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

of 10.6.2022

supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards specifying the minimum details of the data to be reported to trade repositories and the type of reports to be used

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 (EMIR REFIT) introduces several empowerments for ESMA to develop implementing and regulatory technical standards related to reporting framework under EMIR.

ESMA has used the pre-existing empowerment in Article 9(5) of EMIR to review the regulatory technical standards on reporting. Commission Delegated Regulation (EU) No 148/2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories¹ has been reviewed several times since it was first adopted in 2013, mainly to improve the quality of the data reported. Certain aspects of these rules which have been problematic to the market have also been clarified by ESMA through Q&As.

In order to improve the readability of the framework and ensure coherence with the new implementing technical standards and other internationally agreed standards, ESMA has proposed a draft regulatory technical standard repealing Delegated Regulation 148/2013.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

ESMA conducted a public consultation its draft regulatory and implementing technical standards between 26 March 2020 and 3 July 2020. ESMA has received a total of 41 public responses and 10 confidential responses.

Stakeholder views

Details to set out in the reports

In the Consultation Paper ESMA proposed a new structure for the tables of fields. Overall, the clarifications and the proposed changes in the structure of the tables were welcomed. Some concerns regarding the number of reportable fields were however voiced in the general comments on the Consultation Paper. It is to be noted that the major part of the increase in the number of fields is from (i) alignment with the global guidance and (ii) an improvement in the specification of the reportable data. Furthermore, some of the fields on which ESMA consulted were not included in the final draft in the light of the feedback received because they were considered less critical (e.g. beneficiary identifier and type, counterparty rating trigger indicator and counterparty rating threshold indicator).

Reporting of lifecycle events

Counterparties and CCPs are required, pursuant to the Article 9(1) of EMIR as amended by EMIR REFIT, not only to report conclusion of a derivative but also “any modification or termination of the contract”. Sufficiently detailed and transparent requirements on reporting of lifecycle events are necessary to ensure that the authorities can obtain a holistic and accurate view of the exposures in the market at any point in time. Therefore, this information is pivotal for the monitoring of the systemic risk and for increasing the transparency of the derivatives market. ESMA proposed in the Consultation Paper a revised approach to the

¹ OJ L 52, 23.2.2013, p. 1–10

reporting of lifecycle events as the existing one has proven unable to provide the authorities with a good understanding of the business event triggering the report. The base for the proposed approach is separating the information on lifecycle events into two dedicated fields: ‘Action type’ – specifying whether a given report creates, modifies, corrects, terminates etc. a record pertaining to the trade in question, and ‘Event type’ – providing information about the type of business event triggering a given report. The proposed model has been broadly supported and majority of the respondents confirmed that overall, the proposal is very clear. However, the numerous detailed comments from the industry show that further guidance (including concrete examples) will be important to ensure consistent understanding and implementation by market participants.

Cleared trades

Article 2 of Delegated Regulation (EU) No 148/2013 prescribes that where a derivative contract whose details have already been reported pursuant to Article 9 EMIR is subsequently cleared by a CCP, that contract shall be reported as terminated using the action type ‘Early Termination. The new contracts resulting from clearing shall be reported with action type ‘New’. The same Article also provides that where a contract is concluded on a trading venue and cleared on the same day, only the contracts resulting from clearing shall be reported. Furthermore, for cleared contracts the counterparties should identify in the report the CCP and the clearing member, as well as specify the clearing timestamp. ESMA proposed to maintain this reporting logic and maintain the relevant fields.

Reporting at position level

To avoid double-counting of the reports of trades and those of positions in EMIR, the reports of the original trades must be updated to have an appropriate status so that it is clear that they are no longer open. In the Consultation Paper, ESMA proposed to maintain the current approach with small changes. Furthermore, ESMA proposed to clarify that the reporting at position level should be agreed between the two counterparties, i.e. the two counterparties to a trade should either both include the derivative in a position or both continue to report the relevant lifecycle events at trade level. The feedback on this specific point was mixed. ESMA acknowledges the potential difficulties with agreeing bilaterally the level of reporting between counterparties and the negative impact of such problems on the reconciliation. Having in mind that the reporting at position level is an option, rather than a requirement, ESMA clarifies that reporting at trade level is a default way forward, meaning that in the absence of agreement between the counterparties, they should report the derivatives at trade level. Reporting at position level will be feasible only when all the relevant conditions are met and the two counterparties agree on reporting at position level.

Reporting of collateral

Regarding margins, several additional fields have been included in line with international guidance. They should enable authorities to identify emerging risks on derivatives markets due to changes in the applied haircuts. On an aggregated basis, they could also be used to determine the weighted average level of haircuts applied per portfolio as well as its evolution over time. Such information would help authorities to measure the quality of the collateral, assess the evolution of leverage in the financial system and the potential build-up of stress and systemic risk, from a financial stability point of view. None of the respondents raised any major issues.

Notional amounts

This is a key field and it is crucial that this field is populated correctly. Article 3a of Delegated Regulation (EU) No 148/2013 states how it should be filled in for certain

derivative contract types. Delegated Regulation (EU) No 148/2013 also provide definitions of ‘Notional amount’ and ‘Quantity’. CPMI-IOSCO guidance provides detailed instructions regarding the reporting of notional for different OTC products. ESMA proposed that the content of that guidance is used for reporting of notional under EMIR for OTC derivatives. The feedback received was generally supportive.

Price

ESMA proposed in the Consultation Paper certain amendments to the mechanics in which the price of a derivative contract is reported. In particular, ESMA proposed to change the fields and their definitions to better align with international guidance and clarified that the field ‘Price’ should only be completed when the information is not provided in another field. In general, the respondents were positive about the proposals made by ESMA.

Linking of reports

Based on international guidance, ESMA proposed in the Consultation Paper to introduce six new fields. The respondents had split views regarding the introduction of those new fields. ESMA anticipates that the future EMIR guidelines on reporting will include clarifications on how to complete those new reporting fields. ESMA proposed that reports pertaining to derivatives going into and resulting from the same compression exercise are linked via a common identifier and to use it to link derivatives not only in the event of compression, but in the case of other post-trade risk reduction events such as rebalancing. In the light of the received feedback, ESMA decided that this should be reported, where applicable, in particular in the case of compression with a third-party service provider or CCP and portfolio rebalancing.

3. IMPACT ASSESSMENT

The Commission has not conducted a detailed impact assessment on the proposed regulatory technical standards but has based its assessment on ESMA’s cost benefit analysis included in its Final Report.

The main policy decisions have already been analysed and published by the Commission in the legislative proposal that led to Regulation (EU) No 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012.

ESMA understands that the proposed amendments to the technical standards will enhance the quality of the data reported under EMIR and thus provide a clear benefit to the authorities which are entitled to access EMIR data, but also to reporting entities and trade repositories. For example, the proposed amendments aligning the requirements in the EU with the global guidance on reporting of OTC derivatives are expected to bring a significant reduction in costs for entities reporting under several jurisdictions. Similarly, further standardisation of formats and use of ISO 20022 for reporting by the counterparties to the trade repositories, will further enhance the automation of reporting, reduce the data quality issues and contribute to easier reconciliation of the reports, thus decreasing the need of the burdensome follow-up processes on the reconciliation breaks.

Although these benefits outweigh the costs, it is inevitable that in the short run the modifications to reporting systems emerging from the proposed regulatory and implementing technical standards will imply costs for authorities, counterparties and trade repositories. ESMA is proposing an implementation timeline which should help smooth the costs implications.

4. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 presents the details to set out in reports.

Article 2 sets out how to report cleared trades.

Article 3 establishes the conditions to report at position level.

Article 4 establishes the details with regards to the reporting of exposures.

Article 5 specifies the reporting of notional amounts.

Article 6 specifies the reporting of prices.

Article 7 specifies the obligations with regards to linking reports related to derivatives concluded or terminated as a result of the same event.

Article 8 repeals Delegated Regulation (EU) No 148/2013.

Article 9 sets the application of the proposed rules at 18 months after its entry into force.

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(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 repositories², and in particular Article 9(5) thereof,

Whereas:

- (1) Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories has been substantially amended. Since further amendments would be needed in order to improve the clarity of the reporting framework and ensure coherence with new implementing technical standards and other internationally agreed standards, it should be repealed and replaced by this Regulation.
- (2) The reporting of complete and accurate details of derivatives, including the indication of the business events triggering the changes to the derivatives, is essential to ensure that the derivative data can be effectively used.
- (3) Where a derivative contract is composed of a combination of derivative contracts that are negotiated together as the product of a single economic agreement, the competent authorities need to understand the characteristics of each of the derivative contracts concerned. Since competent authorities also need to be able to understand the overall context, it should also be apparent from the report that the derivative contract is part of a complex derivative. Therefore, derivative contracts pertaining to a combination of derivative contracts should be reported in separate reports for each derivative contract with an internal identifier to provide a link between the reports.
- (4) In the case of derivative contracts composed of a combination of derivative contracts which need to be reported in more than one report, it may be difficult to determine how the relevant information about the contract should be set out across reports and thus how many reports should be submitted. Therefore, counterparties should agree on the number of reports to be submitted detailing such a contract.

² OJ L 201, 27.7.2012, p. 1.

- (5) In order to allow flexibility, a counterparty should be able to delegate the reporting of a contract to the other counterparty or to a third party. Counterparties should also be able to agree to delegate reporting to a common third entity including a central counterparty ('CCP'). In order to ensure data quality when one report is made on behalf of both counterparties, it should contain all relevant details in relation to each counterparty. Where the reporting is delegated, the report should contain the full set of details that would have been reported had the report been made by the reporting counterparty.
- (6) It is important to acknowledge that a CCP acts as a party to a derivative contract. Accordingly, where an existing contract is subsequently cleared by a CCP, it should be reported as terminated and the new contract resulting from clearing should be reported.
- (7) It is also important to acknowledge that certain derivatives, such as derivatives traded on trading venues or organised trading platforms located outside the Union, derivatives cleared by CCPs or contracts for difference, are often terminated and included into a position and the risk for such derivatives is managed at position level. Furthermore, it is the resulting position, rather than original derivatives at trade level, that becomes subject to the subsequent lifecycle events. In order to enable efficient and accurate reporting of such derivatives, counterparties should be allowed to report at position level. To ensure that counterparties do not use position-level reporting inappropriately, specific conditions should be set out, which should be fulfilled to report at position level.
- (8) In order to properly monitor concentration of exposures and systemic risk, it is crucial to ensure that complete and accurate information on exposure and collateral exchanged between two counterparties is submitted to trade repositories. The mark to market or mark to model value of a contract indicates the sign and size of the exposures related to that contract, and complements the information on the original value specified in the contract. Thus, it is essential that counterparties report valuations of derivative contracts according to a common methodology. Furthermore, it is equally important to require reporting of posted and received initial and variation margins pertaining to a particular derivative. Therefore, counterparties that collateralise their derivatives should report such collateralisation details on a trade-level basis. Where collateral is calculated on a portfolio basis, counterparties should report posted and received initial and variation margins pertaining to that portfolio using a unique code as determined by the reporting counterparty. That unique code should identify the specific portfolio over which the collateral is exchanged and should also ensure that all relevant derivatives can be linked to that particular portfolio.
- (9) Notional amount is an essential characteristic of a derivative to determine the obligations associated with that derivative. Furthermore, notional amounts are used as one of the metrics to assess exposures, trading volumes and size of the derivative market. Thus, consistent reporting of notional amounts is essential. In order to ensure that counterparties report notional amounts in a harmonised manner, the required method of computing notional amount should be specified with regard to different types of products.
- (10) Similarly, information relating to the pricing of the derivatives should be reported consistently and thus allow competent authorities to verify the reported exposures, evaluate costs and liquidity in the derivatives markets as well as compare the prices of similar products traded in different markets.

- (11) As a result of lifecycle events such as clearing, novation or compression, certain derivatives are created, modified or terminated. In order to enable competent authorities to understand the sequences of events occurring in the market and the relations between the reported derivatives, it is essential to provide a method to link all relevant derivatives impacted by the same lifecycle event. As the most efficient way of linking the derivatives may differ depending on the nature of the event, different linking methods should be set out.
- (12) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (13) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³.
- (14) To enable counterparties and trade repositories to take all necessary actions to adapt to the new requirements, the date of application of this Regulation should be deferred by 18 months,

HAS ADOPTED THIS REGULATION:

Article 1

Details to set out in reports pursuant to Article 9(1) and (3) of Regulation (EU) No 648/2012

- 1. Reports to trade repositories made pursuant to Article 9(1) and (3) of Regulation (EU) No 648/2012 shall include the complete and accurate details set out in Tables 1, 2 and 3 of the Annex to this Regulation that pertain to the derivative concerned. Those details shall be reported in a single report.
- 2. When reporting the conclusion, modification or termination of the derivative, a counterparty shall specify in its report the details of the action type and event type, as described in the fields 151 and 152 in Table 2 of the Annex, to which that conclusion, modification or termination is related.
- 3. By way of derogation from paragraph 1, where the fields in the Tables 1, 2 and 3 of the Annex do not allow for the effective reporting of the details referred to in paragraph 1, those details shall be reported in separate reports, such as in the case where the derivative contract is composed of a combination of derivative contracts that are negotiated together as the product of a single economic agreement.

Before the reporting deadline, counterparties to a derivative contract composed of a combination of derivative contracts referred to in the first subparagraph shall agree on the number of separate reports to be sent to a trade repository in relation to that derivative contract.

The reporting counterparty shall link the separate reports by an identifier that is unique at the level of the counterparty to the group of derivative reports, in accordance with field 6 in Table 2 of the Annex.

³ 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).

4. Where one report is made on behalf of both counterparties, it shall contain the details set out in Tables 1, 2 and 3 of the Annex in relation to each of the counterparties.
5. Where one counterparty reports the details of a derivative to a trade repository on behalf of the other counterparty, or a third entity reports a contract to a trade repository on behalf of one or both counterparties, the details reported shall include the full set of details that would have been reported had the derivatives been reported to the trade repository by each counterparty separately.

Article 2

Cleared trades

1. Where a derivative whose details have already been reported pursuant to Article 9 of Regulation (EU) No 648/2012 is subsequently cleared by a central counterparty ('CCP'), that derivative shall be reported as terminated by specifying in fields 151 and 152 in Table 2 of the Annex to this Regulation the action type 'Terminate' and event type 'Clearing'. New derivatives resulting from clearing shall be reported by specifying in fields 151 and 152 in Table 2 of the Annex to this Regulation the action type 'New' and event type 'Clearing'.
2. Where a derivative is both concluded on a trading venue or on an organised trading platform located outside the Union and cleared by a CCP on the same day, only the derivatives resulting from clearing shall be reported. Those derivatives shall be reported by specifying in fields 151 and 152 in Table 2 of the Annex either the action type 'New', or the action type 'Position component', in accordance with Article 3(2), and event type 'Clearing'.

Article 3

Reporting at position level

1. Following the reporting of the details of a derivative a counterparty has concluded and the termination of that derivative due to inclusion in a position, a counterparty shall be allowed to use position level reporting, provided that all of the following conditions are fulfilled:
 - (a) the risk is managed at position level;
 - (b) the reports relate to derivatives concluded on a trading venue or on an organised trading platform located outside the Union or to derivatives cleared by a CCP or to contracts for difference that are fungible with each other and have been replaced by the position;
 - (c) the derivatives at trade level as referred to in field 154 in Table 2 of the Annex, were correctly reported prior to their inclusion in the position;
 - (d) other events that affect the common fields in the report of the position are separately reported;
 - (e) the derivatives referred to in point (b) were duly terminated by indicating the action type 'Terminate' in field 151 in Table 2 of the Annex and event type 'Inclusion in a position' in the field 152 in Table 2 of the Annex;
 - (f) the resulting position was duly reported either as a new position or as an update to an existing position;

- (g) the report of the position was made correctly filling in all the applicable fields in Tables 1 and 2 of the Annex and by indicating that the report is made at position level in field 154 in Table 2 of the Annex;
 - (h) the counterparties to the derivative agree that the derivative should be reported at position level.
2. When an existing derivative is to be included in a position level report on the same day, such derivative shall be reported with action type 'Position component' in field 151 in Table 2 of the Annex.
 3. The subsequent updates, including valuation updates, collateral updates and other modifications and lifecycle events, shall be reported at position level and they shall not be reported for the original derivatives at trade level that were terminated and included in that position.

Article 4

Reporting of exposures

1. The data on collateral for both cleared and non-cleared derivatives shall include all posted and received collateral in accordance with fields 1 to 29 in Table 3 of the Annex.
2. Where a counterparty 1 collateralises on a portfolio basis, the counterparty 1 or the entity responsible for reporting shall report to a trade repository collateral posted and received on a portfolio basis in accordance with fields 1 to 29 in Table 3 of the Annex and specify a code identifying the portfolio in accordance with field 9 in Table 3 of the Annex.
3. Non-financial counterparties other than those referred to in Article 10 of Regulation (EU) No 648/2012 or the entities responsible for reporting on their behalf shall not be required to report collateral, mark-to-market, or mark-to-model valuations of the contracts set out in Table 2 and Table 3 of the Annex to this Regulation.
4. For derivatives cleared by a CCP, the counterparty 1 or the entity responsible for reporting shall report the valuation of the derivative provided by the CCP in accordance with fields 21 to 25 in Table 2 of the Annex.
5. For derivatives not cleared by a CCP, the counterparty 1 or the entity responsible for reporting shall report, in accordance with fields 21 to 25 in Table 2 of the Annex to this Regulation, the valuation of the derivative performed in accordance with the methodology defined in International Financial Reporting Standard (IFRS) 13 Fair Value Measurement as adopted by Commission Regulation (EC) No 1126/2008⁴, without applying any adjustment to the fair value.

Article 5

Notional amount

1. The notional amount of a derivative referred to in fields 55 and 64 in Table 2 of the Annex shall be specified as follows:

⁴ Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (Text with EEA relevance) (OJ L 320, 29.11.2008, p. 1).

- (a) in the case of swaps, futures, forwards and options traded in monetary units, the reference amount;
- (b) in the case of options other than those referred to in point (a), calculated using the strike price;
- (c) in the case of forwards other than those referred to in point (a), the product of the forward price and the total notional quantity of the underlying;
- (d) in the case of equity dividend swaps, the product of the period fixed strike and the number of shares or index units;
- (e) in the case of equity volatility swaps, the vega notional amount;
- (f) in the case of equity variance swaps, the variance amount;
- (g) in the case of financial contracts for difference, the resulting amount of the initial price and the total notional quantity;
- (h) in case of commodity fixed/float swaps, the product of the fixed price and the total notional quantity;
- (i) in case of commodity basis swaps, the product of the last available spot price at the time of the transaction of the underlying asset of the leg with no spread and the total notional quantity of the leg with no spread;
- (j) in case of swaptions, the notional amount of the underlying contract;
- (k) in the case of a derivative not referred to in subparagraphs (a) to (j), where the notional amount is calculated using the price of the underlying asset and such price is only available at the time of settlement, the end of day price of the underlying asset at the date of conclusion of the contract.

2. The initial report of a derivative contract whose notional amount varies over time shall specify the notional amount as applicable at the date the derivative contract was concluded and the notional amount schedule.

When reporting the notional amount schedule, counterparties shall indicate all of the following:

- (i) the unadjusted date on which the associated notional amount becomes effective;
- (ii) the unadjusted end date of the notional amount;
- (iii) the notional amount which becomes effective on the associated unadjusted effective date.

Article 6

Price

1. The price of a derivative referred to in field 48 in Table 2 of the Annex shall be specified as follows:
 - (a) in the case of swaps with periodic payments relating to commodities, the fixed price;
 - (b) in the case of forwards relating to commodities and equities, the forward price of the underlying;
 - (c) in the case of swaps relating to equities and contracts for difference, the initial price of the underlying.

2. The price of a derivative shall not be specified in field 48 in Table 2 of the Annex when it is specified in another field in Table 2 of the Annex.

Article 7
Linking of reports

The reporting counterparty or entity responsible for reporting shall link the reports related to the derivatives concluded or terminated as a result of the same event referred to in the field 152 in Table 2 of the Annex as follows:

- (a) in the case of clearing, step-in, allocation and exercise, the counterparty shall report the unique trade identifier ('UTI') of the original derivative that was terminated as a result of the event referred to in the field 152 in Table 2 in the field 3 in Table 2 of the Annex within the report or reports pertaining to the derivative or the derivatives resulting from that event;
- (b) in the case of inclusion of a derivative in a position, the counterparty shall report the UTI of the position in which that derivative has been included in the field 4 in Table 2 of the Annex within the report of that derivative sent with action type 'Position component' or a combination of action type 'Terminate' and event type 'Inclusion in a position';
- (c) in the case of post-trade risk reduction ('PTRR') event with a PTRR service provider or CCP providing the PTRR service, the counterparty shall report a unique code identifying this event as provided by that PTRR service provider or CCP in the field 5 in Table 2 of the Annex within all the reports pertaining to the derivatives that were either terminated due to or result from that event.

Article 8
Repeal

Delegated Regulation (EU) No 148/2013 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation.

Article 9
Entry into force

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

It shall apply from [PO: please insert the date of the first Monday following the date corresponding to 18 months after the date of entry into force.].

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

Done at Brussels, 10.6.2022

For the Commission
The President
Ursula VON DER LEYEN