



Brussels, 25.10.2022
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COMMISSION DELEGATED REGULATION (EU) .../...

of 25.10.2022

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2016/2251 as regards the date of application of certain risk management procedures for the exchange of collateral

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 648/2012 (EMIR) Article 11 introduced an obligation for financial counterparties engaged in over-the-counter ('OTC') derivative contracts not cleared by a central counterparty ('CCP') as well as those non-financial counterparties that are above the clearing threshold defined under Article 10 to have risk-management techniques requiring the timely, accurate and appropriate segregated exchange of collateral (together 'the margin requirements'). The Commission Delegated Regulation (EU) 2016/2251 on risk-mitigation techniques for OTC derivatives not centrally cleared ('the margin RTS'), specifies further these risk-management techniques.

Under EMIR, margin requirements would apply regarding intragroup contracts with a third-country group entity when no equivalence decision under Article 13 has been adopted. The margin RTS introduced a deferred date of application of this requirement in order to provide time for the Commission to adopt the relevant equivalence decisions. This deferred date of application is currently set for 30 June 2022.

Despite the eight equivalence decisions adopted so far under Article 13 of EMIR (for the purpose of Article 11), the Commission has indicated that reaching similar decisions with regards to other relevant third-country jurisdictions in relation to which any such implementing act may be warranted has turned out to pose challenges, and that a number of issues would need to be resolved in order to be able to move forward.

Taking into account the challenges of assessing equivalence in this context and thus in reaching the necessary equivalence decisions by the deferred date of application, the possible negative consequences in terms of substantial increased costs for group entities, the amendments propose to extend the deferred date of application of the margin requirements for intragroup transactions set in the margin RTS to 30 June 2025.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The proposed amendment is an adaptation of the timelines to facilitate the current implementation of the margin RTS, and the proposed amendment is limited in nature. Moreover, the deadline related to these provisions is due to expire soon. Given the limited scope of the amendments and the urgency of the matter, in accordance with Article 10(1) of the EBA, EIOPA and ESMA Regulations respectively, it would have been disproportionate for the ESAs to conduct open public consultations or full analyses of the potential related costs and benefits. However, the advice of the stakeholder groups of each of the ESAs has been requested.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The delegated act introduces a modification to Commission Delegated Regulation (EU) 2016/2251.

Article 36 and 37 are amended in the following way:

- The exemption for cross-border intragroup transactions is extended to 30 June 2025 for jurisdictions where no equivalence has been adopted by the Commission pursuant to Article 13(2) of EMIR for the purpose of Article 11(3).

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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 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories¹, and in particular Article 11(15) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2016/2251² specifies, among others, the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in Article 11(3) of Regulation (EU) 648/2012, that financial counterparties are required to have for the exchange of collateral, with respect to their over-the-counter (OTC) derivative contracts not cleared by a central counterparty.
- (2) Article 36(2), point (a), and Article 37(3), point (a), of Delegated Regulation (EU) 2016/2251 provide for a deferred date of application of the bilateral margin requirements for OTC derivative contracts that are not cleared by a central counterparty and that are concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union. That deferred date of application was necessary to ensure that such OTC derivative contracts were not subject to the bilateral margin requirements before the adoption of an implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012.
- (3) So far, eight implementing acts have been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012. However, efforts are still being undertaken to analyse any other relevant third-country jurisdictions in relation to which any such implementing act may be warranted. The immediate application of the bilateral margin requirements for OTC derivative contracts that are not cleared by a central counterparty and that are concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union without the adoption of implementing acts as referred to in Article 13(2) of Regulation (EU) No 648/2012, would, however have detrimental economic impacts on Union counterparties. The application of the bilateral

¹ OJ L 201, 27.7.2012, p. 1.

² Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 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 for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

margin requirements for non-centrally cleared OTC derivative intragroup contracts should therefore be further deferred.

- (4) Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly.
- (5) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (the ESAs).
- (6) The amendments to Delegated Regulation (EU) 2016/2251 are limited adjustments of the existing regulatory framework. Given the limited scope of those amendments and the urgency of the matter, it would be highly disproportionate for the ESAs to conduct open public consultations or analyses of the potential related costs and benefits. The ESAs nevertheless requested the advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council³, the advice of the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council⁴, and 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 Council.⁵
- (7) To provide market participants with legal certainty as quickly as possible, this Regulation should enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) 2016/2251

Delegated Regulation (EU) 2016/2251 is amended as follows:

- (1) in Article 36(2), point (a) is replaced by the following:
 - ‘(a) from 30 June 2025 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;’;
- (2) in Article 37(3), point (a) is replaced by the following:
 - ‘(a) from 30 June 2025 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;’.

³ 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).

⁴ 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).

⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

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*.

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

Done at Brussels, 25.10.2022

For the Commission
The President
Ursula VON DER LEYEN