EUROPEAN
COMMISSION

Brussels, 8.2.2022
C(2022) 620 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 8.2.2022

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2017/2417 as regards the transition to new benchmarks referenced in certain OTC derivative contracts

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 600/2014 on Markets in Financial Instruments (MiFIR)[1] contains the obligation in Article 28 to conclude transactions in derivatives that are subject to the derivatives trading obligation (DTO) on a regulated market, a multilateral trading facility, an organised trading facility or an equivalent third country trading venue. This obligation applies to financial counterparties and non-financial counterparties as defined in Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)[2]. The procedure to establish which derivatives are under a trading obligation is set out in Article 32 of MiFIR.

The derivatives subject to the DTO are specified in Delegated Regulation (EU) 2017/2417 based on their inclusion in the clearing obligation (CO) in accordance with Article 5 of EMIR and on the average frequency and size at which they are traded as well as the number and type of active market participants that trade the derivative. Subject to the DTO are interest rate swaps (IRS) with 3M or 6M tenors denominated in EUR, USD and GBP and Index Credit Default Swaps (Index CDS).

ESMA has reviewed whether or not the conditions for including derivatives in the DTO still apply with regard to the aforementioned instruments and concludes that the DTO should no longer apply with regard to interest rate swaps denominated in USD and GBP based on the LIBOR benchmark. As LIBOR will cease to be published as a panel-based benchmark at the end of this year, it is expected that both preconditions will no longer be met. The average frequency and size at which they are traded no longer is sufficient and is expected to decline further due to the planned cessation of these benchmarks and their removal from the CO.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of Regulation (EU) 1095/2010, ESMA has carried out a public consultation on the draft regulatory technical standards. A Consultation Paper was published on 09 July 2021 on the ESMA website. The Consultation period ended on 2 September and in total 16 replies were received. In addition ESMA sought the views of the Securities and Markets Stakeholders Group established in accordance with Article 37 of the ESMA regulation.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) 1095/2010, ESMA submitted its assessment, including the analysis of costs and benefits related to the draft technical standards to the Commission.[3]

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 of the Delegated Regulation removes 'tables 2 and 3' on USD IRS and GBP IRS from the Annex in Delegated Regulation EU 2017/2417. Article 1 of that Regulation specifies

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1 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.84-148.

2 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-159.

3 The full document can be found here: [ESMA proposes changes to the scope of the clearing and derivative trading obligations for the benchmark transition (europa.eu)](https://europa.eu).

that the derivatives set out in the Annex shall be subject to the DTO. The deletion of these tables will therefore have the effect of removing these benchmarks from the DTO.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[4], and in particular Article 32(1) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2017/2417[5] specifies, among others, the classes of over-the-counter (OTC) derivatives denominated in EURO (EUR), the Pound Sterling (GBP) and US dollar (USD) that are subject to the derivatives trading obligation referred to in Article 28 of Regulation (EU) No 600/2014. The classes denominated in GBP and USD reference the London Inter-Bank Offered Rate (LIBOR) benchmarks.

(2) ICE Benchmark Administration (IBA), the administrator for LIBOR, announced that GBP and JPY LIBOR settings will cease publication at the end of 2021, whereas the publication of certain settings of USD LIBOR will cease in June 2023. On 5 March 2021, the United Kingdom Financial Conduct Authority confirmed that all LIBOR settings will either cease to be provided by any administrator or no longer be representative. In addition, the Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued a joint statement to strongly encourage counterparties to stop using any of the LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021.

(3) After 31 December 2021, counterparties will hence no longer be able to enter into OTC interest rate derivatives contracts referencing GBP LIBOR as that benchmark will have ceased and counterparties are expected to no longer enter into OTC interest rate derivatives contracts referencing USD LIBOR. As a result, the remaining traded volumes in those derivatives are expected to be non-existent to very low, as is their liquidity. The same holds for the volume of trades in those derivatives that will be cleared by central counterparties (CCPs) or traded on trading venues and decreasing

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4 OJ L 173, 12.6.2014, p. 84.

5 Commission Delegated Regulation (EU) 2017/2417 of 17 November 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives (OJ L 343, 22.12.2017, p. 48.).

volume or liquidity is expected for derivatives referencing USD LIBOR. Those events warrant a change in the scope of the clearing obligation and a subsequent amendment in Commission Delegated Regulation (EU) 2015/2205[6], whereby derivatives referencing GBP LIBOR and USD LIBOR are to be removed from the scope of the clearing obligation. As a consequence, the classes of derivatives currently in scope of the derivatives trading obligation that reference GBP LIBOR or USD LIBOR will no longer meet the condition laid down in Article 32(1) of Regulation (EU) No 600/2014 for making derivatives subject to the derivatives trading obligation as of 3 January 2022. Those classes of derivatives therefore need to be removed from the scope of the trading obligation.

(4) As the planned cessation of GBP LIBOR is scheduled for the end of 2021, and regulatory expectations expressed by the Commission, ECB Banking Supervision, ESMA and EBA are for counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, the move away from LIBOR-based interest rate derivatives is expected to take place swiftly. Instead, after 31 December 2021, counterparties are expected to trade or clear other OTC interest rate derivatives, in particular OTC interest rate derivatives, referencing the risk-free rates for GBP or USD. This Regulation should thus enter into force without delay after its publication.

(5) Delegated Regulation (EU) 2017/2417 should therefore be amended accordingly.

(6) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).

(7) 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 Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[7],

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2017/2417

In the Annex to Delegated Regulation (EU) 2017/2417, Tables 2 and 3 are deleted.

Article 2

Entry into force

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

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[6] Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

[7] 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).

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

Done at Brussels, 8.2.2022

For the Commission
The President
Ursula VON DER LEYEN