EUROPEAN
COMMISSION

Brussels, 28.11.2023
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COMMISSION DELEGATED REGULATION (EU) …/...

of 28.11.2023

amending the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards the extension of temporary emergency measures on CCP collateral requirements

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The unprovoked and unjustified invasion of Ukraine by Russia and the resulting disruption of energy supply routes in Europe caused significant price and volatility increases on energy markets in 2022. These in turn triggered substantial margin increases by central counterparties (CCPs) to cover the related exposures throughout spring and summer 2022. These margin increases created significant liquidity strains on clearing participants, in particular on Non-Financial Counterparties (NFCs) which typically have fewer and less liquid assets to meet margin requirements, forcing them to either reduce their positions or leaving them unproperly hedged and exposed to further price variations.

To alleviate liquidity pressures observed in cleared energy markets in spring and summer 2022, ESMA adopted on 14 October 2022 a Final Report revising its regulatory technical standards (RTS) for CCPs to temporarily expand the pool of eligible collateral by CCPs to uncollateralised bank guarantees for NFCs acting as clearing members and to public guarantees for all types of counterparties. These measures contained in Delegated Regulation (EU) 2022/2311 adopted by the European Commission on 22 October 2022[1], which amends the RTS, are expiring on 29 November 2023.

As of today, two EU CCPs have reported using the emergency measures allowed under Delegated Regulation (EU) 2022/2311 adopted by the European Commission on 22 October 2022[2], extending the types of eligible collateral. One EU CCP has reported that uncollateralised bank guarantees are used by two of its clearing members, while another EU CCP reports that three of its clearing members have made use of them. Their use is closely monitored and reviewed by the relevant national competent authorities.

In the meantime, the Commission published on 7 December 2022 a proposal[3] to amend Regulation (EU) No 648/2012, including the provisions relevant to CCP collateral requirements. As explained in the Explanatory Memorandum, "*Article 46 is amended to allow bank guarantees and public guarantees to be considered eligible as highly liquid collateral provided that they are unconditionally available upon request within the liquidation period and making sure a CCP takes them into account when calculating its overall exposure to the bank.*" The Commission proposal, currently discussed by the European Parliament and the Council, would require ESMA to amend the relevant RTS.

In its final report sent to the Commission on 5 October 2023, ESMA concludes that the emergency measures on CCP collateral requirements should be extended for a period of six months. This would bridge the gap between the date the temporary measures are currently set to expire and the date the co-legislators are expected to finalise the review of EMIR and would thus safeguard the smooth functioning of the Union financial and energy markets.

The ESMA report provides draft amendments to the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 developed by ESMA under Article 46(3) of

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1 Commission Delegated Regulation (EU) 2022/2311 of 21 October 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards temporary emergency measures on collateral requirements (OJ L 307, 28.11.2022, p. 31–33).

2 Commission Delegated Regulation (EU) 2022/2311 of 21 October 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards temporary emergency measures on collateral requirements (OJ L 307, 28.11.2022, p. 31–33).

3 Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets.

EMIR, to extend the temporarily expansion of the pool of eligible collateral at EU CCPs to uncollateralised bank guarantees for NFCs acting as clearing members and to public guarantees for all types of counterparties. The Commission recalls that public guarantees have to be granted in compliance with the Union State aid framework.

These modifications are temporary and will expire 6 months after the entry into application of this Commission Delegated Regulation.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA has not conducted open public consultations on the draft regulatory technical standards, in relation to the particular urgency of the matter, given the expiry of the current measures on 29 November 2023, as permitted under Article 10(1) of Regulation (EU) 1095/2010 (ESMA Regulation).

As required under Article 46(3) of EMIR, ESMA consulted the EBA, the ESRB and the ESCB. Where relevant ESMA also took into account publicly available information from a diverse set of industry sources. The Securities and Markets Stakeholder Group (SMSG) was also not consulted due to the urgency of the matter as foreseen in Article 37(1) of the ESMA Regulation.

This amending regulation is based on ESMA's final report sent to the Commission on 5 October 2023.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The delegated act introduces a modification to Commission Delegated Regulation (EU) No 153/2013.

Article 1 modifies Article 39 and 62 of Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties, as well as its annex I, in the following way:

- Article 39 is amended to extend the duration during which the use of public guarantees as specified in Annex I is temporarily allowed;
- Article 62 is amended to extend the duration during which the use of uncollateralised or partially collateralised bank guarantees is temporarily allowed;
- In Annex I, the title is amended and Section 2a is amended to allow for the use, under strict conditions, of public guarantees for an additional 6 months.

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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 repositories[4], and in particular Article 46(3) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2022/2311[5] has amended Commission Delegated Regulation (EU) No 153/2013[6] as regards temporary emergency measures on collateral requirements. Delegated Regulation (EU) 2022/2311 has temporarily expanded the pool of eligible collateral available to non-financial clearing members active on gas and derivatives regulated markets. That expansion has included into that pool uncollateralised bank guarantees until 29 November 2023. That Delegated Regulation has also allowed the use of guarantees issued or backed by public entities as eligible collateral for financial and non-financial counterparties by the CCP until 29 November 2023.

(2) The Commission proposal of 7 December 2022[7] proposes to amend Article 46(1) of Regulation (EU) No 648/2012 to make it possible that bank guarantees and public guarantees are to be considered eligible as highly liquid collateral, subject to certain safeguards. Pursuant to that amendment, CCPs, including CCPs that clear energy derivatives, would be able to allow their clearing members and their clearing members' clients to use a broader range of collateral to meet margin calls from CCPs. That would avoid unnecessary liquidity stresses on those clearing members and clients. It is necessary to avoid a potential discontinuity in the treatment of guarantees

[4] OJ L 201, 27.7.2012, p. 1, ELI: http://data.europa.eu/eli/reg/2012/648/oj.

[5] Commission Delegated Regulation (EU) 2022/2311 of 21 October 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards temporary emergency measures on collateral requirements (OJ L 307, 28.11.2022, p. 31, ELI: http://data.europa.eu/eli/reg_del/2022/2311/oj).

[6] Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties (OJ L 52, 23.2.2013, p. 41, ELI: http://data.europa.eu/eli/reg_del/2013/153/oj).

[7] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets (COM/2022/697 final).

before the outcome of the negotiations on the amendments to Regulation (EU) No 648/2012, and in particular the amendment to Article 46(1) of that Regulation, which concerns the treatment of guarantees, becomes known. The temporary measures enabling the use of such guarantees should therefore be extended for 6 months.

(3) Delegated Regulation (EU) No 153/2013 should therefore be amended accordingly.

(4) To ensure the smooth functioning of the Union financial and energy markets, this Regulation should enter into force as a matter of urgency.

(5) This Regulation is based on draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA), after consulting the European Banking Authority, the European Systemic Risk Board and the European System of Central Banks.

(6) ESMA has not conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, nor did it analyse the potential costs and benefits, as that would have been highly disproportionate to the scope and impact of the amendments to be adopted, taking into account the urgent nature and the limited scope of the proposed changes. Given the urgency, ESMA has not 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 Council[8]. The Securities and Markets Stakeholder Group will be informed thereof pursuant to that provision,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Delegated Regulation (EU) No 153/2013

Delegated Regulation (EU) No 153/2013 is amended as follows:

(1) in Article 39, the second paragraph is replaced by the following:

'Until … [*OP: please insert the date = 6 months after the date of entry into force of this Regulation*], for the purposes of Article 46(1) of Regulation (EU) No 648/2012, public guarantees that meet the conditions set out in Annex I shall be considered as highly liquid collateral.';

(2) in Article 62, second paragraph, the second sentence is replaced by the following:

'However, Section 2, paragraph 1, point (h), of Annex I shall not apply in respect of transactions on derivatives, as referred to in Article 2(4), points (b) and (d), of Regulation (EU) No 1227/2011 from 29 November 2022 to [*OP: please insert the date = 6 months after the date of entry into force of this Regulation*].';

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

Article 2

Entry into force

8 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, ELI: http://data.europa.eu/eli/reg/2010/1095/oj).

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, 28.11.2023

For the Commission
The President
Ursula VON DER LEYEN