminatory, and transparent commercial terms. While this requirement should not result in price regulation or an obligation to contract, clearing members and clients should be permitted to control the risks connected to the clearing services offered, for example counterparty risks.

(9a) Information on the financial instruments covered by the authorisations of CCPs might not specify all classes of OTC derivatives, which a CCP is authorised to clear. To ensure that ESMA can carry out its tasks and duties in relation to the clearing obligation, competent authorities should notify ESMA without delay of any information received from a CCP of its intention to start clearing a class of OTC derivatives that falls under its existing authorisation.

(10) It should be possible to suspend the clearing obligation in certain exceptional situations. Such a suspension should be possible where the criteria on the basis of which specific classes of OTC derivatives have been made subject to the clearing obligation are no longer met. That could be the case where classes of OTC derivatives become unsuitable for mandatory central clearing or where there has been a material change to one of those criteria in respect of particular classes of OTC derivatives. A suspension of the clearing obligation should also be possible where a CCP ceases to offer a clearing service for specific classes of OTC derivatives or for a specific type of counterparty and other CCPs cannot step in fast enough to take over those clearing services. The suspensionof the clearing obligation should also be possible where it is deemed necessary to avoid a serious threat to financial stability in the Union. In order to ensure financial stability and avoid market disruption, ESMA should, while keeping in mind the G20 objectives, ensure that, where an abolition of the clearing obligation is appropriate, it is instigated during the temporary suspension and in sufficient time to enable the modification of relevant regulatory technical standards.

(10a) The obligation laid down in Regulation (EU) No 600/2014 for counterparties to trade derivatives subject to the clearing obligation on trading venues is, in accordance with the trading obligation procedure detailed in that Regulation, triggered when a class of derivatives is declared subject to the clearing obligation. The suspension of the clearing obligation might prevent counterparties from being able to comply with the trading obligation. As a consequence, where the suspension of the clearing obligation has been requested and there is a material change in the criteria for the trading obligation to take effect, it should be possible for ESMA to propose the concurrent suspension of the trading obligation in accordance with Regulation (EU) No 648/2012 instead of Regulation (EU) No 600/2014.

(11) Reporting historic transactions has proven to be difficult due to the lack of certain reporting details which were not required to be reported before the entry into force of Regulation (EU) No 648/2012 but which are required now. This has resulted in a high reporting failure rate and poor quality of reported data, while the burden of reporting those transactions is significant. There is therefore a high likelihood that those historic data will remain unused. Moreover, by the time the deadline for reporting historic transactions becomes effective, a number of those transactions will have already expired and, with them, the corresponding exposures and risks. To remedy that situation, the requirement to report historic transactions should be removed.

(12) Intragroup transactions involving non-financial counterparties represent a relatively small fraction of all OTC derivative transactions and are used primarily for internal hedging within groups. Those transactions therefore do not significantly contribute to systemic risk and interconnectedness, yet the obligation to report those transactions imposes important costs and burdens on non-financial counterparties. -Transactions between counterparties within a group where at least one of the counterparties is a non-financial counterparty should therefore be exempted from the reporting obligation, regardless of the place of establishment of the non-financial counterparty.

(13) In 2017, the European Commission launched a fitness check on public reporting by companies. The purpose of that check is to gather evidence on the consistency, coherence, effectiveness and efficiency of the Union reporting framework. Against that background, the possibility of avoiding unnecessary duplication of reporting and reducing or simplifying the reporting of non-OTC derivatives transactions should be further analysed, taking into account the need for timely reporting and the acts and measures adopted pursuant to Article 4(4) of Regulation (EU) No 648/2012 and Article 30(2) of Regulation (EU) No 600/2014. This analysis should in particular consider the details reported, the accessibility of the data by relevant authorities, as well as measures to further simplify reporting chains for non-OTC derivatives, in particular for non-financial counterparties not subject to the clearing obligation, without undue loss of information. A more general assessment of the effectiveness and the efficiency of the measures introduced to improve the functioning and reduce the burden of the reporting of OTC derivatives in this Regulation should be considered when sufficient experience and data on its application is available, in particular regarding quality and accessibility of data reported to trade repositories as well as the take-up and implementation of delegated reporting.

(14) To reduce the burden of reporting OTC derivative contracts for -non-financial counterparties that are not subject to the clearing obligation, the financial counterparty should, as a rule, be solely responsible- and legally liable- for reporting on behalf of both itself and a non-financial counterparty that is not subject to the clearing obligation with regard to OTC derivative contracts entered into by those counterparties as well as for ensuring the correctness of the reported details. To ensure that the financial counterparty has the data needed to fulfil its reporting obligation, the non-financial counterparty should provide the details relating to the OTC derivative transactions that the financial counterparty cannot be reasonably expected to possess. However, it should be possible for a non-financial counterparty to choose to report its OTC derivative contracts. In that case the non-financial counterparty should inform the financial counterparty accordingly and be responsible and legally liable for reporting that data and for ensuring its correctness.

(15) The responsibility for reporting OTC derivative contracts where one or both of the counterparties is an undertaking for collective investment in transferable securities (UCITS) or an alternative investment fund (AIF) should also be determined. It should therefore be specified that the management company of a UCITS is responsible- and legally liable- for reporting on behalf of that UCITS with regard to OTC derivative contracts entered into by that UCITS as well as for ensuring the accuracy of the reported details. Similarly, the manager of an AIFshould be responsible- and legally liable- for reporting on behalf of that AIF with regard to OTC derivative contracts entered into by that AIF as well as for ensuring the accuracy of the -reported details.

(16) To avoid inconsistencies across the Union in the application of the risk mitigation techniques, due to the complexity of therisk management procedures requiring the timely, accurate and appropriately segregated exchange of collateral of counterparties which involve the use of internal models, competent authorities should validate those risk-management procedures or any significant change to those procedures, before they are applied.

(16a) The need for international convergence and the need for non-financial and small financial counterparties to reduce the risks associated with their currency risk exposures make it necessary to set out special risk management procedures for physically settled foreign exchange forwards and physically settled foreign exchange swaps. In view of their specific risk profile it is appropriate to restrict the mandatory exchange of variation margins on physically settled foreign exchange forwards and physically settled foreign exchange swaps to transactions between the most systemic counterparties in order to limit the build-up of systemic risk and to avoid international regulatory divergence. International convergence should also be ensured with regard to risk-management procedures for other classes of derivatives.

(16b) Post-trade risk reduction services include services such as portfolio compression. Portfolio compression is excluded from the scope of the Union trading obligation established in Article 28 of Regulation (EU) No 600/2014. In order to align Regulation (EU) No 648/2012 with Regulation (EU) No 600/2014 where necessary and appropriate, while taking into account the differences between those two Regulations, the potential to circumvent the clearing obligation as well as the extent to which post-trade risk reduction services mitigate or reduce risks, the Commission, in cooperation with ESMA and the ESRB, should assess which, if any, trade resulting from post-trade risk reduction services should be granted an exemption from the clearing obligation.

(17) To increase transparency and predictability of the initial margins and to restrain CCPs from modifying their initial margin models in ways that could appear procyclical, CCPs should provide their clearing members with tools to simulate their initial margin requirements and with a detailed overview of the initial margin models they use. This is consistent with the international standards published by the Committee on Payments and Market Infrastructures and the Board of the International Organisation of Securities Commissions, and in particular with the disclosure framework published in December 2012[7] and the public quantitative disclosure standards for central counterparties published in 2015[8], relevant for fostering an accurate understanding of the risks and costs involved in any participation in a CCP by clearing members and enhancing transparency of CCPs towards market participants.

7 http://www.bis.org/cpmi/publ/d106.pdf
8 http://www.bis.org/cpmi/publ/d125.pdf

(18) Member States' national insolvency laws should not prevent CCPs from being able to perform with sufficient legal certainty the transfer of client positions or to pay the proceeds of a liquidation directly to clients in case of insolvency of a clearing member with regard to assets held in omnibus and individual segregated client accounts. To incentivise clearing and to improve access to it, Member States' national insolvency laws should not prevent a CCP from following the default procedures in accordance with Regulation (EU) No 648/2012 with regard to assets and positions held in omnibus and individual segregated client accounts held at the clearing member and at the CCP. Where indirect clearing arrangements are established, indirect clients should continue nevertheless to benefit from protection which is equivalent to that provided for under the segregation and portability rules and default procedures laid down in Regulation (EU) No 648/2012.

(19) The fines ESMA can impose on trade repositories under its direct supervision should be effective, proportionate and dissuasive enough to ensure the effectiveness of ESMA's supervisory powers and to increase the transparency of derivatives positions and exposures. The amounts of fines initially provided for in Regulation (EU) No 648/2012 have revealed insufficiently dissuasive in view of the current turnover of the trade repositories, which could potentially limit the effectiveness of ESMA's supervisory powers under that Regulation vis-à-vis trade repositories. The upper limit of the basic amounts of fines should therefore be increased.

(20) Third country authorities should have access to data reported to Union trade repositories where certain conditions guaranteeing the treatment of those data are fulfilled by the third country and where that third country provides for a legally binding and enforceable obligation granting Union authorities direct access to data reported to trade repositories in that third country.

(21) Regulation (EU) 2015/2365 of the European Parliament and of the Council[9] allows for a simplified registration procedure for trade repositories that are already registered in accordance with Regulation (EU) No 648/2012 and wish to extend that registration to provide their services in respect of securities financing transactions. A similar simplified registration procedure should be put in place for the registration of trade repositories that are already registered in accordance with Regulation (EU) 2015/2365 and wish to extend that registration to provide their services in respect of derivative contracts.

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

(22) Insufficient quality and transparency of data produced by trade repositories makes it difficult for entities that have been granted access to those data to use them to monitor the derivatives markets and prevents regulators and supervisors from identifying financial stability risks in due time. To improve data quality and transparency and to align the reporting requirements under Regulation (EU) No 648/2012 with those of Regulations (EU) No 2015/2365 and (EU) No 600/2014, further harmonisation of the reporting rules and requirements is necessary, and in particular, further harmonisation of data standards, formats, methods, and arrangements for reporting, as well as procedures to be applied by trade repositories for the validation of reported data as to their completeness and correctness , and the reconciliation of data with other trade repositories. Moreover, trade repositories should grant non-reporting counterparties, upon request, access to all data reported on their behalf on reasonable commercial terms.

(23) In terms of the services provided by trade repositories, Regulation (EU) No 648/2012 has established a competitive environment. Counterparties should therefore be able to choose the trade repository to which they wish to report and should be able to switch trade repositories if they so choose. To facilitate that switch and to ensure the continued availability of data without duplication, trade repositories should establish appropriate policies to ensure the orderly transfer of reported data to other trade repositories where requested by an undertaking subject to the reporting obligation.

(24) Regulation (EU) No 648/2012 establishes that the clearing obligation should not apply to pension scheme arrangements (PSAs) until a suitable technical solution is developed by CCPs for the transfer of non-cash collateral as variation margins. As no viable solution facilitating PSAs to centrally clear has been developed so far, that temporary derogation should be extended to apply for at least a further two years. Central clearing should however remain the ultimate aim considering that current regulatory and market developments enable market participants to develop suitable technical solutions within that time period. With the assistance of ESMA, EBA, the European Insurance and Occupational Pensions Authority ('EIOPA') and ESRB, the Commission should monitor the progress made by CCPs, clearing members and PSAs towards viable solutions facilitating the participation of PSAs in central clearing and prepare a report on that progress. That report should also cover the solutions and the related costs for PSAs, thereby taking into account regulatory and market developments such as changes to the type of financial counterparty that is subject to the clearing obligation. In order to cater for developments not foreseen at the time of adoption of this regulation, the Commission should be empowered to extend that derogation twice for a period of one year, after having carefully assessed the need for such an extension.

(24b) The exemption for PSAs from the clearing obligation expired on 16 August 2018. For reasons of legal certainty and to avoid any discontinuity, it is necessary to retroactively apply the exemption for PSAs introduced by this Regulation to OTC derivative contracts entered into by PSAs between 17 August 2018 and … [date of entry into force of this Regulation].

(25) To ensure consistent harmonisation on when commercial terms relating to the provision of clearing services are considered to be fair, reasonable, non-discriminatory and transparent, and in order to, under certain conditions, allow additional time for the market participants to develop clearing solutions for PSAs, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of specifying the conditions under which commercial terms relating to the provision of clearing services are considered to be fair, reasonable, non-discriminatory and transparent, and in respect of extending the transitional period during which the clearing obligation should not apply to PSAs. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[10]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

[10] *OJ L 123, 12.5.2016, **p. 1.***

(26) To ensure uniform conditions for the implementation of this Regulation, and in particular with regard to the temporary suspension of the clearing obligation and of the trading obligation and with regard to direct access by the relevant authorities of third countries to information contained in -trade repositories established in the Union, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council . The Commission should adopt immediately applicable implementing acts to suspend the clearing obligation and the trading obligation for specific classes of OTC derivatives because it is necessary to have a swift decision ensuring legal certainty about the outcome of the suspension procedure and therefore there are imperative grounds of urgency.

(27) To ensure consistent harmonisation of rules on risk mitigation procedures, registration of trade repositories and reporting requirements, the Commission should be empowered to adopt draft regulatory technical standards developed by EBA-or ESMA with regard to the following: supervisory procedures to ensure initial and ongoing validation of the risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral; the details of a simplified application for an extension of the registration of a trade repository that is already registered under Regulation (EU) 2015/2365; the details of the procedures for the reconciliation of data between trade repositories, the details of the procedures to be applied by the trade repository to verify the compliance with the reporting requirements by the reporting counterparty or submitting entity and to verify , the completeness and correctness of the data reported; the terms and conditions, the arrangements and the required documentation under which certain entities are granted access to trade repositories. The Commission should adopt those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010 [11],- (EU) No 1094/2010 [12] and (EU) No 1095/2010[13] of the European Parliament and of the Council.

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11 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).

12 *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)*.

13 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).

(28) The Commission should also be empowered to adopt implementing technical standards developed by ESMA with regard to the data standards for the information to be reported for the different classes of derivatives and the methods and arrangements for reporting and the format of the application for an extension of the registration of a trade repository that is already registered under Regulation (EU) 2015/2365. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.

(29) Since the objectives of this Regulation, namely to ensure the proportionality of rules that lead to unnecessary administrative burdens and compliance costs without putting financial stability at risk and to increase the transparency of OTC derivatives positions and exposures, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(30) The application of certain provisions of this Regulation should be deferred to establish all essential implementing measures and allow market participants to take the necessary steps for compliance purposes.

(31) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council[14] and delivered an opinion on .

(32) Regulation (EU) No 648/2012 should therefore be amended accordingly,

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14 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

(24c) In order to simplify the regulatory framework, the extent to which it could be necessary and appropriate to align the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2018 /... [this amending Regulation] to the clearing obligation for derivatives should be considered, in particular the scope of entities subject to the clearing obligation. A more general assessment of the effects of this Regulation on the level of clearing by different types of counterparty and distribution of clearing within each class of counterparty, and as well as the accessibility of clearing services, including the efficiency of the changes made under Regulation (EU) 2018/… [this amending Regulation] with regard to the provision of clearing services under fair, reasonable, non-discriminatory and transparent commercial terms in facilitating access to clearing, should be undertaken when sufficient experience and data on the application of this Regulation is available.

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 648/2012 is amended as follows:

(1) In Article 2, point (8) is replaced by the following:

"(8) 'financial counterparty' means:

(a) an investment firm authorised in accordance with Directive 2014/65/EC of the European Parliament and of the Council[15];

(b) a credit institution authorised in accordance with Directive 2013/36/EU;

(c) an insurance or reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council[16];

(d) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, except if that UCITS is set up exclusively for the purpose of serving one or more employee share purchase plans;

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15 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 (OJ L 173 12.6.2014, p. 349).

16 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

(da) an institution for occupational retirement provision (IORP) within the meaning of Article 6(a) of Directive 2003/41/EC;

(e) an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU which is either established in the Union or managed by an alternative investment fund manager (AIFM) authorised or registered in accordance with Directive 2011/61/EU, except if that AIF is is set up exclusively for the purpose of serving one or more employee share purchase plans, or if the AIF is an SSPE as referred to in Article 2(3)(g) of Directive 2011/61/EU, and, where relevant, its AIFM established in the Union;

(f) a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council[17]

(2) Article 4 is amended as follows:

(a) In paragraph 1, point (a) is amended as follows:

(i) points (i) to (iv) are replaced by the following:

"(i) between two financial counterparties that meet the conditions in the second subparagraph of Article 4a(1);

[17] Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257 28.8.2014, p. 1).

(ii) between a financial counterparty that meets the conditions in the second subparagraph of Article 4a(1) and a non-financial counterparty that meets the conditions in the second subparagraph of Article 10(1);

(iii) between two non-financial counterparties that meet the conditions in the second subparagraph of Article 10(1);

(iv) between, on the one hand, a financial counterparty that meets the conditions in the second subparagraph of Article 4a(1) or a non-financial counterparty that meets the conditions in the second subparagraph of Article 10(1), and, on the other hand, an entity established in a third country that would be subject to the clearing obligation if it were established in the Union;";

(b) in paragraph 1, point (b) is replaced by the following:

"(b) they are entered into or novated on- or after- the date from which the clearing obligation takes effect provided that, on that date, both counterparties meet the conditions set out in point (a);

(c) the following paragraph 3a is inserted:

"3a. Without being obliged to contract, clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable, non-discriminatory, and transparent commercial terms. Such clearing members and clients shall take all reasonable measures to identify, prevent, manage and monitor conflicts of interest, in particular between the trading unit and the clearing unit, that may adversely affect the fair, reasonable, non-discriminatory and transparent provision of clearing services. Such measures shall also be taken where trading and clearing services are provided by different legal entities belonging to the same group.

Clearing members or clients shall be permitted to control the risks connected to the clearing services offered.

The Commission shall be empowered to adopt a delegated act in accordance with Article 82 to supplement this Regulation by specifying the conditions under which commercial terms referred to in the first subparagraph are considered to be fair, reasonable-, non-discriminatory, and transparent, based on the following:

(a) fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list without prejudice to the confidentiality of contractual arrangements with individual counterparties;

(b) factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;

(c) requirements to facilitate clearing services on the basis of costs and risks on a fair and non-discriminatory basis so that any differences in prices charged are proportionate to costs, risks and benefits, and

(d) risk control criteria for the clearing member or client connected to the clearing services offered.";

(3) The following Article 4a is added:

"Article 4a

Financial counterparties subject to a clearing obligation

1. A financial counterparty taking positions in OTC derivative contracts may calculate, every 12 months, its aggregate month-end average position for the previous 12 months- in accordance with paragraph 3.

2. Where a financial counterparty does not calculate its positions or where the result of that calculation exceeds any of the clearing thresholds specified pursuant to Article 10(4)(b), the financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof, including, where relevant, the period for the calculation;

(aa) establish clearing arrangements within four months after the notification referred to in point (a);

(b) become subject to the clearing obligation referred to in Article 4 for OTC derivative contracts pertaining to all classes of OTC derivatives which are subject to the clearing obligation entered into or novated more than four months following that notification.

2a. A financial counterparty that is subject to the clearing obligation referred to in Article 4 on ... [date of entry into force of this Regulation (EU)] or that becomes subject to that obligation in accordance with paragraph 2, shall remain subject to that obligation and continue clearing until it demonstrates to the relevant competent authority that its aggregate month-end average position for the previous 12 months does not exceed the clearing threshold specified pursuant to Article 10(4)(b).

The financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of that position.

3. In calculating the positions referred to in paragraph 1, the financial counterparty shall include all OTC derivative contracts entered into by that financial counterparty or entered into by other entities within the group to which that financial counterparty belongs.

Notwithstanding the first subparagraph, for UCITS and AIFs the positions referred to in paragraph 1 shall be calculated at the level of the fund.

A UCITS management company which manages more than one UCITS and the AIFM which manages more than one AIF shall be able to demonstrate to the relevant competent authority that the calculation of positions at the fund level does not lead to: (i) a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; and (ii) a circumvention of the clearing obligation.

The relevant competent authorities of the financial counterparty and the other entities within the group shall establish cooperation procedures to ensure effective calculation of the positions at the group level.";

(3a) In Article 5, paragraph 1 is replaced by the following:

1. Where a competent authority authorises a CCP to clear a class of OTC derivatives under Article 14 or 15, or where a class of OTC derivatives which a CCP intends to start clearing falls under an existing authorisation granted in accordance with Article 14 or 15, it shall immediately notify ESMA of that authorisation or of the class of OTC derivatives which the CCP intends to start clearing.

(4) In Article 5(2), point (c) is deleted;

(5) In Article 6(2), point (e) is deleted;

(5a) In Article 6, paragraph 3 is replaced by the following:

3. Where a CCP is no longer authorised or recognised in accordance with this Regulation to clear a given class of OTC derivatives, ESMA shall immediately remove it from the public register in relation to that class of OTC derivatives.

(6) The following Article 6a is added:

"Article 6a

Suspension of clearing obligation

1. ESMA may request that the Commission temporarily suspend the clearing obligation referred to in Article 4(1) for specific classes of OTC derivatives or for a specific type of counterparty where one of the following conditions is met:

(a) the specific classes of OTC derivatives are no longer suitable for central clearing on the basis of the criteria referred to in the first subparagraph of Article 5(4) and Article 5(5) ;

(b) a CCP is likely to cease clearing those specific classes of OTC derivatives and no other CCP is able to clear those specific classes of OTC derivatives without interruption;

(c) the suspension of the clearing obligation for - specific classes of OTC derivatives or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability or the orderly functioning of the financial markets in the Union and that suspension is proportionate to these aims.

For the purposes of point (c) of the first subparagraph and prior to the request referred to therein, ESMA shall consult the ESRB and the competent authorities designated in accordance with Article 22.

The request referred to in the first subparagraph shall be accompanied by evidence that at least one of the conditions laid down in the first subparagraph is met .

Where the suspension of the clearing obligation is considered by ESMA to be a material change as referred to in Article 32(5) of Regulation (EU) No 600/2014, the request referred to in the first subparagraph may also include a request to suspend the trading obligation laid down in Article 28(1) and (2) of that Regulation for the same specific classes of OTC derivatives that are subject to the request to suspend the clearing obligation

1a. Under the conditions laid down in paragraph 1, competent authorities responsible for the supervision of clearing members and competent authorities designated in accordance with Article 22 may request that ESMA submit a request for a temporary suspension to the Commission. Such a request by the competent authority shall provide reasons and submit evidence that at least one of the conditions laid down in the first subparagraph of paragraph 1 is fulfilled.

ESMA shall, within 48 hours of receipt of the request from the competent authority referred to in the first subparagraph and based on the reasons and evidence provided by the competent authority, either request that the Commission suspend the clearing obligation referred to in Article 4(1) or reject the request. ESMA shall inform the competent authority concerned of its decision. Where ESMA rejects the request made by the competent authority, it shall provide reasons in writing.

2. The requests referred to in paragraphs 1 and 1a shall not be made public.

3. The Commission shall, without undue delay of the receipt of the request referred to in paragraph 1 and based on the reasons and evidence provided by ESMA, either suspend by way of implementing act the clearing obligation for the specific classes of OTC derivatives or for the specific type of counterparty referred to in paragraph 1, or reject the requested suspension. Where the Commission rejects the requested suspension, it shall provide reasons in writing to ESMA. The Commission shall immediately forward that information to the European Parliament and to the Council. Such information shall not be made public.

The implementing act shall be adopted in accordance with the procedure referred to in Article 86(3).

3a. Where requested by ESMA in accordance with subparagraph 2b of paragraph 1 of this Article, the implementing act suspending the clearing obligation for specific classes of OTC derivatives may also suspend the trading obligation laid down in Article 28(1) and (2) of Regulation (EU) No 600/2014 for the same specific classes of OTC derivatives subject to this suspension of the clearing obligation.

4. The Commission's decision to suspend the clearing obligation and, where applicable, the trading obligation shall be communicated to ESMA and shall be published in the Official Journal of the European Union, on the Commission's website and in the public register referred to in Article 6.

5. The suspension of the clearing obligation referred to in paragraph 3shall be valid for an initial period not exceeding three months from the date of the publication of that suspension in the Official Journal of the European Union.

The suspension of the trading obligation referred to in paragraph 3a shall be valid for the same initial period.

6. Where the grounds for the suspension continue to apply, the Commission- may by way of an implementing act extend the suspension referred to in paragraph 3 for additional periods not exceeding three months, with the total period of the suspension not exceeding twelve months. An extension of the suspension shall be published in accordance with paragraph 4.

The implementing act shall be adopted in accordance with the procedure referred to in Article 86(3).

ESMA shall, in sufficient time before the end of the suspension period referred to in paragraph 5 or of an extension period referred to in the first subaragraph, issue an opinion to the Commission on whether the grounds for the suspension continue to apply. For the purposes of point (c) of the first subparagraph of paragraph 1, ESMA shall consult the ESRB and the competent authorities designated in accordance with Article 22. ESMA shall send a copy of this opinion to the European Parliament and to the Council. The opinion shall not be made public.

The implementing act extending the suspension of the clearing obligation may extend the period of the suspension of the trading obligation referred to in paragraph 5.

The extension of suspension of the trading obligation shall be valid for the same period as the extension of the suspension of the clearing obligation.

(7) Article 9 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported in accordance with paragraph 1a to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

The reporting obligation shall apply to derivative contracts which:

(a) were entered into before 12 February 2014 and remain outstanding on that date;

(b) were entered into on or after 12 February 2014.

Notwithstanding Article 3, the reporting obligation shall not apply to OTC derivative contracts within the same group where at least one of the counterparties is a non-financial counterparty or would be qualified as a non-financial counterparty if it were established in the Union, provided that:

(a) both counterparties are included in the same consolidation on a full basis;

(b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures; and

(c) the parent undertaking is not a financial counterparty.";

Counterparties shall notify their intention to apply this exemption to their competent authorities. The exemption shall be valid unless the notified competent authorities do not agree upon fulfilment of the conditions referred to in the third subparagraph within three months of the date of notification.

Comment: addition in line with political agreement

(b) the following paragraphs are inserted:

"1a. The details of derivative contracts referred to in paragraph 1 shall be reported as follows:

(a) financial counterparties shall be solely responsible and legally liable for reporting on behalf of both counterparties, the details of -OTC derivative contracts concluded with a non-financial counterparty that does not meet the conditions referred to in the second subparagraph of Article 10(1), as well as for ensuring the accuracy of the -reported-details.

To ensure that the financial counterparty has all the data needed to fulfil the reporting obligation, the non-financial counterparty shall provide the financial counterparty with the details relating to the OTC derivative contracts concluded between them, which the financial counterparty cannot be reasonably expected to possess. The non-financial counterparty is responsible for ensuring that those details are accurate.

Notwithstanding, non-financial counterparties who have already invested in a reporting system may choose to report the details of their OTC derivative contracts with financial counterparties to a trade repository. In that case, the non-financial counterparties shall inform the financial counterparties with which they have concluded OTC derivative contracts of their decision beforehand. The responsibility and legal liability for reporting and for ensuring the accuracy of those details shall in this situation remain with the non-financial counterparties.

In the case of OTC derivative contracts concluded by a non-financial counterparty that does not meet the conditions referred to in the second subparagraph of Article 10(1) with an entity established in a third-country that would be a financial counterparty if established in the Union, such a non-financial counterparty shall not be required to report pursuant to Article 9 and shall not be legally liable for reporting or ensuring the accuracy of the details of such OTC derivative contracts where the concerned third-country legal regime for reporting has been deemed equivalent pursuant to Article 13 and, the third-country financial counterparty has reported such information pursuant to its third-country legal regime for reporting to a trade repository that is subject to a legally binding and enforceable obligation to grant to the entities referred to in the Article 81(3) direct and immediate access to the data.

(b) he management company of a UCITS shall be responsible and legally liable for reporting -the details of OTC derivative contracts to which that UCITS is a counterparty -as well as for ensuring the correctness of the details reported;

(c) the manager of an AIF shall be responsible and legally liable for reporting the details of OTC derivative contracts to which that AIF is a counterparty as well as for ensuring the correctness of the details reported;

(ca) the authorised entity responsible for managing and acting on behalf of an IORP that, in accordance with national law, does not have legal personality shall be responsible and legally liable for reporting the details of OTC derivative contracts to which that institution is a counterparty as well as for ensuring the correctness of the details reported;

(d) -counterparties and CCPs required to report the details of derivative contracts shall ensure that the details of their derivative contracts are reported correctly and without duplication.

Counterparties and CCPs subject to the reporting obligation referred to in paragraph 1 may delegate that reporting obligation.

(c) paragraph 6 is replaced by the following:

"6. To ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall, in close cooperation with the ESCB, develop draft implementing technical standards specifying:

(a) the data standards and formats for the information to be reported, which shall include at least the following:

(i) global legal entity identifiers (-LEIs);

(ii) international securities identification numbers (-ISINs);

(iii) unique trade identifiers (-UTIs);

(b) the methods and arrangements for reporting;

(c) the frequency of the reports;

(d) the date by which derivative contracts are to be reported-.

In developing those draft implementing technical standards, ESMA shall take into account international developments and standards agreed upon at Union or global level, and their consistency with the reporting requirements laid down in Article 4 of Regulation (EU) 2015/2365* and Article 26 of Regulation (EU) No 600/2014.

ESMA shall submit those draft implementing technical standards to the Commission by [PO please insert the date 12 months after the entry into force of this amending Regulation].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.";

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

(8) In Article 10, paragraphs 1 and 2 are replaced by the following:

"1. A non-financial counterparty taking positions in OTC derivative contracts may calculate, every 12 months , its aggregate month-end average position for the previous 12 months- in accordance with paragraph 3.

2. Where the non-financial counterparty does not calculate its positions or where the result of that calculation in respect of one or more classes of OTC derivatives exceeds the clearing thresholds specified pursuant to paragraph 4(b), the non-financial counterparty shall:

(a) immediately notify ESMA and the authority designated in accordance with paragraph 5 thereof, including, where relevant, the period used for the calculation;

(aa) establish clearing arrangements within four months of the notification referred to in point (a);

(b) become subject to the clearing obligation referred to in Article 4 for OTC derivative contracts entered into or novated more than four months following the notification referred to in point (a) pertaining either to those asset classes in respect of which the result of the calculation exceeds the clearing thresholds specified pursuant to point 4(b) or, where the non-financial counterparty has not calculated its position, to all classes of OTC derivatives which are subject to the clearing obligation.

3. A non-financial counterparty that is subject to the clearing obligation referred to in Article 4 on ... [date of entry into force of this Regulation (EU)] or that becomes subject to that obligation in accordance with paragraph 2, shall remain subject to that obligation and continue clearing until it demonstrates to the authority designated in accordance with paragraph 5 that its aggregate month-end average position for the previous 12 months- no longer exceeds the clearing threshold specified pursuant to point b of paragraph 4.

The non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of the position.";

2a. The relevant competent authorities of the non-financial counterparty and the other entities within the group shall establish cooperation procedures to ensure effective calculation of the positions at the group level.";

After consulting the ESRB and other relevant authorities, ESMA shall periodically review the clearing thresholds referred to in point (b) and, where necessary, in particular taking into account the interconnectedness of financial counterparties, propose regulatory technical standards to amend them.";

That periodic review shall be accompanied by a report by ESMA on the subject.

(9) Paragraph 15 of Article 11 is amended as follows:

(a) Point (a) is replaced by the following: "(a) the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in paragraph 3;

(aa) the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures;"

(b) The first sentence of subparagraph 2 is replaced by the following:

"The ESAs shall submit those common draft regulatory technical standards, except point (aa), to the Commission by 18 July 2018.

EBA, in cooperation with ESMA and EIOPA, shall submit the draft regulatory technical standards referred to in point (aa) to the Commission by [PO please insert the date 12 months after the entry into force of this amending Regulation].";

(10) In Article 38, the following paragraphs 6 and 7 are added:

"6. A CCP shall provide its clearing members with a simulation tool allowing them to determine the amount, on a gross basis, of additional initial margin that the CCP may require upon the clearing of a new transaction. That tool shall only be accessible on a secured access basis and the results of the simulation shall not be binding.

7. A CCP shall provide its clearing members with information on the initial margin models it uses. That information shall meet all of the following conditions:

(a) it clearly explains the design of the initial margin model and how it operates;

(b) it clearly describes the key assumptions and limitations of the initial margin model and the circumstances under which those assumptions are no longer valid

(c) it is documented.";

(11) In Article 39, the following paragraph 11 is added:

"11. Member States' national insolvency laws shall not prevent a CCP from acting in accordance with Article 48(5) to (7) with regard to the assets and positions recorded in accounts referred to in paragraphs 2 to 5 of this Article."

(12) Article 56 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. For the purposes of Article 55(1), a trade repository shall submit either of the following to ESMA:

(a) an application for registration;

(b) an application for an extension of the registration where the trade repository is already registered under Chapter III of Regulation (EU) No 2015/2365.";

(b) paragraph 3 is replaced by the following:

"3. To ensure a consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the following:

(a) the details of the application for the registration referred to in paragraph 1(a);

(b) the details of a simplified application for the extension of the registration referred to in paragraph 1(b).

ESMA shall submit those draft regulatory technical standards to the Commission by [PO please insert the date 12 months after the entry into force of this amending Regulation].

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

(c) paragraph 4 is replaced by the following:

"4. To ensure uniform conditions of application of paragraph 1, ESMA shall develop draft implementing technical standards specifying the following:

(a) the format of the application for registration referred to in paragraph 1(a);

(b) the format of the application for an extension of the registration referred to in paragraph 1(b).

With regard to point (b) of the first subparagraph, ESMA shall develop a simplified format.

ESMA shall submit those draft implementing technical standards to the Commission by [PO please insert the date 12 months after the entry into force of this amending Regulation].

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.";

(12a) Article 62, paragraph 5 is replaced by the following:

"If a request for records or telephone or data traffic referred to in point (e) of paragraph 1 requires authorisation for national competent authorities from a judicial authorities according to national rules, ESMA shall similarly apply for such authorisation. Such authorisation may also be applied for as a precautionary measure."

(12b) In Article 63, paragraph 1 is replaced by the following:

"1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises, land or property of the legal persons referred to in Article 61(1). Where the proper conduct and efficiency of the inspection so require, ESMA may carry out the on-site inspection without prior announcement.";

(12c) In Article 63, paragraph 2 is replaced by the following:

"2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises, land or property of the legal persons subject to an investigation decision adopted by ESMA and shall have all the powers as referred to in Article 62(1). They shall also have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.";

(12d) In Article 63, paragraph 8 is replaced by the following:

"If the on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7 requires a national competent authority to apply for an authorisation from a judicial authority according to national law, such authorisation shall similarly be applied for by ESMA. Such authorisation may also be applied for as a precautionary measure."

(12e) In Article 64, paragraph 4 is amended as follows:

"4. When submitting the file with the findings to ESMA, the investigation officer shall notify the persons who are subject to the investigations. Such persons shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or to ESMA's internal preparatory documents.";

(12f) In Article 64, paragraph 8 is replaced by the following:

"8. ESMA shall refer matters for criminal prosecution to the appropriate authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts that it knows to be liable to constitute criminal offences under the applicable law. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where it is aware that a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law.";

(13) Article 65(2) is amended as follows:

(a) in point (a), "EUR 20 000" is replaced by "EUR 200 000";

(b) -point (b) is replaced by the following:,

"(b) for the infringements referred to in points (a), (b) and (d) to (k) of Section I of Annex I, and in points (a), (b) and (h) of Section II of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed EUR 100 000."

(c) the following point (c) is added:

"(c) for the infringements referred to in Section IV of Annex I, the amount of the fines shall be at least EUR 5 000 and shall not exceed EUR 10 000.";

(13a) Article 67(1) is replaced by the following:

"Before taking any decision under Article 73(1) and on periodic penalty payment under Article 66, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons subject to the proceedings have had an opportunity to comment.

The first subparagraph shall not apply to decisions referred to in points (a), (c) and (d) of Article 73(1) if urgent action is needed in order to prevent significant and imminent damage to the financial system or significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including the stability or the correctness of data reported to a trade repository. In such a case, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.";

(14) In Article 72, paragraph 2 is replaced by the following:

"2. The amount of a fee charged to a trade repository shall cover all reasonable administrative costs incurred by ESMA for its registration and supervision activities and be proportionate to the turnover of the trade repository concerned and the type of registration and supervision exercised.";

(15) The following Article 76a is inserted:

"Article 76a
Mutual direct access to data

1. Where necessary for the exercise of their duties, relevant authorities of third countries in which one or more trade repositories are established shall have direct access to information in trade repositories established in the Union, provided the Commission has adopted an implementing act in accordance with paragraph 2 to that effect.

2. Upon submission of a request by the authorities referred to in paragraph 1, the Commission may adopt implementing acts, in accordance with the examination procedure referred to in Article 86(2), determining whether the legal framework of the third country of the requesting authority fulfils all of the following conditions:

(a) trade repositories established in that third country are duly authorised;

(b) effective supervision of trade repositories and effective enforcement of their obligations takes place in that third country on an ongoing basis;

(c) guarantees of professional secrecy exist and those guarantees are at least equivalent to those laid down in this Regulation, including the protection of business secrets shared with third parties by the authorities;

(d) trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to grant to the entities referred to in Article 81(3) direct and immediate access to the data.";

(16) In Article 78, the following paragraph 9 and 10 are added:

"(9) A trade repository shall establish the following procedures and policies:

(a) procedures for the effective reconciliation of data between trade repositories;

(b) procedures to verify the completeness and correctness of the data reported ;

(c) policies for the orderly transfer of data to other trade repositories where requested by the counterparties or CCPs referred to in Article 9 or where otherwise necessary.

(10) To ensure a consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying:

(a) the procedures for the reconciliation of data between trade repositories;

(b) the procedures to be applied by the trade repository to verify the compliance by the reporting counterparty or submitting entity with the reporting requirements and to verify the completeness and correctness of the data reported under Article 9.

ESMA shall submit those draft regulatory technical standards to the Commission by ... [12 months after the entry into force of this amending Regulation].

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

(16a) In Article 80, a paragraph 5a is inserted:

"5a. Upon request, a trade repository shall provide counterparties not requiredto report the details of their derivative contracts pursuant to points (a) and (b) of the first subparagraph of Article 9(1a) and counterparties and CCPs which have delegated their reporting obligation pursuant to the third subparagraph of Article 9(1a) with access to the information reported on their behalf.";

(17) Article 81 is amended as follows:

(a) the following point (q) is added to paragraph 3:

"(q) the relevant authorities of a third country in respect of which an implementing act pursuant to Article 76a has been adopted;";

(c) paragraph 5 is replaced by the following:

"5. In order to ensure consistent application of this Article, ESMA shall, after consulting the members of the ESCB, develop draft regulatory technical standards specifying the following:

(a) the information to be published or made available in accordance with paragraphs 1 and 3;

(b) the frequency of publication of the information referred to in paragraph 1;

(c) the operational standards required to aggregate and compare data across trade repositories and for the entities referred to in paragraph 3 to access that information;

(d) the terms and conditions, the arrangements and the required documentation under which trade repositories grant access to the entities referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by [PO please insert the date 12 months after the entry into force of this amending Regulation].

In developing those draft regulatory technical standards, ESMA shall ensure that the publication of the information referred to paragraph 1 does not reveal the identity of any party to any contract.

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

(18) Articles 82(2) to 82(6) are replaced by the following:

"2. The delegation of power referred to in Article 1(6), Article 4(3a) Article 64(7), Article 70, Article 72(3), -and Article 85(2) shall be conferred to the Commission for an indeterminate period of time.

3. The delegation of power referred to in Article 1(6), Article 4(3a), Article 64(7), Article 70, Article 72(3) and Article 85(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall endeavour to consult ESMA and shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Article 1(6), Article 4(3a), Article 64(7), Article 70, Article 72(3) and Article 85(2) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.";

(19) Article 85 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. By ... [five years after entry into force of this amending Regulation] the Commission shall assess the application of this Regulation and prepare a general report. The Commission shall submit that report to the European Parliament and to the Council, together with any appropriate proposals.

2. By [PO please add 12 months before the date referred to in paragraph 1] ESMA shall report to the Commission on the following:

(a) the impact of Regulation (EU) 2018 /... [this amending Regulation] on the level of clearing by financial and non-financial counterparties and the distribution of clearing within each that financial counterparty class, especially with regard to financial counterparties with a limited volume of activity in OTC derivatives and with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);

(b) the impact of Regulation (EU) 2018 /... [this amending Regulation] on the quality and accessibility of the data reported to trade repositories, as well as the quality of the information made available by trade repositories;

(c) the changes to the reporting regime, including the take-up and implementation of delegated reporting (Article 9(1a)) and in particular its impact on the reporting burden for non-financial counterparties not subject to the clearing obligation;

(d) the accessibility of clearing services, in particular whether the requirement to provide clearing services, directly or indirectly, under fair, reasonable, non-discriminatory and transparent commercial terms referred to in Article 4(3a) has been effective in facilitating access to clearing.";

(b) paragraph 2 is replaced by the following:

"2. By … [12 months following the date of entry into force of this amending Regulation], and every 12 months thereafter until the final extension referred to in the third subparagraph, the Commission shall prepare a report assessing whether viable technical solutions have been developed for the transfer by PSAs of cash and non-cash collateral as variation margins and the need for any measures to facilitate those technical solutions.

ESMA shall, by … [six months following the date of entry into force of this amending Regulation], and every 12 months thereafter until the final extension referred to in the third subparagraph, in cooperation with EIOPA, EBA and the ESRB, submit a report to the Commission, assessing the following:

(a) whether CCPs, clearing members and PSAs have undertaken an appropriate effort and developed viable technical solutions facilitating the participation of PSAs in central clearing by posting cash and non-cash collateral as variation margins, including the implications of those solutions on market liquidity and procyclicality and their potential legal or other implications;

(b) the volume and the nature of the activity of PSAs in cleared and uncleared OTC derivatives markets, per asset class, and any related systemic risk to the financial system;

(c) the consequences of PSAs fulfilling the clearing requirement on their investment strategies, including any shift in their cash and non-cash asset allocation;

(d) the implications of the clearing thresholds referred to in Article 10(4) for PSAs;

(e) the impact of other legal requirements on the cost differential between cleared and uncleared OTC derivative transactions, including margins requirements for uncleared derivatives and the calculation of the leverage ratio carried out pursuant to Regulation (EU) No 575/2013;

(f) whether any further measures are necessary to facilitate a clearing solution for PSAs.

The Commission may adopt a delegated act in accordance with Article 82 to extend the two-year period referred to in Article 89(1) twice, by one year, where it concludes that no viable technical solution has been developed and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remains unchanged.

CCPs, clearing members and PSAs shall make their best efforts to contribute to the development of technical solutions that facilitate the clearing of such OTC derivative contracts by PSAs.

The Commission shall set up an expert group made up of representatives of CCPs, clearing members, PSAs and other relevant parties to such technical solutions to monitor their efforts and assess the progress made in the development of viable technical solutions that facilitate the clearing of such OTC derivative contracts by PSAs, including the transfer by PSAs of cash and non-cash collateral as variation margins. That expert group shall meet at least every six months. The Commission shall consider the efforts made by CCPs, clearing members and PSAs when drafting its reports pursuant to the first subparagraph.";

(c) paragraph 3 is replaced by the following:

"1. By [18 months following the date of entry into force of this amending Regulation] the Commission shall prepare a report assessing:

(a) whether the obligation to report transactions under Article 26 of Regulation (EU) No 600/2014 and under this Regulation creates a duplicative transaction reporting obligation for non-OTC derivatives and whether reporting of non-OTC transactions could be reduced or simplified for all counterparties without undue loss of information;

(b) the necessity and appropriateness of aligning the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2018 /… [this amending Regulation] to the clearing obligation for derivatives, in particular the scope of entities subject to the clearing obligation;

(c) whether any trades directly resulting from post-trade risk reduction services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1), taking into account the extent to which those services mitigate risks, in particular counterparty credit risk and operational risk, as well as the potential for circumvention of the clearing obligation and the potential disincentive to central clearing.

The Commission shall submit that report to the European Parliament and the Council, together with any appropriate proposals.

2. By … [7 months before the date in the previous paragraph], ESMA shall submit a report to the Commission. That report shall assess:

(a) the consistency of the reporting requirements for non-OTC derivatives under Regulation (EU) No 600/2014 and under Article 9 of this Regulation, both in terms of details of the derivatives contract reported and access to data by the relevant entities;

(b) whether the reporting requirements for non-OTC derivatives under Regulation (EU) No 600/2014 and under Article 9 of this Regulation should be aligned, both in terms of details of the derivatives contract reported and access to data by the relevant entities;

(c) the feasibility of further simplifying the reporting chains for all counterparties, including all indirect clients, taking into account the need for timely reporting and the acts and measures adopted pursuant to Article 4(4) of this Regulation and Article 30(2) of Regulation (EU) No 600/2014;

(d) on the alignment of the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2018 /... [this amending Regulation] to the clearing obligation for derivatives, in particular the scope of entities subject to the clearing obligation;

(e) in cooperation with the ESRB, whether any trades directly resulting from post-trade risk reduction services including portfolio compression should be exempted from the clearing obligation. That report shall investigate portfolio compression and other available non-price forming post-trade risk reduction services which reduce non-market risks in derivatives portfolios without changing the market risk of the portfolios, such as rebalancing transactions. It shall also explain the purposes and functioning of such post-trade risk reduction services, the extent to which they mitigate risks, in particular counterparty credit risk and operational risk, and assess the need to clear such trades, or to exempt them from clearing, in order to manage systemic risk. It shall also assess to what extent any exemption from the clearing obligation for such services discourages central clearing and may lead to counterparties circumventing the clearing obligation;

(f) whether the list of financial instruments that are considered highly liquid with minimal credit and market risk, in accordance with Article 47, could be extended and whether this list could include one or more money market funds authorized in accordance with in Regulation (EU) 2017/1131.";

(19a) In Article 86, the following paragraph 3 is added:

"3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No182/2011, in conjunction with Article 5 thereof, shall apply.";

(20) In Article 89, the first subparagraph of paragraph 1 is replaced by the following:

"1. Until ... [two years following the date of entry into force of this amending Regulation], the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of PSAs, and to entities established to provide compensation to members of PSAs in case of a default of a PSA.

In addition, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts as referred to in the first subparagraph entered into by PSAs between 17 August 2018 and … [date before date of entry into force of this amending Regulation].";

(21) Annex I is amended in accordance with the Annex to this Regulation.

Article 2

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

2. It shall apply from the date of entry into force, except for the-following:

   (a) points (10) and (11) of Article 1 shall apply from ... [six months from the date of entry into force of this amending Regulation];

   (b) point (7)(b) of Article 1 shall apply from ... [12 months from the date of entry into force of this amending Regulation];

   (c) points (2)(c) and (16) of Article 1 shall apply from ... [24 months from the date of entry into force of this amending Regulation].

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

Done at Brussels,

ANNEX

Annex I is amended as follows:

(1) In Section I, the following points (i), (j) and (k) are added:

"(i) a trade repository infringes Article 78(9)(a) by not establishing adequate procedures for the reconciliation of data between trade repositories;

(j) a trade repository infringes Article 78(9)(b) by not establishing adequate procedures to verify the completeness and correctness of the data reported ;

(k) a trade repository infringes Article 78(9)(c) by not establishing adequate policies for the orderly transfer of data to other trade repositories where requested by the counterparties and CCPs referred to in Article 9 or where otherwise necessary.";

(2) In Section IV, the following point (d) is added: .

"(d) a trade repository infringes Article 55(4) by not notifying ESMA in due time of material changes to the conditions for its registration.".