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From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	21 December 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 21.12.2020 amending regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts

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Delegations will find attached document C(2020) 9148 final.

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Brussels, 21.12.2020  
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**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 21.12.2020**

**amending regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE DELEGATED ACT

#### On intragroup transactions

Under Article 4(2) of Regulation (EU) No 648/2012 ('EMIR'), intragroup transactions may be exempted from the clearing obligation. Intragroup transactions with a third-country group entity may also be exempted if the Commission has adopted an equivalence decision under Article 13(2) for the third country where the group entity is established. To date, the Commission has not adopted such equivalence decisions for the purpose of Article 4(2).

The three Commission Delegated Regulations on the clearing obligation, i.e. Commission Delegated Regulation (EU) 2015/2205 and Commission Delegated Regulation (EU) 2016/1178 regarding interest rate derivative classes, as well as Commission Delegated Regulation (EU) 2016/592 regarding credit derivative classes, include a provision related to intragroup transactions with a third-country group entity. The provision provides for a deferred date of application of the clearing obligation of up to three years for these transactions, in the absence of relevant equivalence decisions.

The amendments propose to extend the exemption for intragroup transactions in order to allow more time to the Commission to adopt the necessary equivalence decisions as it would be detrimental to EU firms and economically unjustified to let this exemption expire abruptly.

#### On EU-UK transactions

After the United Kingdom exits the transition period provided by the Withdrawal Agreement, counterparties established in the United Kingdom will no longer be able to provide certain so-called "life-cycle events" in the EU under the EU Single market rules.<sup>1</sup> The performance of certain restructuring operations on certain cross-border (UK-EU) contracts would require authorisation in some Member States, in line with idiosyncratic national third country regimes. These counterparties established in the United Kingdom would then face 27 national third-country regimes.

In order to address this situation, counterparties to these transactions might choose to novate their contracts to entities established and authorised in the EU. However, the new contracts resulting from these novations might be subject to a clearing obligation that was not applicable at the time the original contracts were entered into. In the absence of the UK's withdrawal from the EU, they would normally have continued to benefit from the exemption.

The proposed amendments address this disincentive to transfer contracts to firms established in the EU by extending the current exemptions envisaged in the three existing Commission Delegated Regulations for a fixed period of time.

#### Removal of the frontloading requirement

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<sup>1</sup> Notably the freedom to provide investment services and activities under Article 34 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

In its final report, ESMA is taking the opportunity of these amending RTS to also update the Delegated Regulations on the clearing obligation in line with the changes to EMIR introduced by Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 (Refit). Specifically here, Refit has amended EMIR such that the frontloading requirement has been removed.

The amendments propose 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.

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

The proposed amendments are an adaptation of the timelines and rules to facilitate the current implementation of the Commission Delegated Regulations on the clearing obligation and are limited in nature. Moreover, the current temporary exemption for intragroup OTC 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. The same reasoning for which they were adopted the first time is still valid, and are thus simply restated 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 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.

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

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

Article 1 modifies Article 3 and 4 of Commission Delegated Regulation (EU) 2015/2205 regarding interest rate derivative classes in the following way:

- Article 3(2) is modified by extending the deferred date of application of the clearing obligation for intragroup transactions with a third-country group entity until 30 June 2022.
- A paragraph 3 is added to Article 3, allowing contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.
- Article 4 is deleted.

Article 2 modifies Article 3 and 4 of Commission Delegated Regulation (EU) 2016/592 regarding credit derivative classes in the following way:

- Article 3(2) is modified by extending the deferred date of application of the clearing obligation for intragroup transactions with a third-country group entity until 30 June 2022.
- A paragraph 3 is added to Article 3, allowing contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.
- Article 4 is deleted.

Article 3 modifies Article 3 and 4 of Commission Delegated Regulation (EU) 2016/1178 regarding interest rate derivative classes in the following way:

- Article 3(2) is modified by extending the deferred date of application of the clearing obligation for intragroup transactions with a third-country group entity until 30 June 2022.
- A paragraph 3 is added to Article 3, allowing contracts with a counterparty established in the United Kingdom currently exempted from the clearing obligation to be novated for a fixed period of 12 months as long as the sole purpose of the novation is to replace the counterparty established in the United Kingdom with a counterparty established in a Member State.
- Article 4 is deleted.

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

of 21.12.2020

## amending regulatory technical standards laid down in Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts

(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<sup>2</sup>, and in particular Article 5(2) thereof,

Whereas:

- (1) Commission Delegated Regulations (EU) 2015/2205<sup>3</sup>, 2016/592<sup>4</sup> and (EU) 2016/1178<sup>5</sup> 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. 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. 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.
- (2) Since 2018, no implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012 has been adopted in relation to the clearing obligation. The 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

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<sup>2</sup> OJ L 201, 27.7.2012, p. 1.

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 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).

country and the other counterparty is established in the Union has therefore been deferred by Commission Delegated Regulation (EU) 2019/667<sup>6</sup>, either until 21 December 2020 or until the adoption of those implementing acts. Despite the efforts invested to analyse third-country jurisdictions in relation to which any such implementing act may be warranted, no implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012 has yet been adopted in relation to the clearing obligation. The application of the clearing obligation to those contracts should therefore be further deferred to avoid the unintended detrimental economic impact that the expiry of that exemption would have on Union firms.

- (3) The United Kingdom became a third country on 1 February 2020 and Union law will cease to apply to and in the United Kingdom on 31 December 2020. The clearing obligation laid down in Regulation (EU) No 648/2012 does not however take into account the eventuality of a Member State withdrawing from the Union. Commission Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 specify the dates from which the clearing obligation is to take effect for contracts pertaining to certain classes of OTC derivatives. In addition, those Regulations provide for different dates depending on the category of counterparty to those contracts. Counterparties cannot predict what the status of a counterparty established in the United Kingdom might become or to what extent that counterparty would be able to continue providing certain services to counterparties established in the Union. The challenges faced by the parties to an OTC derivative contract whose counterparties are established in the United Kingdom are therefore a direct consequence of an event that is beyond their control and may put them at a disadvantage compared to other counterparties in the Union.
- (4) To address that situation, counterparties may want to novate the contract by replacing the counterparty established in the United Kingdom with a counterparty in a Member State. If, due to the withdrawal of the United Kingdom from the Union, it is decided to replace the counterparty established in the United Kingdom with a new counterparty established in the Union, the replacement may trigger the clearing obligation if it occurs on or after the date from which the clearing obligation takes effect for that type of contract. As a result, the parties may have to clear that contract in an authorised or recognised CCP. Since centrally cleared contracts are subject to a different collateral regime than non-centrally cleared contracts, the triggering of the clearing obligation could force certain counterparties to discontinue their transactions, leaving certain risks unhedged. In order to ensure the smooth functioning of the market and a level playing field between counterparties established in the Union, counterparties should be able to replace counterparties established in the United Kingdom with counterparties established in a Member State without triggering the clearing obligation.
- (5) In addition, counterparties should be given sufficient time to replace their counterparties established in the United Kingdom. The date from which the clearing obligation may be triggered for the novation of those contracts should therefore be deferred.

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<sup>6</sup> 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).

- (6) Regulation (EU) No 648/2012 has been amended by Regulation (EU) 2019/834 of the European Parliament and of the Council<sup>7</sup>. Due to that amendment, it is no longer required to clear certain OTC derivative contracts concluded before the clearing obligation takes effect. It is neither any longer required to specify the minimum remaining maturities of the OTC derivative contracts referred to in Article 4 of Regulation (EU) No 648/2012. Therefore, Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 should no longer specify minimum remaining maturities.
- (7) Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 should be amended accordingly.
- (8) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (9) The amendments to Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (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 highly 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<sup>8</sup> of which it was informed accordingly.
- (10) 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 Regulation (EU) No 648/2012, 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*

#### **Amendments to Commission Delegated Regulation (EU) 2015/2205**

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

- (1) Article 3 is amended as follows:
  - (a) in paragraph 2, first subparagraph, point (a) is replaced by the following:

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<sup>7</sup> 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).

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



“(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;”;

(b) the following paragraph 3 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 from [OP: Insert the date that is 12 months after the date of entry into force of this Amending 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*

#### **Amendments to Commission Delegated Regulation (EU) 2016/592**

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

(1) Article 3 is amended as follows:

(a) in paragraph 2, first subparagraph, point (a) is replaced by the following:

“(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;”;

(b) the following paragraph 3 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 from [OP: Insert the date that is 12 months after the date of entry into force of this Amending 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*  
**Amendments to Commission Delegated Regulation (EU) 2016/1178**

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

(1) Article 3 is amended as follows:

(a) in paragraph 2, first subparagraph, point (a) is replaced by the following:

“(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;”

(b) the following paragraph 3 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 from [OP: Insert the date that is 12 months after the date of entry into force of this Amending 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, 21.12.2020

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