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2017/0090 (COD)

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)

{SWD(2017) 148 final}

{SWD(2017) 149 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### 1.1. Reasons for and objectives of the proposal

In the wake of the financial crisis, the EU adopted in 2012 the European Market Infrastructure Regulation<sup>1</sup> (EMIR) to address the shortcomings observed in the functioning of the over-the-counter (OTC) derivatives market.

One of the key shortcomings was that regulators lacked information about activity in the OTC derivatives market; this meant that risks could remain unnoticed until they materialised. Moreover, counterparty credit risk between OTC derivative counterparties was often unmitigated, which could lead to losses materialising were one counterparty to default prior to fulfilling its obligations. Due to the high volumes of OTC transactions across the derivatives market and the interconnectedness of market participants, such losses could pose a broader threat to the financial system<sup>2</sup>.

These shortcomings led the G20 leaders in 2009 to commit to far-reaching measures to increase the stability of the OTC derivatives market, including that all standardised OTC derivatives contracts should be cleared through central counterparties (CCPs), and that OTC derivatives contracts should be reported to trade repositories (TRs).

EMIR implements the 2009 G20 commitment in the EU. The main objective of EMIR is to reduce systemic risk by increasing the transparency of the OTC derivatives market, by mitigating the counterparty credit risk and by reducing the operational risk associated with OTC derivatives. To that end, EMIR establishes core requirements on OTC derivatives, CCPs and TRs. They include:

1. Central clearing of standardised OTC derivative contracts;
2. Margin requirements for OTC derivative contracts that are not centrally cleared;
3. Operational risk mitigation requirements for OTC derivative contracts that are not centrally cleared;
4. Reporting obligations for derivative contracts;
5. Requirements for CCPs; and
6. Requirements for TRs.

Based on the first experience gathered more than four years after the entry into force of EMIR, the framework functions overall very well. Only in a limited number of areas, practical issues with the application of the new framework have arisen. The present proposal therefore sets out a number of targeted modifications of EMIR, in particular to simplify the rules and make them more proportionate. At the same time the proposal maintains all key elements of the framework which have proven to allow achieving the objectives of EMIR.

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<sup>1</sup> 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.

<sup>2</sup> Commission Staff Working Document Impact Assessment, accompanying document to the proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories. SEC(2010) 1059, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010SC1058>.

EMIR entered into force on 16 August 2012. However, most of the requirements did not immediately become applicable, as EMIR empowered the Commission to adopt delegated and implementing acts specifying the technical practicalities and the phase-in schedule of the core requirements. As a result, the requirements have entered into application in different stages. Some of them, such as mandatory clearing and margin requirements for uncleared derivatives, have only recently come into operation.

In accordance with Article 85(1) of EMIR, the Commission was mandated, by August 2015, to review EMIR and to prepare a general report for submission to the European Parliament and the Council.

From May to August 2015, the Commission carried out an extensive assessment of the rules currently in place to prepare the report and a possible legislative proposal. The assessment included a public consultation with more than 170 contributions from a broad range of stakeholders, as well as reports required under Article 85(1) of EMIR from the European Securities and Markets Authority (ESMA), the European Systemic Risk Board (ESRB), and the European System of Central Banks (ESCB). In addition, it was decided to wait to take into account the input to the Call for Evidence on the EU Regulatory framework for financial services carried out between September 2015 and January 2016, in order to get further evidence on the state of play of EMIR implementation.

In November 2016, the Commission adopted the EMIR report<sup>3</sup>. On the one hand, the report indicated that no fundamental change should be made to the nature of the core requirements of EMIR, which are integral to ensuring transparency and mitigating systemic risks in the derivatives market and for which there is general support from authorities and market participants. In addition, a comprehensive review of the impact of EMIR is not yet possible since certain core requirements provided for under EMIR have yet to be implemented or completed.

On the other hand, the report pointed to the possibility of amending EMIR in some specific areas so as to eliminate disproportionate costs and burdens on certain derivatives counterparties – especially non-financial counterparties (NFCs) – and to simplify rules without compromising the objectives of the legislation.

In light of the need to eliminate disproportionate costs and burdens to small companies, and to simplify rules without putting financial stability at risk, the EMIR review was included in the 2016 Commission's Regulatory Fitness and Performance programme (REFIT).<sup>4</sup>

As part of REFIT, the Commission assessed the extent to which specific policy requirements in EMIR have met their objectives in an efficient and effective way, while at the same time being coherent, relevant and providing EU added-value. The evaluation indicates that in some targeted areas EMIR imposes disproportionate costs and burdens and excessively complex requirements, and it would be possible to achieve the objective of EMIR to increase financial stability more efficiently. These areas include: (1) compliance for derivatives counterparties

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<sup>3</sup> Report from the Commission to the European Parliament and the Council under Article 85(1) of 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 COM(2016) 857 final of 23.11.2016. <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1480141638729&uri=COM:2016:857:FIN>.

<sup>4</sup> European Commission, REFIT and the 10 Priorities of the Commission, 25 October 2016. [http://ec.europa.eu/atwork/pdf/201621025\\_refit\\_scoreboard\\_summary\\_en.pdf](http://ec.europa.eu/atwork/pdf/201621025_refit_scoreboard_summary_en.pdf).

that are part of the periphery of the derivatives trading network (e.g. small financials, NFCs, pension funds); (2) Transparency; and (3) Access to clearing.

The impact assessment report accompanying this proposal therefore considers the costs and benefits of areas of EMIR where targeted action could ensure fulfilment of the EMIR objectives in a more proportionate, efficient and effective manner.

The impact assessment provides comprehensive evidence that a reduction of costs and burdens can be achieved hand-in-hand with a simplification of EMIR, without compromising financial stability. The proposed amendments contribute to the objectives of CMU and to the Jobs and Growth agenda in line with the political priorities of the Commission.

## **1.2. Consistency with existing policy provisions in the policy area**

EMIR is related to several pieces of EU legislation, including the Capital Requirements Regulation (CRR)<sup>5</sup>, the Markets in Financial Instruments Directive (MiFID I<sup>6</sup> and MiFID II<sup>7</sup>) and the related Regulation<sup>8</sup>, and the Commission's proposal on the recovery and resolution of CCPs<sup>9</sup>.

This proposal is consistent with the Commission's legislative proposal to amend Regulation (EU) No 575/2013<sup>10</sup>. As part of that proposal, the Commission aims to exclude from the binding leverage ratio the initial margins on centrally cleared derivative transactions received by institutions in cash from their clients and passed on to CCPs. The proposal to amend Regulation (EU) No 575/2013 will, therefore, ease the access to clearing as the capital requirements to offer client or indirect clearing services will diminish.

This proposal is also consistent with the MiFID I and MiFID II and the related Regulation, which provide a basis for the definition of derivatives and of financial counterparties. In this regard, the upcoming application in January 2018 of MiFID II and MiFIR will have an impact on the scope of counterparties considered as financial counterparties and on the harmonisation of the definition of foreign exchange (FX) contracts that will fall under EMIR. The MiFID II framework aims at reclassifying large non-financial commodities traders as financial counterparties, putting an 'ancillary activity test' that determines how much non-hedging (or speculative) commodity derivative trading non-financial firms can conduct before this activity

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<sup>5</sup> Regulation (EU) no 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, p.1).

<sup>6</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.1.2004, p.1).

<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> Proposal for a Regulation of the European Parliament and of the Council on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, and (EU) 2015/2365, COM(2016) 856 final.

<sup>10</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012.

is no longer deemed 'ancillary to the main business' of the firm and the firm be obliged to seek a MiFID authorisation. Hence the largest non-financial counterparties (NFC) active on commodity markets will be obliged to seek a MiFID authorisation. This development will lead to largest NFCs being subject to the clearing obligation under EMIR. Concerning the harmonisation of the definition of FX derivatives contracts, it will allow a uniform and consistent application of the EMIR rules to these contracts within the Union.

Furthermore, this proposal is consistent with the Commission proposal for a framework for the recovery and resolution of central counterparties. The obligation to clear standardised OTC derivatives is set to increase the scale and importance of CCPs in Europe and beyond. CCPs manage the risks inherent in financial markets (e.g. counterparty risk, liquidity risk and market risk), and therefore improve the overall stability and resilience of financial markets. In the process, they become critical nodes in the financial system, linking multiple financial actors and concentrating significant amounts of their exposure to diverse risks. Effective risk management of the CCP and robust supervisory oversight is therefore key to ensure that such exposures are adequately covered. EMIR does regulate CCPs in terms of making sure that CCPs are sufficiently resilient, but does not regulate the recovery and resolution scenarios. This proposal complements the proposed framework for the recovery and resolution of central counterparties by introducing the mechanism for a temporary suspension of clearing obligation in others situations than resolution.

This proposal is also consistent with the adopted Commission Delegated Regulation amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives<sup>11</sup>. This Delegated Regulation will prolong the compliance deadline for counterparties belonging to the 'Category 3' (small financial counterparties) defined in the relevant regulatory technical standards<sup>12</sup> until 21 June 2019 because of the significant difficulties these counterparties face to get access to clearing.

Finally, this proposal is consistent with work ongoing at an international level in the framework of the Financial Stability Board (FSB) aiming to, among others, (i) achieve a consistent application of the Principles for Financial Markets Infrastructure (PFMIs) developed by the Committee on Payments and Markets Infrastructure (CPMI) and the International Organisation of Securities Commissions (IOSCO); (ii) monitor the implementation of the G20 derivatives markets reforms (through the FSB OTC Derivatives Working Group); (iii) develop further guidelines on CCPs resolution (FSB Resolution Group); and (iv) harmonise and introduce greater standardisation into the OTC derivatives reporting systems (the FSB and CPMI-IOSCO Groups on removing legal barriers for

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<sup>11</sup> Commission Delegated Regulation (EU) .../...of 16.3.2017 amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives, C(2017) 1658 final.

<sup>12</sup> 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. 15).  
Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 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 103, 19.4.2016, p. 5).  
Commission Delegated Regulation (EU) 2016/1178 of 10 June 2016 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 195, 20.7.2016, p. 3).

regulators to the access to data or the creation of the Unique Transaction Identifier (UTI) and the Unit Product Identifier (UPI))

### **1.3. Consistency with other Union policies**

This proposal is related to and consistent with the ongoing initiative to establish a Capital Markets Union (CMU). 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.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **2.1. Legal basis**

The legal basis for this proposal is Article 114 TFEU, which is the legal basis for EMIR. The analysis carried out as part of the Impact Assessment report identifies that elements of EMIR need to be amended to eliminate disproportionate costs/burdens to some derivatives counterparties and to simplify rules without putting at risk financial stability. Only the co-legislators have the competence to make the necessary amendments.

### **2.2. Subsidiarity (for non-exclusive competence)**

EMIR as a regulation is binding in its entirety and directly applicable in all Member States. The objectives of EMIR to mitigate the risks and improve the transparency and standardisation of OTC derivative contracts by laying down uniform requirements for such contracts and for the performance of activities of CCPs and trade repositories cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of actions, be better achieved at Union level in accordance with the principle of subsidiarity as set out in Article 5 of the TFEU.

### **2.3. Proportionality**

The proposal aims to ensure that the objectives of EMIR are met in a more proportionate, effective and efficient manner. This results in simpler or reduced requirements of EMIR, with a view to reducing the administrative burden of the Regulation on stakeholders, in particular on smaller ones. Also, by recalibrating certain requirements of EMIR, the proposal contributes directly to making EMIR more proportionate overall. At the same time the proposal does not go beyond what is necessary to achieve the objectives, taking into account the need to monitor and to mitigate the risks of derivatives to the financial stability.

### **2.4. Choice of the instrument**

EMIR is a regulation and thus it needs to be amended by a regulation.

## **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

### **3.1. Ex-post evaluations/fitness checks of existing legislation**

The Impact Assessment accompanying this proposal contains an evaluation report on EMIR.

EMIR was included in the 2016 Commission's Regulatory Fitness and Performance programme (REFIT). This was due to the need to simplify targeted areas of EMIR and make them more proportionate, as evidenced by the contributions to the public consultation on EMIR and the Call for Evidence on financial regulation, as well as by the Commission's

review of the application of EMIR. In that context, the evaluation assessed to what extent specific policy requirements in EMIR have met their objectives and in particular whether these requirements have done so in an efficient and effective way, while at the same time being coherent, relevant and providing EU added-value.

Some of the core requirements of EMIR have only recently become applicable or are not applicable yet. There is therefore still a lack of adequate evidence and it is too early to draw a firm conclusion on long-term impacts. The assessment therefore did not constitute a full evaluation of EMIR. Instead, the evaluation assesses whether the core requirements of EMIR to report OTC derivatives, to centrally clear standardised OTC derivatives, and to subject uncleared OTC derivatives to risk-mitigation techniques and margins rules have met the operational requirements to: i) obtain complete and comprehensive information on OTC derivatives positions, ii) increase the use of CCP clearing, and iii) improve bilateral clearing practices. To the extent possible, the review analysed the performance of the relevant EMIR requirements in the context of five evaluation criteria: 1) efficiency; 2) effectiveness; 3) relevance; 4) coherence; and 5) added-value of EU action.

As to the effectiveness of the EMIR requirements to obtain complete and comprehensive information on OTC derivatives, to increase the use of CCP clearing, and to subject uncleared OTC derivatives to risk-mitigation techniques and to margins rules, this evaluation concludes that, while the initial results are satisfactory, there is room for simplifying the requirements without putting financial stability at risk. On reporting, the evaluation finds that there has been progress in the collection of information on the OTC derivatives market, but that the reporting requirements could be streamlined to improve the quality of the data reported and to make supervision more effective. On the clearing obligation, the evaluation concludes that, while there has been an increase in the share of OTC derivatives that are centrally cleared, there are a number of obstacles to access central clearing for certain market participants, and a need to introduce a mechanism to allow for the suspension of the clearing obligation on financial stability grounds.

As regards efficiency, the evaluation identifies specific areas where the requirements could be better calibrated to eliminate disproportionate costs/burdens related to certain transactions or to certain derivatives counterparties (i.e. small financial counterparties, non-financial counterparties, pension funds). In terms of relevance, the evaluation concludes that the core requirements of EMIR remain integral to international efforts to reform the global OTC derivatives market. Effective and efficient EMIR rules also contribute to achieving the Commission's ongoing initiative to establish a Capital Markets Union and to the Jobs and Growth agenda in line with the political priorities of the Commission.

EMIR is coherent with other pieces of EU legislation, as outlined in the follow-up to the Call for Evidence and in the Commission's proposed amendment to the Capital Requirements Regulation. In terms of the EU added value, EMIR covered a gap that existed in legislation by introducing a new framework aiming to address in a uniform process at EU level the lack of transparency of the OTC derivatives market and the related systemic risks.

### **3.2. Stakeholder consultations**

This proposal builds on a public consultation on EMIR review which took place in the period from May to August 2015. The consultation generated more than 170 contributions from a

broad range of stakeholders<sup>13</sup>. As part of the consultation, a public hearing was held in Brussels on 29 May 2015, and it gathered around 200 stakeholders<sup>14</sup>. Specific input was received from ESMA, European Systemic Risk Board and European System of Central Banks in line with the Commission's mandate to review EMIR. In a related area the Commission carried out a public consultation entitled Call for Evidence between September 2015 and January 2016. The consultation sought feedback, concrete examples and empirical evidence on the impact of EU regulatory framework for financial services. The respondents to the Call for Evidence also raised claims on EMIR<sup>15</sup>. A public hearing was held in Brussels on 17 May 2016<sup>16</sup>. On 7 December 2016, the Commission consulted the Member States experts on the different policy options in the areas identified in the report on the review of EMIR<sup>17</sup>.

Generally the objectives of EMIR of promoting transparency and standardisation in derivatives markets and reducing systemic risk through its core requirements were supported. These core requirements – central clearing, margin requirements, operational risk mitigation requirements, reporting and requirements for CCPs and trade repositories – were seen to be achieving the objectives of EMIR, and delivering on its international commitments for regulatory reform. However, the stakeholders highlighted a number of areas where EMIR requirements could be adjusted without compromising on its overall objectives in order to: (i) simplify and increase the efficiency of the requirements; and (ii) reduce disproportionate costs and burdens. The proposal takes this stakeholder feedback into account by introducing targeted amendments to EMIR, in particular by i) better calibrating the application of some requirements to specific actors, notably to small financial counterparties, non-financial counterparties and pension funds, ii) removing obstacles to clearing and iii) simplifying the rules, including reporting requirements. A number of stakeholders' requests could not be reflected in the proposal because of the need to ensure EMIR continues to achieve its objectives to promote transparency and standardisation in derivatives markets as well as to reduce systemic risk, because of institutional constraints or because of the REFIT nature of the proposal. Other EMIR related issues might need to be further assessed and developed in due time taking into consideration future developments.

### 3.3. Impact Assessment

The Commission conducted an impact assessment (IA) of relevant policy alternatives. Policy options were assessed against the key objectives to increase proportionality of rules that lead to unnecessary administrative burden and compliance costs without putting financial stability at risk and to increase the transparency of OTC derivatives positions and exposures.

The impact assessment was approved by the Regulatory Scrutiny Board (RSB) on 16 February 2017. It had been submitted to the RSB on 1 February, but the RSB made a number of recommendations for improvements and thus the IA was resubmitted on 8 February to the RSB. The modifications introduced in the IA to take into consideration the recommendations by the RSB were the following:

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<sup>13</sup> The consultation and the summary of the responses can be found at [http://ec.europa.eu/finance/consultations/2015/emir-revision/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/emir-revision/index_en.htm).

<sup>14</sup> Information can be found at [http://ec.europa.eu/finance/events/2015/0529-emir-revision/index\\_en.htm](http://ec.europa.eu/finance/events/2015/0529-emir-revision/index_en.htm).

<sup>15</sup> The consultation can be found at [http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm).

<sup>16</sup> Further information can be found at [http://ec.europa.eu/finance/events/2016/0517-call-for-evidence/index\\_en.htm](http://ec.europa.eu/finance/events/2016/0517-call-for-evidence/index_en.htm).

<sup>17</sup> Further information can be found at <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=30153&no=2>.

1. Problem definition. Introduction of a better description of the overall Union legal framework applying to derivatives markets and the implementation of the G20 OTC derivatives reforms by other jurisdictions. Inclusion of the main elements of the evaluation annex in the main body of the impact assessment. Reference to additional qualitative and quantitative evidence in the description of the problems in order to illustrate their magnitude, especially for small market players. Explanation why not all issues raised by stakeholders have been assessed.

2. Political trade-offs. Explicit reference to financial stability in the policy options for the assessment of the trade-off between the potential burden reductions for market players and the potential risks associated to financial stability.

3. Calculating burden reduction. Inclusion of some quantitative data for the calculation of the burden reductions for different market players, taking into consideration the existing limitations to quantify the overall burden reduction. Insertion of the main underlying assumptions behind cost estimates in the body of the report, together with additional caveats on the reliability of the estimates. Description of the costs which are not quantified.

4. Options. Streamlining of the options to present alternative packages of measures.

The options considered in the impact assessment concern targeted adjustments of specific provisions in EMIR. To achieve the desired objectives, a number of preferred policy options were identified:

- Pension Scheme Arrangements (PSAs) should be provided with a new transitional exemption from the clearing obligation, on the ground that no viable technical solution facilitating the participation of PSAs in central clearing has emerged to date. In contrast to the other options assessed, this will give CCPs, clearing members and PSAs more time to explore technical solutions and measures to facilitate them, while adhering to the objective of EMIR that the aim for PSAs remains central clearing as soon as this is feasible.
- A better calibration of the rules on the qualification of non-financial counterparties (NFCs) subject to clearing and margin requirements should be ensured by better taking into consideration the nature of the derivatives transactions NFCs are entering into for which clearing should be mandatory. This will reduce costs to certain NFCs and will not raise concerns from a financial stability perspective. At the same time, certain counterparties that are currently considered NFCs but which due to the nature of their activities are financial counterparties (for example investment funds under national frameworks) will be included in the definition of a financial counterparty and will therefore not any longer be treated as NFCs.
- The category of small financial counterparties (SFCs) should be defined in such a way that very small financial counterparties for which central clearing is not economically feasible because of their small volume of activity are not subject to the clearing obligation. This will lighten the burden on those SFCs that deal with a small volume of derivatives, while keeping the rest of the small financial counterparties (those belonging to the 'Category 3' defined in the relevant regulatory technical standards) obliged to clear once the phase-in period set in the regulatory technical standards ends, thus maintaining incentives for CCPs, clearing members and their clients to develop solutions to on-board this type of small financial counterparties.

- The obligation to report historic data ('backloading') should be removed. This will significantly reduce costs and burdens on counterparties and eliminate the potentially insurmountable obstacle of having to report data which may simply not be available without compromising prudential needs. At the same time, compared to the status quo, this will result only in a very limited loss of data compared to the currently applicable rules.
- Intragroup transactions involving any NFCs should be exempted from the reporting obligation. Given the nature and limited volume of such trades, this has the advantage of significantly reducing the costs and burdens of reporting for those counterparties that are the most disproportionately affected by the requirement, while the resulting very limited loss of data will not significantly affect authorities' ability to monitor systemic risk in the OTC derivative markets.
- For exchange-traded derivatives transactions ('ETDs') single-sided reporting by the central counterparties should be introduced. This has the advantage that the reporting of ETDs will be greatly simplified without adversely impacting the transparency of the derivatives market. While CCPs will face a slightly higher burden, they are well equipped for this task and the overall reporting burden will decrease as the reporting requirement concerning ETDs will be eliminated for all other counterparties.
- For transactions other than ETD transactions, the responsibility, including the legal liability, for reporting transactions between a small NFC (i.e. not subject to the clearing obligation) and a financial counterparty should be on the financial counterparty to the trade. This will significantly reduce the burden of reporting for small NFCs, for whom this burden is most significant, without leading to any loss of data. This will also introduce in EMIR very similar reporting rules to those contained in Regulation (EU) No 2015/2365 of the European Parliament and of the Council on Securities Financing Transactions ('SFTR').
- The reporting rules and procedures should be further harmonised and trade repositories should be required to ensure the quality of data. This will help increase the transparency of OTC derivative markets, facilitate the task of the relevant authorities of monitoring systemic risk, and maintain to the extent possible alignment with international standards in this field. In the medium and long run this approach will also increase the proportionality of the reporting rules and reduce costs and burdens.
- The upper limit of basic amount of fines for infringements of EMIR requirements by trade repositories should be increased. The advantage of this option is the increased efficiency and dissuasive effect of the fines which is considered to be necessary by regulators to incentivise the good quality of the data while ensuring the proportionality of the rules.
- The interaction between EMIR default management tools and national insolvency laws should be clarified to ensure the insolvency remoteness of client assets.
- The principle to provide clearing services under Fair, Reasonable And Non-Discriminatory commercial terms ('FRAND' principle) be introduced in EMIR. These measures tackle different hurdles to access to clearing; the potential additional regulatory burden is justified by the public interest in making central clearing work and the clearing obligation being obeyed.

The impact assessment also considered the overall costs and benefits of the preferred options, with a view to reducing compliance costs and the burden imposed on market participants, without compromising financial stability.

While EMIR pursues the general objective of reducing the systemic risk by increasing the safety and efficiency of the OTC derivatives market, the present initiative aims to render the application of EMIR more effective and efficient and, by better calibrating certain requirements, to reduce the regulatory and compliance burden for market participants where compliance costs outweigh prudential benefits, nonetheless without endangering financial stability. This is in line with the Commission's Better Regulation Agenda.

While there are a number of limitations in calculating the exact amount of cost reductions, the impact assessment estimates that the combined effect of all preferred options, calculated solely for the purpose of the impact assessment, amount to cost reductions ranging from EUR 2.3 billion to EUR 6.9 billion in fixed (one-off) costs and from EUR 1.1 billion to EUR 2.66 billion in operational costs. Annex 8 of the impact assessment presents in detail the underlying assumptions that led to these estimates and the limitations affecting their reliability. Key challenges in quantifying cost reductions mainly related to the fact that most EMIR requirements have started to apply recently (e.g. clearing obligations and margin requirements), and that some have not yet started to apply (e.g. clearing obligation for Category 3 financial counterparties). Therefore, the estimated cost reductions rely on a limited amount of publicly available data and anecdotal market evidence, which may not accurately capture the diversity and the specificity of the counterparties at play. This also means that the estimated cost reductions are valid only at the current point in time. Finally, as calculations have focused on cost reductions, some minimal adjustment costs have not been quantified. These have however been described qualitatively in detail in Annex 7 of the impact assessment.

Overall, businesses, SMEs, and micro-enterprises will, in particular, benefit from (i) reducing regulatory requirements in cases where disproportionate compliance costs appear to outweigh prudential benefits and (ii) improving access to clearing. The simplification of reporting requirements will benefit all counterparties, including SMEs. In addition, small NFCs will benefit from the reporting of the transactions by the financial counterparty to the trade. Finally, introducing new FRAND principles will make it easier to find access to clearing for many counterparties.

Section 6 of the impact assessment provides a break-down of the distribution of cost reduction/minimal adjustment costs, covering all counterparties.

First, with regard to the scope of the clearing requirements, greater proportionality in the application of clearing rules will benefit NFCs as the envisaged measures will ensure a better level-playing field in the qualification of NFCs subject to clearing and margin requirements, protecting them from additional fixed costs ranging from between EUR 9.6 million to EUR 26.7 million. A re-calibration of what constitutes an SFC that would be subject to the clearing obligation will allow (very) small financial counterparties for which central clearing is not economically feasible to avoid estimated costs ranging from EUR 509.7 million to EUR 1.4 billion. Pension Scheme Arrangements, and indirectly policy holders, will benefit from a new transitional clearing exemption on the grounds that no viable technical clearing solution has emerged to date. It is estimated that the avoided operational costs should reach between EUR 780 million and 1.56 billion. In addition, following changes to the scope of reporting requirements, all reporting counterparties are expected to benefit from the lightening of

certain reporting requirements, such as the removal of the 'backloading' obligation and the ETD reporting. In particular, the exemption from the reporting obligation of intragroup transactions in which one of the counterparties is an NFC and the exemption of the obligation of small NFCs also to report transactions between themselves and financial counterparties are expected to reduce EMIR-related compliance costs for the 'real economy'. The ballpark estimate of the total reduction in EMIR-related compliance costs for corporates range from EUR 350 million to 1.1 billion for operational costs, and from EUR 1.8 billion to EUR 5.3 billion for fixed costs.

Second, greater transparency of OTC derivatives positions and exposures will enable authorities to identify any potential problems at an earlier stage and to take timely action addressing any risks, thus benefitting the resilience of financial markets, at minimal adjustment costs for counterparties and trade repositories.

Third, improved access to clearing will allow additional market participants, in particular from the "real economy", to manage and hedge their risks and, by reducing the likelihood of sudden shocks and business disruptions occurring, contribute to a less volatile business development and job security of their employees. In particular, corporates that will continue to be subject to the clearing obligation because of their systemic risk profile should benefit from a fixed cost reduction ranging from EUR 24.8 million to EUR 69.5 million. Likewise, the estimated benefits for systemic small financials from an improved access to clearing should reach EUR 32.6 million to EUR 91.3 million when the clearing obligation applies. These estimated cost reductions will therefore free up further investment opportunities, benefiting the objectives of the Capital Markets Union and the Commission's Growth and Jobs agenda.

Overall, there should be no significant relevant social and economic cost. The envisaged simplification and increased proportionality of rules on reporting will allow achieving the objectives of EMIR while considerably reducing the overall administrative burden borne by counterparties that are subject to reporting requirements under EMIR. Concerning the modification of responsibility for the reporting obligation, the entities that should take on the reporting obligation in the future are better equipped for this task and, due to the economies of scale involved, the relevant overall aggregate costs should decrease. In particular, CCPs will face minimal adjustment costs relating to the need to introduce ETD reporting. However, as CCPs already have a significant amount of data concerning these transactions in their possession and are already required to report all centrally-cleared derivative transactions under EMIR, the additional burden placed on CCPs would be limited. Additional measures to harmonise the calculation of the thresholds for clearing and the further harmonisation of reporting rules and procedures may at most involve some limited adjustment administrative costs, in particular for trade repositories, in the initial stages of implementation, but should lead to greater efficiencies and reduce the overall burden in the mid-term and long-term. With regard to trade repositories, as they would have to implement adequate procedures in any case to meet requirements pursuant to the Securities Financing Transactions Regulation, the policy action under EMIR considered in this impact assessment would not create a considerable additional burden. Similarly, a requirement to observe fair, reasonable and non-discriminatory commercial terms in the provision of clearing services, which will benefit many counterparties, is expected to involve only limited additional administrative costs for clearing members.

### **3.4. Fundamental rights**

The proposal is not likely to have a direct impact on the rights listed in the main UN conventions on human rights, the Charter of Fundamental Rights of the European Union which is an integral part of the EU Treaties, and the European Convention on Human Rights ('ECHR').

## **4. BUDGETARY IMPLICATIONS**

The proposal will have no implications for the budget of the Union.

The present proposal would require ESMA to update or develop five technical standards. The delivery of technical standards is due 9 months after the entry into force of the Regulation. The proposed tasks for ESMA will not require the establishment of additional posts and can be carried out with existing resources.

## **5. OTHER ELEMENTS**

### **5.1. Implementation plans and monitoring, evaluation and reporting arrangements**

The proposal includes a clause according to which an evaluation of EMIR in its entirety should be carried out, with a particular focus on its effectiveness and efficiency in meeting EMIR's original objectives with ESMA reporting on some specific elements:

- whether viable solutions have been developed to facilitate the participation of PSAs in central clearing and their impact on the level of central clearing by PSAs;
- the impact of the proposed solutions on the level of clearing by NFCs as well as an examination of the distribution of clearing within the NFC counterparty class especially with regard to the appropriateness of the clearing threshold(s);
- the impact of the proposed solutions on the level of clearing by small financials as well as an examination of the distribution of clearing within the small financial counterparty class especially with regard to the appropriateness of the clearing threshold(s);
- the quality of the transaction data reported to trade repositories, the accessibility of those data, and the quality of the information received from trade repositories;
- the accessibility of clearing to all counterparties.

In principle, this evaluation should take place at the latest 3 years after the application of the amendments brought by this proposal. In certain cases, notably for PSAs, it is important to monitor progress in the availability of solutions for PSAs' clearing on an ongoing basis.

### **5.2. Detailed explanation of the specific provisions of the proposal**

#### **Amendments to the clearing obligation (EMIR Articles 2, 4, new 4a, new 6b, 10, 85 and 89)**

##### *Financial counterparties*

Point (a) of Article 1(2) of this proposal amends point (a) of Article 4(1) of EMIR so that the conditions for the OTC derivative contracts to become subject to the clearing obligation when a counterparty is a financial counterparty are specified in the second subparagraph of the new Article 4a(1). This new Article is inserted by Article 1(3) of this proposal. The second subparagraph of the new Article 4a(1) sets clearing thresholds for contracts concluded by financial counterparties by referring to the clearing thresholds set out by virtue of point (b) of Article 10(4), thus the clearing thresholds are the same as for non-financial counterparties. Point (b) of the second subparagraph of the new Article 4a(1) specifies that the excess of one of the

values set for a class of OTC derivatives triggers the clearing obligation for all asset classes. The new Article 4a(1) furthermore explains the way the clearing thresholds are calculated. A financial counterparty becomes subject to the clearing obligation if its aggregate month-end average position for the months March, April and May exceeds the clearing thresholds. This corresponds to the calculation of clearing thresholds by non-financial counterparties.

Finally, in order to ensure that the definition covers all entities which due to the nature of their activities are financial counterparties, Article 1(1) brings into the definition of a financial counterparty contained in EMIR Article 2 alternative investment funds registered under national law that are currently considered non-financial counterparties under EMIR, Central Securities Depositories, and Securitisation Special Purpose Entities. These entities will thus be treated as financial counterparties under EMIR.

#### *Non-financial counterparties*

Article 1(8) amends paragraphs 1 and 2 of EMIR Article 10. The amended paragraph 1 changes the way the clearing thresholds are calculated. A non-financial counterparty becomes subject to the clearing obligation if its aggregate month-end average position for the months March, April and May exceeds the clearing thresholds, instead of if the rolling average position over 30 working days exceeds the thresholds which is the case under the current EMIR rules. The reference to paragraph 3 means that the current hedging exemption is retained so only those OTC derivative contracts which are not objectively measurable as reducing risks directly relation to the commercial activity or treasury financing activity are calculated to the thresholds.

The point (b) of the second subparagraph of paragraph 1 specifies that the clearing obligation applies only for the asset class or asset classes for which the clearing threshold has been exceeded and for which a clearing obligation exists.

#### *Pension Scheme Arrangements*

Article 1(20) replaces the first subparagraph of paragraph 1 of EMIR Article 89 in order to extend by three years the temporary exemption from the clearing obligation of pension scheme arrangements, in the absence of a viable technical solution for the transfer by pension scheme arrangements of non-cash collateral as variation margins. Point (b) of Article 1(19) replaces paragraph 2 of EMIR Article 85 and sets out under points (a), (b), (c), (d), (e) and (f) the criteria that the Commission shall assess and address in a report on the progress towards viable technical solutions, with input from ESMA, EIOPA, EBA and the ESRB. While various factors have so far prevented such solutions to be developed, the Commission considers it feasible to develop viable technical solutions within three years after the adoption of the proposal, and expects markets participants to work on the basis of that timeline. This is also supported by the expectation that some regulatory disincentives for making clearing services available more broadly (for example the introduction of capital requirements based on the leverage ratio) will be tackled during that period. Only for the unlikely case of some unforeseen developments of a significant nature, the Commission is granted the power to extend the derogation once by two years by means of a delegated act if carefully assessed circumstances justify this.

#### *Removal of the frontloading requirement*

Point (b) of Article 1(2) removes the requirement laid down in point (ii) of point (b) of EMIR Article 4(1) to clear OTC derivative contracts entered into or novated on or after notification by a competent authority to ESMA on an authorisation of a CCP to clear a class of OTC derivatives but before the date from which the clearing obligation takes effect if the contracts have a remaining maturity higher than the minimum remaining maturity determined in a Commission Delegated Regulation on clearing obligations under Article 5(2)(c).

### *Suspension of clearing obligation*

Article 1(6) inserts to EMIR a new Article 6b that gives the Commission the power, on specific grounds, to temporarily suspend any clearing obligation on the basis of a request of ESMA and lays down the procedure for the suspension. As also pointed out by ESMA, this power is needed since in certain specific circumstances, continued application of the clearing obligation may be impossible (for example because the CCP(s) clearing the biggest portion of a certain OTC derivatives class may exit that market) or may have adverse effects for financial stability (for example because the clearing obligation would impede bilateral hedging for counterparties without access to the centrally cleared market). Such developments may occur unexpectedly, and the current procedure for the removal of a clearing obligation that would require the amendment of a regulatory technical standard, can be too slow to respond to the changing market circumstances or financial stability concerns. The new power is subject to tightly framed conditions, and the suspension would be limited in time. The procedure to permanently remove the clearing obligation remains unchanged, and this will always require an amendment of a regulatory technical standard.

### **Amendments with a view to incentivise clearing and to increase access to it (EMIR Articles 4 and 39)**

Point (c) of Article 1(2) introduces a new paragraph 3a to EMIR Article 4(3) according to which clearing members and their clients who provide clearing services to other counterparties or offer their clients the possibility to provide such services to other counterparties to do so under fair, reasonable and non-discriminatory commercial terms. The Commission is empowered through delegated acts to specify what are fair, reasonable and non-discriminatory terms.

Article 1(11) inserts a new paragraph to EMIR Article 39 to clarify that assets covering the positions recorded in an account are not part of the insolvency estate of the CCP or clearing member that keeps separate records and accounts. This provision offers certitude to those who provide clearing services or offer their clients the possibility to provide such services that they can fulfil their commitments with regard to the EMIR default management procedures. This incentivises them to provide access to central clearing of OTC derivatives contracts as a service. Equally the provisions offer certitude to clients and indirect clients that in the case of default of a clearing member or a client providing clearing services, their assets are protected and can, thus, be ported to other clearing members or clients that provide indirect clearing services. This gives further incentive for central clearing.

### **Amendments to requirements for CCPs' transparency (EMIR Article 38)**

Article 1(10) adds paragraphs 6 and 7 to EMIR Article 38 so that CCPs are required to provide their clearing members with tools to simulate their initial margin requirements (paragraph 6) as well as with a detailed overview of the characteristics of the initial margin models they use (paragraph 7).

### **Amendments to the risk-mitigation techniques for OTC derivative contracts not cleared by a CCP (EMIR Article 11)**

To avoid inconsistencies across the Union in the application of the risk mitigation techniques, Article 1(9) gives a mandate to ESAs to develop draft regulatory technical standards in order to specify the procedure for the a priori supervisory approval of the risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral, and of significant changes to the risk-management procedures.

### **Amendments to the reporting obligation (EMIR Article 9)**

Point (a) of Article 1(7) removes the requirement in EMIR Article 9(1) to report historic transactions, i.e. transactions that were not outstanding on the starting date of the reporting obligation on 12 February 2014. It furthermore introduces a provision to EMIR Article 9(1) to the

effect that intragroup transactions where one of the counterparties is a non-financial counterparty are exempted from the reporting obligation.

Point (b) of Article 1(7) inserts a new paragraph 1a to Article 9. This new paragraph 1a lays down rules on the reporting obligation in some specific cases establishing who is responsible for reporting including for any liability arising therefrom:

- for transactions that are not OTC derivatives transactions (exchange-traded transactions), the CCP is responsible, and legally liable, for reporting on behalf of both counterparties.
- for transactions between a financial counterparty and a non-financial counterparty not subject to clearing obligation, the financial counterparty is responsible, and legally liable for reporting on behalf of both counterparties to the transaction;
- the management company that manages a UCITS that is a counterparty to an OTC derivative contract is responsible, and legally liable, for reporting on behalf of that UCITS;
- the manager is responsible, and legally liable, for the reporting on behalf of an alternative investment fund (AIF) that is a counterparty to an OTC derivative contract.

In any case counterparties and CCPs have to ensure that the details of the derivative contracts are reported without duplication. Also, they may delegate the reporting obligation.

Point (c) of Article 1(7) expands the mandate for ESMA to develop technical standards to allow for the further harmonisation of the reporting rules and requirements, in particular the data standards, methods, and arrangements for reporting.

#### **Amendments to ensure the quality of data (EMIR Articles 78 and 81)**

Article 1(16) adds to the general requirements for trade repositories in EMIR Article 78 the requirements to have adequate procedures for the reconciliation of data between trade repositories; to have adequate procedures to ensure the quality of the reported data; and to establish adequate policies for the orderly transfer of data to other trade repositories where this is requested by an undertaking subject to the reporting obligation under Article 9 or required for any other reason. Furthermore, ESMA is mandated to develop procedures to be applied by the trade repository for the validation of the reported data as to its completeness and accuracy and for the reconciliation of data between trade repositories.

Point (b) of Article 1(17) adds a new paragraph 3a to EMIR Article 81 requiring trade repositories to grant counterparties access to all data reported on their behalf in order to allow for a verification of its accuracy.

#### **Amendments to the registration of trade repositories (EMIR Articles 56 and 72)**

Point (a) of Article 1(12) amends EMIR Article 56 by introducing the possibility to submit a simplified application for an extension of registration for trade repositories that are already registered under the Securities Financing Transactions Regulation. Points (b) and (c) of Article 1(12) give ESMA a mandate to develop technical standards for a simplified application for an extension of registration to avoid duplicate procedures. Article 1(14) inserts a consequent change to Article 72(1) on the fees when a trade repository is already registered under SFTR.

#### **Amendments to the supervision of trade repositories (EMIR Article 65 and Annex I)**

The fines ESMA can impose on trade depositories it directly supervises need to be effective, proportionate and dissuasive to ensure the effectiveness of ESMA's supervisory powers. Article 1(13) therefore amends EMIR Article 65(2) by increasing the upper limit of the basic amount of fines ESMA can impose on trade repositories to 100 000 or 200 000 depending on the

infringement. Furthermore, the amendment introduces the missing basic amounts of fines for the infringements relating to obstacles to the supervisory activities, referred to in Section IV of Annex I. For these infringements the amount of fines is proposed to be at least EUR 5 000 and not to exceed EUR 10 000.

Article 1(21) amends the Annex I to the Regulation by inserting to the list of infringements contained therein infringements corresponding to the new general requirements for the trade repositories enshrined in new paragraph 9 of EMIR Article 78 and the infringement contained in Article 55(4) when a trade repository does not notify ESMA in due time of material changes to the condition of its initial registration.

#### **Amendments to the requirements for data availability in trade repositories (EMIR Article 76a and 81)**

Article 1(15) inserts a new Article 76a in EMIR. Authorities in third countries that have trade repositories are granted direct access to the data held in Union trade depositories if the Commission has adopted an implementing act declaring that in the third country the (a) trade repositories are duly authorised, (b) effective supervision and enforcement of trade repositories takes place on an ongoing basis; (c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and they are at least equivalent to those set out in this Regulation; and (d) that trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to give direct and immediate access to the data to the relevant Union authorities. Article 1(17) introduces a change to EMIR Article 81 regarding the list of entities to which trade repositories have to make information available to enable them to fulfil their respective responsibilities and mandates. These changes are necessary to respond to the recommendation presented in the FSB thematic peer review of OTC derivative trade reporting in November 2015 that all jurisdictions should, by June 2018 at the latest, have a legal framework to permit access by both domestic and foreign authorities to data held in a domestic TR. At the same time, it is in the clear interest of Union public authorities to have access to data held by third country TRs in order to have a full picture of global derivatives markets. The change is targeted and limited to mutual access to data for public authorities.

Point (b) of Article 1(17) introduces a new requirement on TRs to provide access to counterparties and CCPs which have delegated their reporting obligations to the data reported on their behalf.

Point (c) of Article 1(17) extends the mandate given to ESMA under EMIR Article 81(5) to develop draft regulatory technical standards to specify and harmonise the terms and conditions, arrangements, and documentation on the basis of which trade repositories are to grant direct and immediate access to the entities referred to in Article 81(3).

#### **Evaluation clause (EMIR Article 85)**

Article 1(19) introduces a mandate for the Commission to evaluate EMIR and prepare a general report to be submitted the report to the European Parliament and the Council, together with any appropriate proposals.

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<sup>18</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>19</sup>,

Acting in accordance with the ordinary legislative procedure<sup>20</sup>,

Whereas:

- (1) Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>21</sup> 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

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<sup>18</sup> OJ C [...], [...], p. [...].

<sup>19</sup> OJ C [...], [...], p. [...].

<sup>20</sup> Position of the European Parliament of ... (OJ ...) and decision of the Council of ...

<sup>21</sup> 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).

the most efficient way, and aims in particular at reducing regulatory and administrative burdens.

- (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.
- (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) Financial counterparties with a volume of activity in OTC derivatives markets that is too low to present an important systemic risk for the financial system and is too low for central clearing to be economically viable 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 financial counterparty 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, while retaining their requirement to exchange collateral when any of the clearing thresholds is exceeded.
- (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 and non-discriminatory 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. Intragroup transactions where at least one of the counterparties is a non-financial counterparty should therefore be exempted from the reporting obligation.
- (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. Moreover, since Regulation (EU) No 600/2014 of the European Parliament and of the Council<sup>22</sup> requires every ETD to be cleared by a CCP, CCPs already hold the vast majority of the details of those contracts. To reduce the burden of reporting ETDs, the responsibility, including any legal liability, for reporting ETDs on behalf of both counterparties should fall on the CCP as well as for ensuring the accuracy of the details reported.
- (14) To reduce the burden of reporting for small non-financial counterparties, the financial counterparty should be responsible, and legally liable, for reporting on behalf of both

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<sup>22</sup> 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).

itself and the non-financial counterparty that is not subject to the clearing obligation with regard to OTC derivative contracts entered into by that non-financial counterparty as well as for ensuring the accuracy of the details reported.

- (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.
- (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<sup>23</sup> and the public quantitative disclosure standards for central counterparties published in 2015<sup>24</sup>, 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

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<sup>23</sup> <http://www.bis.org/cpmi/publ/d106.pdf>

<sup>24</sup> <http://www.bis.org/cpmi/publ/d125.pdf>

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<sup>25</sup> 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 derivatives contracts.
- (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) No 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.
- (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 three years. 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

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<sup>25</sup> Regulation (EU) No 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).

developments such as changes to the type of financial counterparty that is subject to the clearing obligation. In order to cater for developments not foreseen at the time of adoption of this regulation, the Commission should be empowered to extend that derogation for additional two years, after having carefully assessed the need for such an extension.

- (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 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<sup>26</sup>.
- (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<sup>27</sup>, Regulation (EU) No 1094/2010 of the Parliament and of the Council<sup>28</sup> and Regulation (EU) No 1095/2010 of the Parliament and of the Council<sup>29</sup>.
- (28) The Commission should also be empowered to adopt implementing technical standards developed by ESMA by means of implementing acts pursuant to Article 291

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<sup>26</sup> 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).

<sup>27</sup> 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).

<sup>28</sup> 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).

<sup>29</sup> 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).

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<sup>30</sup> and delivered an opinion on [...].
- (32) Regulation (EU) No 648/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

#### *Article 1*

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

- (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/EC of the European Parliament and of the Council<sup>31</sup>, a credit institution authorised in accordance with Regulation (EU) No 575/2013, an insurance of reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council<sup>32</sup>, a UCITS authorised in accordance with Directive 2009/65/EC, 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, a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of

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<sup>30</sup> 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).

<sup>31</sup> 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).

<sup>32</sup> 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).

the Council<sup>33</sup> and a securitisation special purpose entity as defined in Article 4(1)(66) of Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>34</sup>."

(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 on, or after, the date from which the clearing obligation takes effect.";

(c) the following paragraph 3a is inserted:

"3a. Clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable and non-discriminatory commercial terms.

The Commission shall be empowered to adopt a delegated act in accordance with Article 82 to specify the conditions under which commercial terms referred to in the first subparagraph are considered to be fair, reasonable and non-discriminatory.";

(3) The following Article 4a is inserted:

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<sup>33</sup> 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).

<sup>34</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms (OJ L 176, 27.6.2013, p. 1).

*“Article 4a*

*Financial counterparties subject to a clearing obligation*

1. A financial counterparty taking positions in OTC derivative contracts shall calculate, annually, its aggregate month-end average position for the months March, April and May in accordance with paragraph 3.

Where 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;
- (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 months March, April and May of a given year 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 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;
- (5) In Article 6(2), point (e) is deleted;
- (6) The following Article 6b is inserted:

*“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 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 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.

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.
4. The Commission's decision to suspend the clearing obligation shall be communicated to ESMA and 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 of three months from the date of the publication of that suspension in the Official Journal of the European Union.
6. The Commission, after consulting ESMA, may extend the suspension referred to in paragraph 5 for additional periods of three months, with the total period of the suspension not exceeding twelve months. 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 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. Counterparties 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:

- (a) were entered into before 12 February 2014 and remain outstanding on that date;
- (b) were entered into on or after 12 February 2014.

The reporting obligation shall not apply to intragroup transactions referred to in Article 3 where one of the counterparties is a non-financial counterparty.";

(b) the following paragraph 1a is inserted:

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

- (a) CCPs shall be responsible for reporting on behalf of both counterparties the details of derivative contracts that are not OTC derivative contracts as well as for ensuring the accuracy of the details reported;

- (b) financial counterparties shall be responsible for reporting on behalf of both counterparties the details of OTC derivative contracts concluded with a non-financial counterparty that is not subject to the conditions referred to in the second subparagraph of Article 10(1) as well as for ensuring the accuracy of the details reported;
- (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 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.";

- (c) paragraph 6 is replaced by the following:

"6. To ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall 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 *[PO please insert the date 9 months after the entry into force of this 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.";

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\* 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 and 2 are replaced by the following:

“1. A non-financial counterparty taking positions in OTC derivative contracts shall calculate, annually, its aggregate month-end average position for the months March, April and May in accordance with paragraph 3.

Where the result of that calculation 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) 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;
- (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 months March, April and May of a given year 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.”;

(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 *[PO please insert the date 9 months after the entry into force of this 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. Where the requirement referred to in paragraph 9 is satisfied, the assets and positions recorded in those accounts shall not be considered part of the insolvency estate of the CCP or the clearing member.”;

(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 *[PO please insert the date 9 months after the entry into force of this 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 *[PO please insert the date 9 months after the entry into force of this 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.”;

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

(a) in point (a), “EUR 20 000” is replaced by “EUR 200 000”;

(b) in point (b), “EUR 10 000” is replaced by “EUR 100 000”;

(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.”;

(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 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 *[PO please insert the date 9 months after the entry into force of this 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 [*PO please insert the date 9 months after the entry into force of this 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 [*PO please add the date of the latest date of entry into application + 3 years*] 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.

(b) paragraph 2 is replaced by the following:

“2. By *[PO please add date of entry into force + 2 years]*, 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 *[PO please add date of entry into force + 18 months]*, 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 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;
- (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 *[PO please add 6 months before the date referred to in paragraph 1]* ESMA shall report to the Commission on the following:

- (a) whether viable technical solutions have been developed that facilitate the participation of PSAs in central clearing and the impact of those solutions on the level of central clearing by PSAs, taking into account the report referred to in paragraph 2;
- (b) the impact of this Regulation on the level of clearing by non-financial counterparties and the distribution of clearing within the non-financial counterparty class, especially with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);

- (c) the impact of this Regulation on the level of clearing by financial counterparties other than those subject to Article 4a(2) and the distribution of clearing within that financial counterparty class, especially with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);
  - (d) the improvement of the quality of transaction data reported to trade repositories, the accessibility of those data and the quality of the information received from trade repositories in accordance with Article 81;
  - (e) the accessibility of clearing by counterparties.”;
- (20) In Article 89, the first subparagraph of paragraph 1 is replaced by the following:
- “1. Until [*PO please add date of entry into force + 3 years*], 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.”;
- (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*.

Article 1(3), Article 1(7)(d), and paragraphs 8, 10, and 11 of Article 1 shall apply from [*PO please add the date 6 months after the entry into force*] 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 [*PO please add the date 18 months after the entry into force*].

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

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*