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MOTION FOR A RESOLUTION

pursuant to Rule 87a(3) of the Rules of Procedure

on the Commission delegated regulations of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (C(2012)9593) and on requirements for central counterparties (C(2012)9623)

Committee on Economic and Monetary Affairs

Rapporteur: Werner Langen

European Parliament resolution on the Commission delegated regulations of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (C(2012)9593) and on requirements for central counterparties (C(2012)9623)

The European Parliament,

- having regard to the Commission delegated regulations C(2012)9593 and C(2012)9623,
- having regard to Article 290 of the Treaty on the Functioning of the European Union,
- having regard to 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)¹,
- having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories²,
- having regard to the draft regulatory technical standards submitted on 27 September 2012 by the European Securities and Markets Authority pursuant to Article 4(4), Article 5(1), Article 6(4), Article 8(5), Article 10(4), Article 11(14), Article 25(8), Article 26(9), Article 29(4), Article 34(3), Article 41(5), Article 42(5), Article 44(2), Article 45(5), Article 46(3), Article 47(8) and Article 49(4) of Regulation (EU) No 648/2012,
- having regard to the motion for a resolution by the Committee on Economic and Monetary Affairs,
- having regard to Rule 87a (3) of its Rules of Procedure,
- A. whereas Regulation (EU) No 648/2012 (EMIR) lays down clearing and bilateral risk-management requirements for over-the-counter ('OTC') derivative contracts, reporting requirements for derivatives contracts and uniform requirements for the performance of activities of central counterparties ('CCP') and trade repositories;
- B. whereas that Regulation empowers the Commission, following submission of draft regulatory technical standards, inter alia, by the European Securities and Markets Authority (ESMA), to adopt delegated acts in a number of specified areas, in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010 (ESMA-Regulation);

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 201, 27.7.2012, p.1.

- C. whereas ESMA has submitted to the Commission, on 27 September 2012, six draft regulatory technical standards on OTC derivatives, colleges for CCPs, CCP requirements and trade repositories¹;
- D. whereas, on 19 December 2012, the Commission adopted five of those draft regulatory technical standards in the form of Delegated regulations, without changes to the drafts submitted by ESMA; whereas the draft regulatory technical standard on colleges for central counterparties was not adopted by the Commission; whereas, in accordance with Article 14(1) of the ESMA-Regulation, in the event that the Commission does not endorse a draft regulatory standard, the Commission shall inform, inter alia, the European Parliament, stating its reasons; whereas the Commission submitted that information only by letter of 31 January 2013, i.e. six weeks after it decided not to adopt the draft regulatory standard concerned;
- E. whereas two of the Delegated regulations adopted by the Commission, Delegated regulations C(2012)9593 and C(2012)9623, concern regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP, and on requirements for central counterparties, respectively;
- F. whereas, under Article 13(1) of the ESMA-Regulation Parliament and the Council may object to a regulatory technical standard within three months from the date of notification of the standard adopted by the Commission;
- G. whereas the scrutiny period is reduced to one month from the date of notification where the delegated act adopted by the Commission is the same as the draft regulatory technical standard submitted by ESMA, as in the current case;
- H. whereas in accordance with Article 13(1) of the ESMA-Regulation and with Rule 87a(5) of Parliament's Rules of Procedure, the Chair of the Committee on Economic and Monetary Affairs has, on behalf of Parliament, notified the Commission and the Council by letters of 21 December 2012 and 9 January 2013 that the deadline will be extended by one month;
- I. whereas if either the Parliament or the Council objects to a regulatory technical standard within the scrutiny period, it does not enter into force;
- J. whereas, in accordance with paragraph 2. of the Common Understanding between Parliament, the Council and the Commission on delegated acts, the three institutions shall cooperate throughout the procedure leading to the adoption of delegated acts with a view to a smooth exercise of delegated powers and an effective control of this power by Parliament and the Council;
- K. whereas the Commission, before adopting regulatory technical standards, should take note of the timetable for Parliament to exercise its scrutiny rights, and should avoid adopting such standards at a point in time where Parliament's scrutiny period is reduced to less than two months, including the extension of the scrutiny period as

¹ http://www.esma.europa.eu/system/files/2012-600_0.pdf

provided for in Article 13(1) of the ESMA-Regulation;

- L. whereas Parliament's services have transmitted comments by Members of the competent Committee of Parliament on the draft regulatory technical standards to the Commission services shortly after their submission by ESMA; whereas the Commission services replied to those comments only after the adoption of the Delegated regulations; whereas the Commission and, where relevant, ESMA can be expected to provide a timely response to comments from Members of Parliament on draft regulatory technical standards, in particular where the views expressed by Members of Parliament are not reflected in the regulatory technical standards adopted by the Commission;
- M. whereas not all draft regulatory technical standards provided for in EMIR have been submitted by ESMA by the deadline of 30 September 2012 set in that Regulation; whereas, in particular, the draft regulatory technical standards under Article 4(4) and Article 11(15) of EMIR are still outstanding; whereas in case of delays in the preparation and adoption of regulatory technical standards, Parliament should be duly informed of the revised timetable and the reasons for the delay;
- N. whereas Recital 25 of Regulation C(2012)9593 states that the excess of one of the values set for a class of OTC derivatives should trigger the excess of the clearing threshold for all classes; whereas the application of this approach may lead to a clearing obligation and margining requirements for other entities which are part of the same group, an outcome not intended by the EMIR Regulation; whereas Article 10(4)(b) of EMIR states that the Delegated regulation should specify the values of clearing thresholds taking into account the positions and exposures per counterparty and per class of OTC derivatives; whereas EMIR does not require that if a non-financial counterparty exceeds the clearing threshold in one class of OTC derivatives, its group automatically has to clear all other classes of OTC derivatives; whereas Article 26(1) of Delegated regulation C(2012)9623 discriminates between derivatives traded on a regulated market and OTC derivatives that are subject to both to the clearing and trading obligation and have comparable risk profile by setting different liquidation periods for margin calculation purposes; whereas such an approach could have an impact on the risk management of companies in the European Union, and thus overall negative macroeconomic effects;
- O. whereas under Article 10(4)(b) and Recital 31 of EMIR the determination of the value of the clearing thresholds shall take into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives;
- P. whereas this is not sufficiently reflected in Article 11 and Recital 22 of Delegated regulation C(2012)9593 which refer to the gross notional value of OTC positions for setting the clearing threshold for non-financial counterparties; whereas a clearing threshold based on gross positions may trigger mandatory clearing at a level considerably below systemic relevance; whereas a threshold referring to the net exposure would better represent the risk and could be implemented easily by all parties concerned;
- Q. whereas in accordance with Article 11(2) of EMIR the obligation for marking-to-market applies to non-financial counterparties which are subject to the clearing

obligation; whereas Article 13 and Recital 28 of Delegated Regulation C(2012)9593 do not sufficiently reflect this provision of EMIR; whereas this lack of clarity in the Delegated regulation is not in line with intention of EMIR; whereas the Delegated regulation should clarify that non-financial counterparties that are not subject to the clearing obligation are not required to mark-to-market;

- R. whereas Article 11 of EMIR requires counterparties that enter into an OTC derivative contract not cleared by a CCP to ensure appropriate procedures and arrangements in place to measure, monitor and mitigate operational risk and counterparty credit risk; whereas Article 13(3)(b) of Delegated regulation C(2012)9593 sets a threshold at 100 OTC derivative contracts per counterparty above which portfolio reconciliation is required on a quarterly basis for a non-financial counterparty which is not subject to the clearing obligation; whereas portfolio reconciliation on a quarterly basis is very costly for non-financial counterparties; whereas a threshold of 300 OTC derivative contracts would be more appropriate for non-financial counterparties that are not subject to the clearing obligation;
- S. whereas under Article 11(1) of EMIR, financial counterparties and non-financial counterparties that enter into an OTC derivative contract not cleared by a CCP shall ensure that appropriate procedures and arrangements are in place to measure, monitor and mitigate operational risk and counterparty risk, including at least, inter alia, the timely confirmation, where available by electronic means, of the terms of the relevant OTC derivative contract;
- T. whereas Article 12 of Delegated regulation C(2012)9593 specifies those procedures and arrangements; whereas that Article while allowing for a phased implementation of electronic confirmation procedures does not appropriately reflect the intention of EMIR to allow for alternative procedures to be considered on a permanent basis for certain counterparties or transactions that are not suitable for electronic confirmation; whereas the Delegated regulation should, for example, take account of situations where it is not appropriate to require the timely electronic confirmation of OTC derivative contracts entered into by smaller non-financial counterparties who transact on an infrequent basis and should specify the conditions that should be met by alternative manual procedures;
- U. whereas under Article 46(1) of EMIR a CCP shall accept highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members; whereas for non-financial counterparties, a CCP may accept bank guarantees, taking such guarantees into account when calculating its exposure to a bank that is a clearing member; whereas under Article 46(3)(c) the conditions under which commercial bank guarantees may be accepted shall be specified in regulatory technical standards;
- V. whereas Annex 1 Section 2(1)(h) of Delegated regulation C(2012)9623 establishes that a commercial bank guarantee shall be fully backed by collateral that is not subject to wrong way risk based on a correlation with the credit standing of the guarantor or the non-financial clearing member unless that wrong way risk has been adequately mitigated, and to which the CCP has prompt access and that is bankruptcy remote in case of the simultaneous default of the clearing member and the guarantor;

- W. whereas that provision strongly restricts the use of bank guarantees and thus makes its use virtually impossible for non-financial counterparties, which is not in line with Article 46(1) of EMIR;
- X. whereas Recital 90 of EMIR states that "It is important to ensure international convergence of requirements for CCPs and trade repositories. This Regulation follows the existing recommendations developed by the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO) noting that the CPSS-IOSCO principles for financial market infrastructure, including CCPs, were established on 16 April 2012.";
- Y. whereas Article 26 of Delegated regulation C(2012)9623 specifies a liquidation period for financial instruments other than OTC derivatives which specifically results in a divergence with equivalent arrangements determined in the USA, and which exceed the recommendations included in the CPSS-IOSCO principles for financial market infrastructure established on 16 April 2012; whereas such an approach would have a negative impact on the users of these instruments based in the European Union relative to users based in other jurisdictions, including the USA, and thus overall negative macroeconomic effects; whereas nevertheless ESMA and national competent authorities need to assess that a liquidation of all positions can be guaranteed in a default under any circumstance in such time horizon;
- Z. whereas, in order to see swift implementation of EMIR, the Parliament expects close cooperation with ESMA and the Commission with an accelerated process for re-presenting amended Delegated regulations C(2012)9593 and C(2012)9623;
1. Objects to Commission delegated regulations C(2012)9593 and C(2012)9623;
 2. Instructs its President to forward this resolution to the Commission and to notify it that the delegated regulations cannot enter into force;
 3. Instructs its President to forward this resolution to the Council and to the governments and parliaments of the Member States.