Tuesday 12 June 2018

III

(Preparatory acts)

EUROPEAN PARLIAMENT

P8_TA(2018)0244

Clearing obligation, reporting requirements and risk-mitigation techniques for OTC derivatives, and trade repositories ***I

Amendments adopted by the European Parliament on 12 June 2018 on the proposal for a regulation of the European Parliament and of the Council 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 (COM(2017)0208 – C8-0147/2017 – 2017/0090(COD)) [1]

(Ordinary legislative procedure: first reading)

(2020/C 28/15)

Amendment 1

AMENDMENTS BY THE EUROPEAN PARLIAMENT (*)

to the Commission proposal

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(1) The matter was referred back for interinstitutional negotiations to the committee responsible, pursuant to Rule 59(4), fourth subparagraph (A8-0181/2018).

(*) Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ▌.

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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(Text with EEA relevance)

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]),

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 (TRs) 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.

(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 ***without prejudice to the overarching objective of preserving financial stability and reducing systemic risks***.

(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.

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

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(4) In 2015 and 2016, the Commission carried out two public consultations on the application of Regulation (EU) No 648/2012 of the European Parliament and of the Council. The Commission also received input on the application of that Regulation from the European Securities and Markets Authority ('ESMA'), the European Systemic Risk Board ('ESRB') 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 Article 85(1) of Regulation (EU) No 648/2012. Although not all the provisions of Regulation (EU) No 648/2012 are fully applicable yet and therefore a comprehensive evaluation of that Regulation is not yet possible, the report identified areas for which targeted action is necessary to ensure that the objectives of Regulation (EU) No 648/2012 are reached in a more proportionate, efficient and effective manner.

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

(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 (SFCs)***, 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 derivative by a ***SFC*** 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 are not centrally cleared.

(7) Non-financial counterparties are less interconnected than financial counterparties. They are also often active in only one class of OTC derivative. 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 should therefore be narrowed, so that those non-financial counterparties are subject to the clearing obligation only with regard to the asset class or asset classes that exceed the clearing threshold ▌ .

(7a) Since financial counterparties and non-financial counterparties present different risks, it is necessary to develop two distinct clearing thresholds. In order to take into account any development of financial markets, those thresholds should be updated regularly.

(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, the requirement creates additional costs and efforts 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. The requirement for clearing members to facilitate indirect clearing services on reasonable commercial terms is therefore not efficient. 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 explicitly required to do so under fair, reasonable, non-discriminatory ***and transparent*** commercial terms.

(10) It should be possible to suspend the clearing obligation in certain situations. First, that suspension should be possible where the criteria on the basis of which a specific class of OTC derivative has been made subject to the clearing obligation are no longer met. That could be the case where a class of OTC derivative becomes unsuitable for mandatory central clearing or where there has been a material change to one of those criteria in respect of a particular class of OTC derivative. A suspension of the clearing obligation should also be possible where a CCP ceases to offer a clearing service for a specific class of OTC derivative or for a specific type of counterparty and other CCPs cannot step in fast enough to take over those clearing services. Finally, the suspension of a clearing obligation should also be possible where that is deemed necessary to avoid a serious threat to financial stability in the Union.

(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. ***All*** transactions ***between affiliates within the 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) The requirement to report exchange-traded derivative contracts ('ETDs') imposes a significant burden on counterparties because of the high volume of ETDs that are concluded on a daily basis. ***The Commission public consultation on fitness check on supervisory reporting, which was published on 1 December 2017, aims to gather evidence on the cost of compliance with existing supervisory reporting requirements at Union level, as well as on the consistency, coherence, effectiveness, efficiency, and the Union added value of those requirements. This consultation provides an opportunity for authorities to assess ETD reporting holistically alongside all existing and future regulatory reporting regimes, allows authorities to take into account the new reporting environment following the implementation of*** Regulation (EU) No 600/2014 ▌ ([5])***and provides the possibility to make proposals to effectively*** reduce ▌ burden ***on market participants who are required to report ETD transactions. The Commission should take those findings into consideration in order to propose future changes to the*** reporting ***requirements under Article 9(1) in relation to ETD*** reporting ▌ .

(14) To reduce the burden of reporting for small non-financial counterparties ***not subject to the clearing obligation***, the financial counterparty should be ***solely*** responsible, and legally liable, for reporting ***a single data set with regard to OTC derivative contracts entered into with a*** non-financial counterparty that is not subject to the clearing obligation ▌ as well as for ensuring the accuracy of the details reported. ***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 accuracy.***

(15) The responsibility for reporting other derivative contracts should also be determined. It should therefore be specified that the management company of an undertaking for collective investment in transferable securities ('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 details reported. Similarly, the manager of an alternative investment fund ('AIF') should 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 details reported.

(16) To avoid inconsistencies across the Union in the application of the risk mitigation techniques, supervisors should approve risk-management procedures requiring the timely, accurate and appropriately segregated exchange of collateral of counterparties, or any significant change to those procedures, before they are applied.

([5]) Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

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(16a) ***In order to avoid international regulatory divergence and bearing in mind the particular nature of the trade in such derivatives, the mandatory exchange of variation margins on physically settled foreign exchange forwards and physically settled foreign exchange swap derivatives should only apply to transactions between the most systemic counterparties, namely credit institutions and investment firms.***

(16b) ***Post-trade risk reduction services, such as portfolio compression, can lead to a reduction of systemic risk. By reducing risks in existing derivatives portfolios, without changing the overall market position of the portfolio, they can lower counterparty exposures and counterparty risk associated with a build-up in gross outstanding positions. 'Portfolio compression' is defined in Article 2 (1) of Regulation (EU) No 600/2014 and excluded from the scope of the Union trading obligation established in Article 28 of Regulation (EU) No 600/2014. In order to align this Regulation with Regulation (EU) No 600/2014 where necessary, taking into account the differences of these two Regulations and the potential to circumvent the clearing obligation, the Commission, in cooperation with ESMA and ESRB, should assess which post-trade risk reduction services could 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 Organization of Securities Commissions, and in particular with the disclosure framework published in December 2012 ([6]) and the public quantitative disclosure standards for central counterparties published in 2015 ([7]), 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.

(18) Uncertainties remain as to what extent assets held in omnibus or individual segregated accounts are insolvency remote. It is therefore unclear in which cases CCPs can with sufficient legal certainty transfer client positions where a clearing member defaults, or in which cases CCPs can, with sufficient legal certainty, pay the proceeds of a liquidation directly to clients. To incentivise clearing and to improve access to it, the rules relating to insolvency remoteness of those assets and positions should be clarified.

(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 OTC 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 ([8]) 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.

([6]) http://www.bis.org/cpmi/publ/d106.pdf
([7]) http://www.bis.org/cpmi/publ/d125.pdf
([8]) 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 Regulation (EU) 2015/2365 and Regulation (EU) No 600/2014, further harmonisation of the reporting rules and requirements is necessary, and in particular, further harmonisation of data standards, 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 accuracy, and the reconciliation of data with other trade repositories. Moreover, trade repositories should grant counterparties, upon request, access to all data reported on their behalf to allow those counterparties to verify the accuracy of those data.

(22a) ***Afin de réduire la charge administrative et d' accroître l' appariement des transactions, l' AEMF devrait instaurer une norme commune de déclaration aux référentiels centraux au niveau de l' Union. Les CCP et autres contreparties financières se voyant déléguer de plus en plus d' obligations de déclaration, un format unique améliorerait l' efficacité pour tous les participants.***

(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 a further ***two*** years ***in respect of the very large majority of PSAs***. 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. ▌ ***The*** Commission should be empowered to extend that derogation for ***one*** additional ***year, if it considers that a solution was agreed on by the stakeholders and additional time is needed for its implementation***.

(24a) ***Small PSAs, in addition to those classified as small financial counterparties, do not present the same risks as larger PSAs and it is appropriate to allow them a longer exemption from the clearing obligation. For such PSAs, the Commission should extend the exemption from that obligation to three years. If, by the end of that period, the Commission considers that the small PSAs have made necessary effort to develop appropriate technical solutions for participating in central clearing and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of pensioners remains unchanged, the Commission should be able to extend the derogation by two additional years. After the exemption lapses, small PSAs should be subject to this Regulation in the same way as all other entities within its scope of application. Due to the lower volumes of derivative contracts concluded by small PSAs, it is to be expected that they will not exceed the thresholds triggering the clearing obligation. As a result, even after the exemption lapse, most small PSAs would still not be subject to the clearing obligation.***

(24b) ***The exemption for PSAs should continue to apply from the date of entry into force of this Regulation and if this Regulation enters into force after 16 August 2018, should also apply retroactively to all OTC derivative contracts executed after that date. The retroactive application of this provision is necessary to avoid a gap between the end of the application of the existing exemption and the new exemption, since both serve the same purpose.***

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(25) The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union 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, ***transparent*** and non-discriminatory, and in respect of the extension of the period in which the clearing obligation should not apply to PSAs.

(26) To ensure uniform conditions for the implementation of this Regulation, and in particular with regard to the availability of information contained in the Union trade repositories to the relevant authorities of third countries, 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 ([9]).

(27) To ensure consistent harmonisation of rules on risk mitigation procedures, registration of trade repositories and reporting requirements, the Commission should adopt draft regulatory technical standards developed by EBA, EIOPA and ESMA regarding the supervisory procedures to ensure initial and ongoing validation of the risk-management procedures that require the timely, accurate and appropriately segregated 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 to be applied by the trade repository to verify compliance with the reporting requirements by the reporting counterparty or submitting entity, the completeness and accuracy of the information reported and the details of the procedures for the reconciliation of data between trade repositories. The Commission should adopt those draft regulatory technical standards by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council ([10]), Regulation (EU) No 1094/2010 of the Parliament and of the Council ([11]) and Regulation (EU) No 1095/2010 of the Parliament and of the Council ([12]).

(28) The Commission should also be empowered to adopt implementing technical standards developed by ESMA by means of implementing acts pursuant to Article 291 of the Treaty of the European Union and in accordance with Article 15 of Regulation (EU) No 1095/2010 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.

(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 ([13]) and delivered an opinion on […].

([9]) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

([10]) 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).

([11]) 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).

([12]) 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).

([13]) 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).

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

(32a) The clearing obligation for derivatives laid down in Regulation (EU) No 648/2012 and the trading obligation for derivatives laid down in Regulation (EU) No 600/2014 should be aligned where necessary and appropriate. Therefore, the Commission should prepare a report on the changes made to the clearing obligation for derivatives in this Regulation, in particular regarding the scope of entities subject to the clearing obligation as well as the suspension mechanism, that should also be made to the trading obligation for derivatives set out in Regulation (EU) No 600/2014.

HAVE ADOPTED THIS REGULATION:

Article 1

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

(-1) In Article 1, paragraph 4 is replaced by the following:

"4. This Regulation shall not apply to:

(a) central banks and other public bodies charged with or intervening in the management of the public debt;

(b) the Bank for International Settlements;

(c) multilateral development banks, as listed in Article 117(2) of Regulation (EU) No 575/2013.";

(-1a) In Article 1, paragraph 5, point a is deleted;

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

"(8) 'financial counterparty'means an investment firm authorised in accordance with Directive 2014/65/***EU*** of the European Parliament and of the Council [1], a credit institution authorised in accordance with ***Directive 2013/36/EU***, an insurance ***or*** reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council [2], a UCITS authorised in accordance with Directive 2009/65/EC ***except if that UCITS is related to an employee share purchase plan***,, an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC, an AIF 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 related to an employee share purchase plan, and, where relevant, its AIFM is established in the Union; and*** a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council [3] ;

[1] 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).

[2] 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).

[3] 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)."

(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 are subject to the conditions in the second subparagraph of Article 4a(1);

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

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

(iv) between, on the one hand, a financial counterparty that is subject to the conditions in the second subparagraph of Article 4a(1) or a non-financial counterparty that is subject to 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 ***either:***

(i) on or after the date from which the clearing obligation takes effect; or

ii) on or after the date from which both counterparties meet the conditions set out in point (a).";

(c) the following ***paragraphs are*** inserted:

"3a. Clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable and non-discriminatory ***and transparent*** commercial terms. ***Such clearing members and clients shall take all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest within a group of affiliated entities, 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.***

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

3b. In order to ensure the consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the conditions under which commercial terms for clearing services, referred to in paragraph 3a, are considered to be fair, reasonable, non-discriminatory and transparent.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by … [six months following the date of entry into force of this amending Regulation].

The Commission is empowered 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.";

(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, annually, its aggregate month-end average position for the ***previous 12*** months ▌ in accordance with paragraph 3.

Where ***the financial counterparty does not calculate its position or*** the result of that calculation exceeds the clearing thresholds specified pursuant to Article 10(4)(b), the financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof;

(b) be subject to the clearing obligation referred to in Article 4 for future OTC derivative contracts, irrespective of the asset class or asset classes for which the clearing threshold has been exceeded; ***and***

(c) clear the contracts referred to in point (b) within four months of becoming subject to the clearing obligation.

2. A financial counterparty that has become subject to the clearing obligation in accordance with paragraph 1 and subsequently demonstrates to the relevant competent authority that its aggregate month-end average position for the ***previous 12*** months ▌ no longer exceeds the clearing threshold referred to in paragraph 1, shall no longer be subject to the clearing obligation set out in Article 4.

2a. Where a previously exempt financial counterparty becomes subject to the clearing obligation in accordance with paragraph 1, it shall clear its OTC derivative contracts within four months of becoming subject to that clearing obligation.

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.";

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

(4a) In Article 6, paragraph 2, after point d the following point is added:

"***(da) within each class of OTC derivatives referred to in point (d), the details of the contract types for which relevant CCPs have been authorised to clear and the date at which those CCPs have become authorised to clear those contracts***;";

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

(6) The following Article 6b is ***added***:

"*Article 6b*

Suspension of clearing obligation in situations other than resolution

1. In circumstances other than those referred to in Article 6a(1), ESMA may request that the Commission ***temporarily*** suspend the clearing obligation referred to in Article 4(1) for a specific class of OTC derivative or for a specific type of counterparty where one of the following conditions is met:

(a) the class of OTC derivative is no longer suitable for central clearing on the basis of the criteria referred to in the first subparagraph of paragraph 4 and in paragraph 5 of Article 5;

(b) a CCP is likely to cease clearing that specific class of OTC derivative and no other CCP is able to clear that specific class of OTC derivative without interruption;

(c) the suspension of the clearing obligation for a specific class of OTC derivative or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability in the Union and that suspension is proportionate to that aim.

For the purposes of point (c) of the first subparagraph, ESMA shall consult the ESRB prior to the request referred to therein.

Where ESMA requests that the Commission ***temporarily*** suspend the clearing obligation referred to in Article 4(1), it shall provide reasons and submit evidence that at least one of the conditions laid down in the first subparagraph is fulfilled. ***The Commission shall without delay inform the European Parliament and the Council of ESMA's request.***

1a. A suspension request by ESMA as referred in paragraph 1 of this Article may be requested by a competent authority designated in accordance with Article 22. Where the competent authority requests that ESMA submit a suspension request, it 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 a request by the competent authority and based on the reasons and evidence provided by the competent authority, either request that the Commission suspend the clearing obligation for the specific class of OTC derivative or for the specific type of counterparty referred to in paragraph 1, or reject the competent authority's request. ESMA shall inform the competent authority concerned of its decision and provide a detailed reasoning explaining it.

2. The request referred to in paragraph 1 shall not be made public.

3. The Commission shall, within 48 hours of the request referred to in paragraph 1 and based on the reasons and evidence provided by ESMA, either suspend the clearing obligation for the specific class of OTC derivative or for the specific type of counterparty referred to in paragraph 1, or reject the requested suspension. ***The Commission shall inform ESMA of its decision and shall provide a detailed reasoning explaining it.The Commission shall thereafter transmit that information without delay to the European Parliament and the Council.***

4. The Commission's decision to suspend the clearing obligation ▌ 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. A suspension of the clearing obligation pursuant to this Article shall be valid for a period ***not exceeding one month*** from the date of the publication of that suspension in the Official Journal of the European Union.

6. ***Where the grounds for*** the suspension ***continue to apply***, the Commission, after consulting ESMA ***and the ESRB***, may extend the suspension referred to in paragraph 5 for ***one or more*** periods of ***one month, which shall not cumulatively exceed 12 months from the end of the initial suspension*** period. An extension of the suspension shall be published in accordance with Article 4.

For the purposes of the first subparagraph, the Commission shall notify ESMA ***and inform the European Parliament and the Council*** of its intention to extend a suspension of the clearing obligation. ESMA shall issue an opinion on the extension of the suspension within 48 hours of that notification.";

(7) Article 9 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. ***Financial*** counterparties, ***non-financial counterparties that meet the conditions referred to in the second subparagraph of Article 10(1)*** 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 ▌ 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.";

(b) the following ***paragraphs*** 1a ***and 1b are*** inserted:

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

▌

(b) ▌ the details of OTC derivative contracts concluded ***between a financial counterparty and*** a non-financial counterparty that ***do not meet*** the conditions referred to in the second subparagraph of Article 10(1) ***shall be reported as follows:***

(i) financial counterparties shall be solely responsible and legally liable for reporting a single data set*, as well as for ensuring the accuracy of the details reported.* ***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.***

(ii) notwithstanding point (i), non-financial counterparties who have already invested to put in place 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.

(ba) in the case of OTC derivative contracts concluded by a non-financial counterparty that is not subject to 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:

(i) 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;

(ii) the concerned third-country legal regime for reporting has not been declared equivalent pursuant to Article 13, the third-country financial counterparty chooses to be subject to, as if it were a financial counterparty established in the Union, to the requirements of this Article and registers itself with ESMA.

ESMA shall make make a Union-wide register of the third-country financial counterparties that choose to be subject to this Article in accordance with point (ii) publicly available on its website;

(c) the management company of a UCITS shall be responsible for reporting the details of OTC derivative contracts to which that UCITS is a counterparty as well as for ensuring the accuracy of the details reported;

(d) the manager of an AIF shall be responsible for reporting the details of OTC derivative contracts to which that AIF is a counterparty as well as for ensuring the accuracy of the details reported;

(e) counterparties and CCPs ***that report OTC derivative contracts to a trade repository*** shall ensure that the details of their derivative contracts are reported accurately and without duplication.

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

1b. ESMA shall develop draft regulatory technical standards specifying the details to be provided by a third-country financial counterparty for its registration with ESMA referred to in point (ba)(ii) of the first subparagraph of paragraph 1a.

ESMA shall submit those draft regulatory technical standards to the Commission by … [six months following the date of entry into force of this amending Regulation].

The Commission is empowered 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 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, including any phase-in for contracts entered into before the reporting obligation applies.

In developing those draft 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) No 2015/2365 (*) and Article 26 of Regulation (EU) No 600/2014.

ESMA shall submit those draft implementing technical standards to the Commission by [***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.;

(*) 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 to 4 are replaced by the following:

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

Where ***the non-financial counterparty does not calculate its position or*** the result of ***the*** calculation ***referred to in the first subparagraph*** exceeds the clearing thresholds specified pursuant to paragraph 4(b), that non-financial counterparty shall:

(a) immediately notify ESMA and the authority designated in accordance with paragraph 5 thereof;

(b) ***where it has not calculated its position***, be ***subject to the clearing obligation referred to in Article 4 for future OTC derivative contracts in all asset classes and to the requirements set out in Article 11(3)***;

(ba) where the result of the calculation referred to in the first subparagraph exceeds the clearing thresholds specified pursuant to point (b) of paragraph 4, be subject to the clearing obligation referred to in Article 4 for future OTC derivative contracts in the asset class or asset classes for which the clearing threshold has been exceeded ***and exempted from the requirements set out in Article 11(3) in the other asset class or asset classes for which the clearing threshold has not been exceeded***;

(c) clear the contracts referred to in point (b) within four months of becoming subject to the clearing obligation.

2. A non-financial counterparty that has become subject to the clearing obligation in accordance with the second subparagraph of paragraph 1 and subsequently 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 referred to in paragraph 1 shall no longer be subject to the clearing obligation set out in Article 4.

3. In calculating the positions referred to in paragraph 1, the non-financial counterparty shall include all the OTC derivative contracts entered into by the non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

4. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards, after consulting the ESRB and other relevant authorities, specifying:

(a) criteria for establishing which OTC derivative contracts are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity referred to in paragraph 3; and

(b) values of the clearing thresholds, which are determined taking into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives.

ESMA may develop distinct clearing thresholds for financial and non-financial counterparties taking into account the interconnectedness of financial counterparties and their higher systemic risk.

After conducting an open public consultation, ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012 ***and shall regularly update them.***

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

After consulting the ESRB and other relevant authorities, ESMA shall periodically review the thresholds ***referred to in point (b)*** and, where necessary, ***in particular to ensure increased participation in central clearing***, propose regulatory technical standards to amend them.";

(8a) In Article 11, the following paragraph is inserted:

"1a. The requirements referred to in paragraph 1 of this Article shall not apply to intragroup transactions as referred to in Article 3 where one of the counterparties is a non-financial counterparty which is not subject to the clearing obligation in accordance with the second subparagraph of Article 10(1).";

(8b) In Article 11, paragraph 3 is amended as follows:

"3. Financial counterparties shall have risk-management procedures in place that require timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties as referred to in Article 10 may not apply risk-management procedures that require timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are in the asset class or asset classes for which the clearing threshold has not been exceeded.";

(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, as well as related 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 to the Commission by *[**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 paragraphs 5 to 7 of Article 48 with regard to the assets and positions recorded in the 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 *[**12** months after the entry into force of this **amending** Regulation]*.

Power is delegated to the Commission to adopt 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 *[9 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) In Article 62, paragraph 5 is deleted.

(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 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 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 deleted.

(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.";

(12g) In Article 65(1), the second subparagraph is deleted.

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

(a) in point (a), "EUR 20 000"is replaced by "EUR 2 00 000";

(b) in point (b), "EUR 10 000"is replaced by "EUR 1 00 000";

(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.";

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(13a) In Article 67(1), the following subparagraph is added:

"The first subparagraph shall not apply 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 accuracy 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 ensure the completeness and accuracy of the reported data;

(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 accuracy of the information 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 adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.";

(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 76(a) has been adopted;";

(b) the following paragraph 3a is inserted:

"3a. A trade repository shall provide counterparties and CCPs referred to in the second subparagraph of Article 9(1a) with the information reported on their behalf.";

(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 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 [***12** months after the entry into force of this **amending** Regulation*].

In developing those draft 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 adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.";

(18) Article 82(2) is replaced by the following:

"2. The delegation of power referred to in Article 1(6), Article 4(3) Article 64(7), Article 70, Article 72(3), Article 76a and Article 85(2) shall be conferred to the Commission for an indeterminate period of time.";

(19) Article 85 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. By … *[˘**three years following the date of entry into application 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 the Council, together with any appropriate proposals.'

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(aa) the following paragraph inserted:

"1a. By … [three years after the date of entry into force of this amending Regulation], ESMA shall submit a report to the European Parliament, to the Council and to the Commission analysing the impact on market participants of the changes introduced by Regulation (EU) 2018/… [this amending Regulation] to the reporting regime. That report shall in particular assess the take-up and implementation of the respective provisions allowing the delegation of reporting to financial counterparties and requiring reporting of contracts by CCPs and investigate whether those new provisions have had the intended effect of reducing the reporting burden for smaller counterparties. It shall also investigate how those new provisions have affected the competition between trade repositories and whether and to what extent they have resulted in a less competitive environment and less freedom of choice for clearing members and their clients.";

(b) paragraph 2 is replaced by the following:

"2. By *[**one year following the date of entry into force of this amending Regulation***], ***and every year thereafter until … two years following the date of entry into force of this amending Regulation***], 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 year thereafter until … [two years following the date of entry into force of this amending Regulation***], 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 shall adopt a delegated act in accordance with Article 82 to extend the three-year period referred to in Article 89(1) once, by two years, 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.";

(c) paragraph 3 is replaced by the following:

"3. By … [two years following the date of entry into force of this amending Regulation]▌ the Commission shall either:

(a) submit a proposal for a binding solution, other than permanent or further temporary exemptions of PSAs from the clearing obligation, if it considers that no solution has been found by stakeholders; or

(b) adopt a delegated act in accordance with Article 82 to extend the two year period referred to in Article89(1) once, by one year, only if it considers that a solution was agreed on by the stakeholders and that additional time is needed for the implementation of that solution; or

(c) allow the exemption to lapse, while encouraging stakeholders to implement their solution beforehand if it considers that a solution has been found."

▌

▌

(ca) the following paragraphs are inserted:

"3a. By … [three years following the date of entry into force of this amending Regulation], the Commission shall adopt a delegated act in accordance with Article 82 to extend the three year period referred to in Article 89(1a) once, by two years, only if it considers that the small PSAs referred to in Article 89(1a) have made the necessary efforts to develop appropriate technical solutions and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of pensioners remain unchanged;

3b. ESMA shall by … [12 months after the date of entry into force of this amending Regulation] submit a report to the Commission, assessing 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.";

(e) the following paragraphs are added:

"6. By … [six months after entry into force of this amending Regulation], the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council 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 as well as the suspension mechanism. Where such an alignment is deemed necessary and appropriate, the report shall be accompanied by a legislative proposal introducing the necessary changes.

7. ESMA shall, by … [18 months following the date of entry into force of this amending Regulation], in cooperation with EIOPA and EBA, submit a report to the Commission, assessing whether the principle of fair, reasonable, non-discriminatory and transparent commercial terms referred to in Article 4(3a) has been effective in facilitating access to clearing.

The Commission shall, by … [two years after the date of entry into force of this amending Regulation], present a report to the European Parliament and the Council assessing whether the principle of fair, reasonable, non-discriminatory and transparent commercial terms has been effective in facilitating access to clearing and proposing, where necessary, improvements to that principle. That report shall consider the findings of the report referred to in the first subparagraph and be accompanied by a legislative proposal, where appropriate.

8. By … [12 months after the date of entry into force of this amending Regulation] the Commission shall prepare a report assessing whether 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). In this report the Commission shall take into account in particular, the extent to which they mitigate risks, in particular counterparty credit risk and operational risk, as well as the potential for circumvention of the clearing obligation and the potential to disincentive central clearing. The Commission shall submit that report to the European Parliament and the Council, together with any appropriate legislative proposals.

To assist the Commission in the elaboration of the report mentioned in the first subparagraph, ESMA shall, by … [six months after the date of entry into force of this amending Regulation], in cooperation with the ESRB, submit a report to the Commission, assessing whether 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.

9. Based inter alia on the findings of the Commission public consultation on fitness check on supervisory reporting published on 1 December 2017 and on the report submitted by ESMA pursuant to the second subparagraph, the Commission shall, by [12 months following the entry into force of this amending Regulation], review and report on the application of Article 9(1a). The Commission shall submit that report to the European Parliament and the Council, together with any appropriate legislative proposal. When reviewing the application of Article 9(1a), the Commission shall assess whether the obligation to report transactions under Article 26 of Regulation (EU) No 600/2014 creates unnecessary duplication of transaction reporting for non-OTC derivatives and whether the requirement to report non-OTC transactions under Article 9(1a) could be reduced without undue loss of information with a view to simplifying the reporting chains for non-OTC derivatives for all counterparties, in particular for non-financial counterparties not subject to the clearing obligation referred to in the second subparagraph of Article 10(1).

ESMA shall, by … [six months after entry into force of this amending Regulation], in cooperation with the ESRB, submit a report to the Commission, assessing the following:

(a) the consistency between 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 it is possible to align 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; and

(c) the feasibility of 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."

(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.

PSAs, CCPs and clearing members 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 PSAs, CCPs, clearing members and other relevant parties to such technical solutions to monitor their efforts and assess the progress made in the development of technical solutions that facilitate the clearing of such OTC derivative contracts by PSAs. That expert group shall meet at least every six months. The Commission shall consider the efforts made by PSAs, CCPs and clearing members when drafting its reports pursuant to the first subparagraph of Article 85(2).";

(20a) In Article 89, the following paragraph is inserted:

"1a. Notwithstanding paragraph 1, until … [three 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 the PSAs belonging to the category of small PSAs, and to entities established to provide compensation to members of those PSAs in case of a default of such a PSA.

The Commission shall adopt a delegated act in accordance with Article 82 to supplement this Regulation by determining which PSAs can be considered to be small PSAs in accordance with the first subparagraph of this paragraph, taking into account that the small PSA category shall not represent more than 5 % of the OTC derivative contracts entered into by PSAs.";

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

Article 2

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

This Regulation shall apply from … [five months after the entry into force of this amending Regulation].

Notwithstanding the second paragraph of this Article, Article 1(7)(d), and paragraphs 8, 10, and 11 of Article 1 shall apply from *[▌ six months after the **date of** entry into force of this amending Regulation]* and Article 1(2)(c), Article 1(7)(e), Article 1(9), points (b) and (c) of Article 1(12) and Article 1(16) shall apply from *[▌ 18 months after the **date of** entry into force of this amending Regulation]*.

If this Regulation enters into force after 16 August 2018, then Article 89(1) shall apply retroactively to all OTC derivative contracts executed by PSAs after 16 August 2018 and before the date of entry into force of this Regulation.

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

Done at …,

For the European Parliament	*For the Council*
The President	*The President*

Tuesday 12 June 2018

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 ensure the completeness and accuracy of the reported data;

(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.".