



2017/0090(COD)

26.1.2018

*****I**

DRAFT REPORT

on the 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
(COM(2017)0208 – C8-0147/2017 – 2017/0090(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Werner Langen

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ■ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the 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
(COM(2017)0208 – C8-0147/2017 – 2017/0090(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2017)0208),
 - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0147/2017),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Economic and Social Committee of ...,
 - having regard to the opinion of the European Central Bank of ... ,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs (A8-0000/2018),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Recital 7

Text proposed by the Commission

Amendment

(7) Non-financial counterparties are

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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.*

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.

Or. en

Justification

See justification amendment 20.

Amendment 2

Proposal for a regulation

Recital 9

Text proposed by the Commission

(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.

Amendment

(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, non-discriminatory *and transparent* commercial terms.

Justification

In addition to being fair, reasonable and non-discriminatory, the commercial terms of the clearing services need to be also transparent.

Amendment 3**Proposal for a regulation****Recital 12***Text proposed by the Commission*

(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.

Amendment

(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. ***All*** intragroup transactions where at least one of the counterparties is a non-financial counterparty should therefore be exempted from the reporting obligation ***regardless of the non-financial counterparties' place of establishment.***

Or. en

Justification

In order to ensure a truly cost saving for the real economy it is necessary to exempt from the reporting obligation all transactions worldwide within a group where at least one of the counterparties is a non-financial counterparty.

Amendment 4**Proposal for a regulation****Recital 13**

Text proposed by the Commission

(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 Council²² 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.

²² 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).

Amendment

(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 Council²² 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. ***The CCP should report to the TR specified by the counterparty. Clearing members and their clients should be able to choose where to report their ETD transactions.***

²² 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).

Or. en

Justification

This amendment aims to achieve a reduction of costs for market players and to extend the possibilities of choice for Clearing members.

Amendment 5

Proposal for a regulation

Recital 14

Text proposed by the Commission

(14) To reduce the burden of reporting for ***small*** non-financial counterparties, the

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Amendment

(14) To reduce the burden of reporting for non-financial counterparties ***not subject***

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financial counterparty should be responsible, and legally liable, for reporting on behalf of both 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.

to the clearing obligation, the financial counterparty should be *solely* responsible, and legally liable, for reporting *a single data set* on behalf of both itself and the non-financial counterparty that is not subject to the clearing obligation with regard to OTC derivative contracts entered into by *itself and* that non-financial counterparty, as well as for ensuring the accuracy of the details reported. *To ensure that the financial counterparty has the data needed to fulfil its reporting obligation, the non-financial counterparty should provide the details relating to the OTC derivative transactions that the financial counterparty cannot be reasonably expected to possess. However, it should be possible for non-financial counterparties to choose to report their OTC derivatives contracts on their own, in which case they should inform the financial counterparty accordingly. In such cases, the non-financial counterparty should remain responsible and legally liable for reporting that data and for ensuring its accuracy.*

Or. en

Justification

This would clarify that financial counterparties would report a single data set and that the financial counterparty is responsible and legally liable for the content and timeliness of the report submitted to the trade repository. This would require the non-financial counterparties to ensure that financial counterparties have the data they are required to report. Further, it would provide non-financial counterparties with the ability to continue to report data relating to their OTC derivatives on their own behalf.

Amendment 6

Proposal for a regulation Recital 16 a (new)

Text proposed by the Commission

Amendment

(16 a) In order to avoid international regulatory divergence and bearing in

mind the particular nature of such derivatives' trades, the mandatory exchange of variation margins on physically settled foreign exchange forward and physically settled foreign exchange swap derivatives, such as a contract that combines a spot and a forward, should only apply to transactions between the most systemic counterparties, such as credit institutions and investment firms.

Or. en

Justification

The Rapporteur supports the view taken by the ESAs in their proposed change to Delegated Regulation (EU) 2016/2251, submitted to the Commission on 19 December 2017. However he wants an extension to physically settled foreign exchange swap derivatives to achieve a perfect alignment with the BCBS-IOSCO Framework. For those reasons, Delegated Regulation (EU) 2016/2251 supplementing this Regulation, in particular the requirements for compliance with Article 11(3) thereof, should be amended.

Amendment 7

Proposal for a regulation

Recital 22

Text proposed by the Commission

(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

Amendment

(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.***

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.

Or. en

Justification

To provide certainty that the non-financial counterparty that is below the clearing thresholds is not obligated to check the accuracy of the data reported by the financial counterparty to the trade repository and to align with the changes that shift the legal liability for the content and timeliness of the trade report to the financial counterparty.

Amendment 8

Proposal for a regulation

Article 1 – paragraph 1 – point 1

Regulation (EU) No 648/2012

Article 2 – point 8

Text proposed by the Commission

(8) 'financial counterparty' means an investment firm authorised in accordance with Directive 2014/65/EC of the European Parliament and of the Council³¹, 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 Council³², 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

Amendment

(8) 'financial counterparty' means an investment firm authorised in accordance with Directive 2014/65/EC of the European Parliament and of the Council³¹, 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 Council³², 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, ***which is either established in the Union or managed by an alternative investment fund manager (AIFM)***

Parliament and of the Council³³ **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 Council³⁴ .**

authorised or registered in accordance with Directive 2011/61/EU and, where relevant, its AIFM is established in the Union; and a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council;”

³¹ 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).

³¹ 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).

³² 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).

³² 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).

³³ 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).

³³ 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).

³⁴ **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).**

Or. en

Justification

SSPEs would remain in the category of NFCs. As recognised in the Securitisation Regulation, SSPEs neither carry the risks nor have the same financial and operational capacities as financial institutions. The exact scope of AIFs falling under this Regulation as financial counterparty should not include all non-EU AIFs; it should be limited to AIFs established in the Union or managed by an EU AIFM.

Amendment 9

Proposal for a regulation

Article 1 – paragraph 1 – point 2 – point c

Regulation (EU) No 648/2012

Article 4 – paragraph 3a – subparagraph 1

Text proposed by the Commission

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.

Amendment

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

Or. en

Justification

See justification amendment 10.

Amendment 10

Proposal for a regulation

Article 1 – paragraph 1 – point 2 – point c

Regulation (EU) No 648/2012

Article 4 – paragraph 3 b (new)

Text proposed by the Commission

Amendment

3b. In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the conditions under which commercial terms for clearing services, referred to in the paragraph 3a, are considered to be fair, reasonable, non-discriminatory and transparent. ESMA shall submit those draft regulatory technical standards to the Commission by ... [six months following the date of entry into force of this amending Regulation]. The Commission is empowered to supplement this Regulation by adopting the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of

Justification

In addition to being fair, reasonable and non-discriminatory, the commercial terms of the clearing services need to be also transparent. The proposal of the Commission to require clearing members to provide clearing services on a FRAND basis should be supported because it will help smaller counterparties in gaining access to clearing.

Amendment 11

Proposal for a regulation

Article 1 – paragraph 1 – point 3

Regulation (EU) No 648/2012

Article 4a – paragraph 1 – subparagraph 1

Text proposed by the Commission

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.

Amendment

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

Justification

To simplify the new rules for SFCs, the mandatory check by all FCs of their position (above or below the threshold) would be replaced by a voluntary check by those FCs that would reasonably expect to fall below the threshold in order to reduce bureaucracy and cost.

Amendment 12

Proposal for a regulation

Article 1 – paragraph 1 – point 3

Regulation (EU) No 648/2012

Article 4a – paragraph 1 – subparagraph 2 – introductory part

Text proposed by the Commission

Where the result of that calculation **exceeds** the clearing thresholds specified pursuant to Article 10(4)(b), the financial

Amendment

Where the result of that calculation **does not exceed** the clearing thresholds specified pursuant to Article 10(4)(b), the

counterparty shall:

financial counterparty shall:

Or. en

Justification

See justification amendment 11.

Amendment 13

Proposal for a regulation

Article 1 – paragraph 1 – point 3

Regulation (EU) No 648/2012

Article 4a – paragraph 1 – subparagraph 2 – point b

Text proposed by the Commission

(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;*

Amendment

(b) **not** be subject to the clearing obligation referred to in Article 4 **and to the requirements set out in paragraph 3 of Article 11** for future OTC derivative contracts.

Or. en

Justification

See justification amendment 11

Amendment 14

Proposal for a regulation

Article 1 – paragraph 1 – point 3

Regulation (EU) No 648/2012

Article 4a – paragraph 1 – subparagraph 2 – point c

Text proposed by the Commission

(c) *clear the contracts referred to in point (b) within four months of becoming subject to the clearing obligation.*

Amendment

deleted

Or. en

Justification

See justification amendment 11

Amendment 15

Proposal for a regulation

Article 1 – paragraph 1 – point 3

Regulation (EU) No 648/2012

Article 4a – paragraph 2

Text proposed by the Commission

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.

Amendment

2. A financial counterparty that has become ***exempted from*** the clearing obligation in accordance with paragraph 1 ***shall*** subsequently ***demonstrate*** to the relevant competent authority that its aggregate month-end average position for the months March, April and May of a given year ***does not exceed the clearing threshold referred to in paragraph 1***. ***Where such a position*** exceeds the clearing threshold referred to in paragraph 1, ***the financial counterparty*** shall be subject to the clearing obligation set out in Article 4 ***and to the requirements set out in paragraph 3 of Article 11 for future contracts***.

Or. en

Justification

See justification amendment 11

Amendment 16

Proposal for a regulation

Article 1 – paragraph 1 – point 6

Regulation (EU) No 648/2012

Article 6b – paragraph 6 – subparagraph 1

Text proposed by the Commission

The Commission, after consulting ESMA, may extend the suspension referred to in

Amendment

The Commission, after consulting ***the European Parliament, the Council and***

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.

ESMA, may extend the suspension referred to in paragraph 5 of this Article for **one or more** periods of **one** months, **not cumulatively exceeding six months from the end of the initial suspension** period **where the grounds for** the suspension **continue to apply**. An extension of the suspension shall be published in accordance with Article 4.

Or. en

Justification

The important procedure needs to integrate the co-legislators.

Amendment 17

Proposal for a regulation

Article 1 – paragraph 1 – point 7 – point b

Regulation (EU) No 648/2012

Article 9 – paragraph 1a – subparagraph 1 – point b

Text proposed by the Commission

(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;

Amendment

(b) the details of **[OTC]** derivative contracts concluded **between a financial counterparty and** a non-financial counterparty that **does not meet** the conditions referred to in the second subparagraph of Article 10(1) **shall be reported as follows:**

(i) **non-financial counterparties who have already invested to put in place a reporting system may choose to report the details of their OTC derivative contracts with financial counterparties to a trade repository;**

(ii) **where the non-financial counterparty choose to use the option referred to in point (i), they shall inform the financial counterparties with which they have concluded OTC derivatives contracts of their decision beforehand.**

The responsibility and legal liability for reporting and for ensuring the accuracy of those details shall in this case remain with the non-financial counterparties;

(iii) where the non-financial counterparty chooses not to use the option referred to in point (i), financial counterparties shall be solely responsible and legally liable for reporting, on behalf of both counterparties, a single data set, as well as for ensuring the accuracy of the details reported.

Or. en

Justification

This amendment clarifies that the financial counterparties are responsible and legally liable for reporting in a single data set, and for the content and accuracy of the reported data, for OTC derivatives concluded with non-financial counterparties below the clearing thresholds. Additionally, this amendment recognizes that there are several types of non-financial counterparties and some non-financial counterparties may seek to perform the reporting themselves.

Amendment 18

Proposal for a regulation

Article 1 – paragraph 1 – point 7 – point b

Regulation (EU) No 648/2012

Article 9 – paragraph 1a – subparagraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(b a) in the case of OTC derivatives contracts concluded by a non-financial counterparty established within the Union that is not subject to the conditions referred to in the second subparagraph of Article 10(1) with an entity established in a third-country that would be a financial counterparty if established in the Union, such non-financial counterparty established in the Union shall not be a reporting counterparty and shall not be legally liable for reporting or ensuring the accuracy of the details of such OTC derivatives contracts if the third-country

financial counterparty has reported such information pursuant to its third-country legal regime for reporting and the respective third-country legal regime for reporting is deemed equivalent pursuant to Article 13; if a third-country legal regime for reporting has not been deemed equivalent, a third-country financial counterparty may report the details of such OTC derivatives contracts concluded with non-financial counterparties established in the Union by registering in a Union-wide register, thereby declaring compliance with the reporting obligation in Article 9 and the non-financial counterparty shall not be legally liable for reporting or ensuring the accuracy of the details of such OTC derivatives contracts;

Or. en

Justification

It must be clarified how the reporting should be done in case of OTC derivatives contracts conclude between a non-financial counterparty established within the European Union that should not report oneself and a financial counterparty established in a third-country. Otherwise, non-financial companies would have to conserve their reporting schemes, thereby impeding the intended relief of the proposal for real economy.

Amendment 19

Proposal for a regulation

Article 1 – paragraph 1 – point 8

Regulation (EU) No 648/2012

Article 10 – paragraph 1 – point b

Text proposed by the Commission

(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;

Amendment

(b) be subject to the clearing obligation referred to in Article 4 **and to the requirements set out in paragraph 3 of Article 11** for future OTC derivative contracts in the asset class or asset classes for which the clearing threshold has been exceeded;

Or. en

Justification

The rapporteur supports the proposal to restrict the clearing obligation to the class of OTC derivatives for which the Clearing Threshold has been exceeded. But he believes also that it is important to introduce an amendment in article 11 (3) of EMIR as regards non-financial counterparties exceeding the Clearing threshold (“NFCs+”) who should not be subject to segregation and exchange of collateral requirements for other asset classes than the one where the threshold has been breached. This will reduce burdens and costs for NFC+.

Amendment 20

Proposal for a regulation

Article 1 – paragraph 1 – point 8 a (new)

Regulation (EU) No 648/2012

Article 11 – paragraph 3

Present text

3. Financial counterparties shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after the clearing threshold is exceeded.

Amendment

(8a) In Article 11, paragraph 3 is replaced by the following:

"3. Financial counterparties shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are ***in the asset class or asset classes for which the clearing threshold has been exceeded and that are*** entered into on or after the clearing threshold is exceeded."

Or. en

(<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R0648-20170103&from=FR>)

Justification

The rapporteur supports the proposal to restrict the clearing obligation to the class of OTC derivatives for which the Clearing Threshold has been exceeded. But he believes also that it is important to introduce an amendment in article 11 (3) of EMIR as regards non-financial

counterparties exceeding the Clearing threshold (“NFCs+”) who should not be subject to segregation and exchange of collateral requirements for other asset classes than the one where the threshold has been breached. This will reduce burdens and costs for NFC+.

Amendment 21

Proposal for a regulation

Article 1 – paragraph 1 – point 14

Regulation (EU) No 648/2012

Article 72 – paragraph 2

Text proposed by the Commission

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.;

Amendment

2. The amount of a fee charged to a trade repository shall cover all **reasonable** 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.;

Or. en

Justification

The costs should remain as competitive as possible.

Amendment 22

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point b

Regulation (EU) No 648/2012

Article 85 – paragraph 2 – subparagraph 1

Text proposed by the Commission

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.

Amendment

By ... [one year following the date of entry into force of this amending Regulation] **and every year thereafter until ...** [three years following the date of entry into force of this amending Regulation], 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.

Or. en

Justification

The current exemption for PSA has delivered no tangible result after almost six years. It is now, necessary to impose on all stakeholders that could contribute to a technical solution a best-effort obligation, with a view to PSAs finally clearing their derivatives' trades as soon as possible, which is very important for financial stability.

Amendment 23

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point b

Regulation (EU) No 648/2012

Article 85 – paragraph 2 – subparagraph 2 – introductory part

Text proposed by the Commission

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:

Amendment

ESMA shall, by ... [six months following the date of entry into force of this amending Regulation], **and every year thereafter until ...** [three years following the date of entry into force of this amending Regulation], in cooperation with EIOPA, EBA and the ESRB, submit a report to the Commission, assessing the following:

Or. en

Justification

See justification amendment 22.

Amendment 24

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point b

Regulation (EU) No 648/2012

Article 85 – paragraph 2 – subparagraph 3

Text proposed by the Commission

Amendment

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.;

deleted

Or. en

Justification

See justification amendment 22

Amendment 25

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c

Regulation (EU) No 648/2012

Article 85 – paragraph 3 – introductory part

Text proposed by the Commission

Amendment

3. *By [PO please add 6 months before the date referred to in paragraph 1] ESMA shall report to the Commission on the following:*

3. *After the three-year period referred to in Article 89(1) the Commission shall:*

Or. en

Justification

See justification amendment 22.

Amendment 26

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c

Regulation (EU) No 648/2012

Article 85 – paragraph 3 – point a

Text proposed by the Commission

Amendment

(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;*

(a) *submit a proposal for a binding solution if it considers that no solution has been found by stakeholders;*

Or. en

Justification

See justification amendment 22.

Amendment 27

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c

Regulation (EU) No 648/2012

Article 85 – paragraph 3 – point b

Text proposed by the Commission

Amendment

(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);*

(b) *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, if it considers that a solution is within reach of the stakeholders and that additional time is needed for its finalization;*

Or. en

Justification

See justification amendment 22.

Amendment 28

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c

Regulation (EU) No 648/2012

Article 85 – paragraph 3 – point c

Text proposed by the Commission

Amendment

(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);*

(c) *let the exemption lapse, while encouraging stakeholders to implement their solution beforehand if it considers that a solution has been found.*

Or. en

Justification

See justification amendment 22.

Amendment 29

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c

Regulation (EU) No 648/2012

Article 85 – paragraph 3 – point d

Text proposed by the Commission

Amendment

(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;*

deleted

Or. en

Justification

See justification amendment 22.

Amendment 30

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c

Regulation (EU) No 648/2012

Article 85 – paragraph 3 – point e

Text proposed by the Commission

Amendment

(e) the accessibility of clearing by counterparties.;

deleted

Or. en

Justification

See justification amendment 22.

Amendment 31

Proposal for a regulation

Article 1 – paragraph 1 – point 19 – point c a (new)

Regulation (EU) No 648/2012

Article 85 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

(c a) In Article 85, the following paragraph is added:

“5a. ESMA shall, by ... [18 months following the date of entry into force of this amending Regulation], in cooperation with EIOPA, EBA and the ESRB, submit a report to the Commission, assessing whether the FRAND principle referred to in paragraph 3a of Article 4 has been effective in facilitating access to clearing.

The Commission, by [insert date of entry into force + 2 years], shall present a report to the European Parliament and the Council assessing whether the FRAND principle has been effective in facilitating access to clearing and proposing, where necessary, improvements to that principle. That report shall consider the findings of the report referred to in the first subparagraph and be accompanied by a legislative proposal, where appropriate.”

Or. en

Justification

Enhancing access to clearing is, in particular from an end-client perspective, a fundamental part of EMIR Refit. Therefore, to enforce the FRAND principle, the Commission and ESMA should be able to evaluate the effectiveness of the provision regarding the impact on the access to clearing.

Amendment 32

Proposal for a regulation

Article 1 – paragraph 1 – point 20

Regulation (EU) No 648/2012

Article 89 – paragraph 1 – subparagraph 1

Text proposed by the Commission

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.;

Amendment

Until ... [three years following the date of entry into force of this amending Regulation], 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. ***PSAs, CCPs and clearing members shall make their best efforts to contribute to the development of technical solutions that facilitate the clearing of such OTC derivative contracts by PSAs. The Commission shall set up an expert group made up of representatives of PSAs, CCPs, clearing members and other relevant parties to such technical solutions to monitor their efforts and assess the progress made in the development of technical solutions that facilitate the clearing of such OTC derivative contracts by PSAs. That expert group shall meet at least every six months. The Commission shall consider the efforts made by PSAs, CCPs and clearing members when drafting its reports pursuant to the first subparagraph of Article 85(2).***

Or. en

Justification

An institutionalized and regular roundtable coordinated by the EC with the concerned parties will give more transparency to the solution finding process and highlight the responsibilities of all the stakeholders. EC should also regularly provide progress reports to the co-legislators.

EXPLANATORY STATEMENT

I. Background

The European Market Infrastructures Regulation (EMIR) (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) has been a cornerstone of the EU financial services' legislation since its entry into force in 2012. Adopted further to commitments taken by the G20 at its Pittsburgh summit in September 2009, EMIR has encompassed key reforms aiming at addressing systemic risks on the derivatives market that had been revealed by the financial crisis of 2007-2008.

The implementation of EMIR, in which the European Commission (EC) and the European supervisory authorities (ESAs), played a significant role by drafting level-2 measures, has been long and complex. Certain requirements (e.g. the clearing obligation) have not yet fully been implemented while other requirements (e.g. reporting standards) have already been revised at level 2.

However, ten years after the crisis and five years into the implementation of EMIR, the EC proposes a review on May 4 2017. This proposal is part of the Commission's Regulatory Fitness and Performance (REFIT) programme, which aims to ensure that EU legislation delivers results for citizens and businesses effectively, efficiently and at minimum cost. This programme targets to keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising on policy objectives.

The notional amount of outstanding OTC derivatives contracts reaches \$542 trillion in June 2017, this shows how essential the regulation of derivatives is and the importance of EMIR for financial stability.

I. Overview of the key features of the EC proposal

With the inclusion of EMIR in the REFIT programme, the Commission aims to make this legislation simpler, lighter, more efficient, more transparent and to eliminate disproportionate costs and burdens on certain derivatives counterparties.

1. Reporting obligation - Improvement of the efficiency

The proposal intends to reduce significantly the reporting burden and costs for non-financial counterparties.

- Single-sided reporting

The EMIR review introduces single-sided reporting in 3 cases:

- central counterparties (CCPs) would be responsible for reporting exchange-trade derivatives on behalf of both counterparties;
- financial counterparties would be responsible for reporting their transactions with non-financial counterparties that are not subject to the clearing obligation;
- finally, UCITS (undertakings for collective investments in transferable securities) and AIF (alternative investment fund) managing companies would be responsible for reporting on behalf of the funds that they manage.

- Intra-group transactions

Intra-group transactions would be exempted from the reporting when one of the counterparties is a non-financial counterparty.

- Backloading obligation

The EC proposes removing this obligation which consisted of reporting trades entered into before the reporting obligation started to apply.

2. Enhancement of the data quality and accessibility

The proposal aims at raising the quality and consistency of data accessible to authorities as well as at facilitating reciprocal access by Union authorities and third-country authorities of the data held at their respective trade repositories, and adding (to the list of authorities which can access EU trade repositories' data) the third-country authorities from jurisdictions benefitting from an equivalence of their requirements for trade repositories. The proposals also includes changes in respect of the requirements for trade repositories, such as:

- introducing an obligation for trade repositories to ensure data quality and to give access to counterparties to data reported on their behalf;
- and giving European Securities and Markets Authority (ESMA) the possibility to use a broader range of fines on trade repositories.

3. Drawing the lessons from the implementation of the clearing obligation

EC proposes a relaxation of clearing rules for counterparties for whom this obligation generates disproportionate costs or practical difficulties.

- Pension Scheme Arrangements

The current exemption for PSA would be extended by three years and then possibly by two more years via a delegated act.

- Small financial counterparties

Small financial counterparties would benefit from an exemption from the clearing obligation if they fall below certain thresholds.

- Non-financial counterparties

Non-financial counterparties would have to apply the clearing obligation only for the derivative class for which they are above the clearing threshold.

- Deletion of the frontloading obligation

The mandatory clearing of contracts entered into or novated before the clearing obligation has taken effect, if a CCP is authorised to clear the relevant contract, will be removed.

- Introducing the possibility to suspend the clearing obligation

The Commission on a proposal by ESMA would be empowered to suspend the clearing obligation in case of market turmoil.

4. Improvement in the access to clearing and in CCPs' transparency

EC proposes:

- a new obligation for clearing members and clients to provide clearing services under fair, reasonable, non-discriminatory (FRAND) commercial terms;
- and an insolvency-related clarification 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.

As for CCPs, the only change would be the introduction of an obligation to provide more information on their initial margin policies (e.g. a simulation tool) to their clearing members.

5. Change of classification for certain entities

The proposal introduces two minor changes. Securitisation Special Purpose Entities (SSPEs), currently classified as non-financial counterparties would become financial counterparties, while Alternative Investment Funds (AIFs) would also include AIFs registered under national law.

II. Rapporteur's proposals

The legislators should adapt as far as possible the EC's proposal to the concerns and problems encountered by real economy operators in their implementation of EMIR.

The rapporteur mainly supports the proposal of the European Commission. The general intention to reduce the burden on non-financial counterparties, including their intra-group transactions, should be welcomed.

The proposed amendments are based on discussions with many market participants, regulatory authorities, Member States and on the ECB's opinion of 11 October.

1. Reporting obligation – Some necessary clarifications and improvements

The rapporteur supports the following additional modifications:

- In order to ensure a certain legal security, companies that have already invested and set up a reporting system should be able to choose to continue to use it and to perform the reporting of their trades themselves.
- Furthermore, it must be clarified that if a company which is under the derivatives thresholds specified in article 10(1) contracts with a financial counterparty established in a third-country, the non-financial counterparty will not be in charge of the reporting. Otherwise, companies would have to maintain their reporting system, thereby impeding the intended relief of the proposal for real economy.
- It must be clarified that, in case there is single-sided reporting, the institution in charge of reporting is also the legally responsible party.
- The exemption for intra-group transactions, when at least one non-financial counterparty is involved, is an important provision for the real economy. Nevertheless, an exception limited to transactions within the European Union does not properly take into account the reality of such groups. Thus, it is necessary to exempt from the reporting obligation all transactions by a non-financial counterparty within a group worldwide without any restrictions.
- ETD - All measures should offer competitive and cost-effective solutions that meet the international standards.

2. Clearing obligation

- Pension Scheme Arrangements (PSA) - More incentives in order to move towards a solution

After almost six years the current exemption for Pension Scheme Arrangements (PSAs) has not delivered any tangible result. Now it is necessary to impose on all stakeholders that could contribute to a technical solution a best-effort obligation, with a view to PSAs finally clearing their derivatives' trades as soon as possible, which is very important for financial stability. The present exception for PSAs should be extended by three years (as proposed by the EC) after which the Commission should have three options:

- consider that no solution has been found by stakeholders. In the absence of a market-led solution, the EC could step in and impose a solution.
- consider that a solution is within reach of the stakeholders and that additional time is needed for its finalization. In this situation, the EC can choose to extend the exemption by two more years.

- consider that a solution has been found and let the exemption lapse, while encouraging stakeholders to implement their solution beforehand.

Furthermore, the EC would regularly meet representatives of the concerned parties as part of an expert group. Such an arrangement will give more transparency to the solution finding process and highlight the responsibilities of all stakeholders. The EC should also regularly provide progress reports to the co-legislators.

- Additional relief for small financial counterparties and non-financial counterparties

To simplify the new rules for small financial counterparties, the mandatory check by all financial counterparties of their position (above or below the threshold) would be replaced by a voluntary check by those financial counterparties that would reasonably expect to fall below the threshold in order to reduce bureaucracy and cost.

The rapporteur supports the proposal to restrict the clearing obligation to the class of OTC derivatives for which the clearing threshold has been exceeded. On the other hand, he considers it important to add that non-financial counterparties exceeding the clearing threshold (NFC+) should be subject to segregation and exchange of collateral requirements only for the asset classes where the threshold has been breached. This will more effectively reduce the burden on non-financial counterparties.

- Suspension of the clearing obligation – Necessary clarifications and improvements

The suspension of the clearing obligation is a useful innovation but the procedure needs to be clarified and more transparent for market participants as well as for the co-legislators.

Furthermore, this procedure needs to be aligned with its twin procedure of suspension of the clearing obligation due to recovery and resolution of a CCP which has not yet been determined. Thus, this question should be clarified later on.

3. Modifications of the classification of the entities

SSPEs would remain in the category of non-financial counterparties. As recognised in the Securitisation Regulation, SSPEs neither carry the risks nor have the same financial and operational capacities as financial institutions. Moreover, the definition of financial counterparty should be carefully drafted in order to prevent any extra-territorial reach whereby third-country AIFs would be caught in scope of EMIR and potentially subject to conflicting legal requirements.

4. More effective clearing access is needed

While legislators promote clearing as a risk-management tool, not all financial counterparties and non-financial counterparties can access clearing without disproportionate costs and not all clearing members or clients who propose clearing services have strong incentives or

commercial gains to develop that activity. For those reasons, the solutions proposed by the Commission go in the right direction; nevertheless, the incentives need to be strengthened and clarified in order to truly improve the access to clearing.

5. Physically-settled FX forwards and physically-settled FX swaps - Necessary harmonization of legislation at the global level

As proposed by the ESAs on 19 December 2017, the mandatory exchange of variation margins (VM) for physically-settled FX forwards should be limited to certain counterparties (banks and investment firms), via a modification of the RTS on risk-mitigation techniques for uncleared OTC derivatives. Your rapporteur supports the entry into force of the proposed change as soon as possible because such changes are necessary in order to establish a similar treatment of such transactions across the globe and therefore address any problem of level-playing field on the foreign exchange market. Indeed in most countries of the world (USA, Japan, Canada, Singapore, Australia, Switzerland, Hong Kong, etc.), there is no mandatory variation margins exchange. However, to achieve a perfect alignment the ESAs proposal needs to be extended to physically settled FX swaps. A different approach in the EU would be particularly detrimental to small companies that may no longer be able to manage currency risks as they currently do.

On 20 December 2017, the council submitted a proposal that in some points deviates from the rapporteur's proposal and that, presumably, will not always reduce enough bureaucracy.