



Brussels, 19.12.2012  
C(2012) 9603 final

**COMMISSION DELEGATED REGULATION (EU) No .../..**

**of 19.12.2012**

**supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE DELEGATED ACT**

Article 81(5) of Regulation (EU) No 648/2012 empowers the Commission to adopt, following submission of draft standards by the European Securities and Markets Authority (ESMA), and in accordance with Article 10 of Regulation (EU) No 1095/2010, delegated acts on regulatory technical standards specifying the data to be made available to the public and to relevant authorities by trade repositories, as well as operational standards for aggregating, comparing and accessing trade repositories data.

In accordance with Articles 10 to 15 of Regulation (EU) No 1095/2010 establishing ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

### **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Articles of Regulation (EU) No 648/2012. A consultation paper was published on the ESMA internet site on 26 June 2012, and the consultation closed on 5 August 2012. Prior to the publication of Regulation (EU) No 648/2012 on 27 July 2012, ESMA released a discussion paper<sup>1</sup> (DP) on the basis of the political agreement on EMIR reached on 9 February 2012. This document presented preliminary views and possible options for the development of the draft technical standards ESMA is required to develop.

Moreover, ESMA also consulted i) the Post-Trading Consultative Working Group which was asked in September 2011 to respond to a call for input; ii) the Securities and Markets Stakeholder Group (SMSG), which provided advice on both the Discussion Paper and the Consultation Paper; iii) the authorities that ESMA is required to consult under the different articles of Regulation (EU) No 648/2012. ESMA held two opening hearings on 6 March 2012 and 12 July 2012. Together with the draft technical standards, ESMA has submitted an explanation of how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

### **3. ANALYSIS OF COSTS AND BENEFITS**

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has submitted an analysis of the costs and benefits related to the draft technical standards submitted to the Commission. This analysis is available at:

<http://www.esma.europa.eu/content/Impact-assessment-Annex-VIII-Final-report-draft-Regulatory-and-Implementing-Technical-Standa>

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<sup>1</sup> <http://www.esma.europa.eu/system/files/2012-95.pdf>

The analysis examines the main benefits and costs that have been identified by ESMA in relation to the draft technical standards.

#### **4. LEGAL ELEMENTS OF THE DELEGATED ACT**

Article 1 specifies the information to be published by trade repositories.

Article 2 specifies data access for relevant Union authorities.

Article 3 specifies data access for third country authorities

Article 4 specifies operational standards for aggregation and comparison of data cross trade repositories.

Article 5 specifies operational standards for access to data.

Article 6 provides that the Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the opinion of the European Central Bank<sup>2</sup>,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories<sup>3</sup>, and in particular Article 81 (5) thereof,

Whereas:

- (1) It is essential to clearly identify relevant contracts and their respective counterparties. Following a functional approach, entities accessing data held by trade repositories should be considered according to the competences they have and the functions they perform.
- (2) The European Securities and Markets Authority (ESMA) should have access to all the transaction level data held by trade repositories, for the purpose of trade repository supervision, to be able to make information requests, take appropriate supervisory measures and also monitor whether registration as a trade repository should be kept or withdrawn.
- (3) Given its responsibilities under Regulation (EU) No 1095/2012 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)<sup>4</sup> and Regulation (EU) No 648/2012, ESMA should be given access on different mandates. The access to data by individual staff members of ESMA should be in line with each of those specific mandates.

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<sup>2</sup> OJ C X, xx.xx.201x, p.xx

<sup>3</sup> OJ L 201, 27.7.2012.

<sup>4</sup> OJ L 331, 15.12.2010, p. 84.

- (4) The European Systemic Risk Board (ESRB), ESMA and the relevant members of the European System of Central Banks (ESCB), including some national central banks and relevant Union securities and markets authorities, have a mandate for monitoring and preserving financial stability in the Union, and should therefore have access to transaction data for all counterparties for the purpose of their respective tasks in that regard.
- (5) Supervisors and overseers of central counterparties (CCPs) need access to enable the effective exercise of their duties over of such entities, and should therefore have access to all the information necessary for such mandate.
- (6) Access by the relevant ESCB members serves to fulfil their basic tasks, most notably the functions of a central bank of issue, their financial stability mandate, and in some cases prudential supervision over some counterparties. Since certain ESCB members have different mandates under national legislation, they should be granted access to data in accordance to the different mandates listed in Article 81(3) of Regulation (EU) No 648/2012.
- (7) The relevant Union securities and market authorities have as a main duty investor protection in their respective jurisdictions and should be granted access to transaction data on markets, participants, products and underlyings covered under by their surveillance and enforcement mandates.
- (8) The authorities appointed under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids<sup>5</sup> should be granted access to the transactions in equity derivatives where the underlying is either admitted to trading on a regulated market in their jurisdiction, has their legal address within their jurisdiction or is an offeror for a company for such an undertaking and the consideration it offers includes securities.
- (9) The Agency for the Cooperation of Energy Regulators (ACER) should be granted access for the purpose of monitoring wholesale energy markets in order to detect and deter market abuse in cooperation with national regulatory authorities, and the monitoring of wholesale energy markets to detect and deter market abuse under Regulation (EU) No 1227/2011 the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (REMIT)<sup>6</sup>. ACER should therefore have access to all data held by a trade repository as regards energy derivatives.
- (10) Regulation (EU) No 648/2012 only covers trade data and not pre-trade data such as orders to trade as required under Regulation (EU) No 1227/2011. Therefore, trade repositories should not be regarded as the appropriate source of information to ACER in that regard.
- (11) Under a functional approach for accessing data held by trade repositories, prudential supervision is an essential component. Similarly, different authorities might have a prudential supervisory mandate. Therefore, access to the transaction data on the

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<sup>5</sup> OJ L 142, 30.4.2004, p.12.

<sup>6</sup> OJ L 326, 8.12.2011, p. 1.

relevant entities should be ensured to all authorities listed under Article 81(3) of Regulation (EU) No 648/2012.

- (12) Entities accessing trade repository data under Article 81 (3) of Regulation (EU) No 648/2012 should ensure that they keep and enforce policies in order to ensure that only the relevant persons access the information for a well-defined and legally founded purpose, also being clear on the possible other persons authorised to access such data.
- (13) The access to data should be considered within three aggregation levels. Transaction data should include individual trade details; position data should regard aggregate position data by underlying/product for individual counterparties; and aggregate notional data should correspond to overall positions by underlying/product with no counterparty details. Access to transaction data would also grant access to position level and aggregate data. Access to position data would also grant access to aggregate data, but not transaction level data. Conversely, access to aggregate notional data should be the less granular category and should not enable access to position or transaction level data.
- (14) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (15) In accordance with Article 10 of Regulation (EU) No 1095/2010, ESMA has consulted the relevant authorities and the members of the European System of Central Banks (ESCB) before submitting the draft regulatory technical standards on which this Regulation is based., ESMA has also conducted open public consultations on these draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the ESMA Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation,

HAS ADOPTED THIS REGULATION:

### *Article 1*

#### **Publication of aggregate data**

1. Trade repositories shall publish data provided for in Article 81(1) of Regulation (EU) No 648/2012, including at least:
  - (a) a breakdown of the aggregate open positions per derivative class as follows:
    - (i) commodities;
    - (ii) credit;
    - (iii) foreign exchange;
    - (iv) equity;
    - (v) interest rate;
    - (vi) other.

- (b) a breakdown of aggregate transaction volumes per derivative class as follows:
  - (i) commodities;
  - (ii) credit;
  - (iii) foreign exchange;
  - (iv) equity;
  - (v) interest rate;
  - (vi) other.
- (c) a breakdown of aggregate values per derivative class, as follows:
  - (i) commodities;
  - (ii) credit;
  - (iii) foreign exchange;
  - (iv) equity;
  - (v) interest rate;
  - (vi) other.

- 2. The data shall be published on a website or an online portal which is easily accessible by the public and updated at least weekly.

## *Article 2*

### **Data access by relevant authorities**

- 1. A trade repository shall provide access to all transaction data to the European Securities and Markets Authority (ESMA) for the purpose of fulfilling its supervisory competences.
- 2. ESMA shall enact internal procedures in order to ensure the appropriate staff access and any relevant limitations of access as regards non-supervisory activities under ESMA's mandate.
- 3. A trade repository shall provide the Authority for the Cooperation of Energy Regulators (ACER) with access to all transaction data regarding derivatives where the underlying is energy or emission allowances.
- 4. A trade repository shall provide a competent authority supervising a CCP and the relevant member of the European System of Central Banks (ESCB) overseeing the CCP, where applicable, with access to all the transaction data cleared or reported by the CCP.

5. A trade repository shall provide a competent authority supervising the venues of execution of the reported contracts with access to all the transaction data on contracts executed on those venues.
6. A trade repository shall provide a supervisory authority appointed under Article 4 of Directive (EC) 2004/25 with access to all the transaction data on derivatives where the underlying is a security issued by a company which meets one of the following conditions:
  - (a) it is admitted to trading on a regulated market within their jurisdiction;
  - (b) it has its registered office or, where it has no registered office, its head office, in their jurisdiction;
  - (c) it is an offeror for the entities provided for in points (a) or (b) and the consideration it offers includes securities.
7. The data to be provided in accordance with paragraph 6 shall include information on:
  - (a) the underlying securities;
  - (b) the derivative class;
  - (c) the sign of the position;
  - (d) the number of reference securities;
  - (e) the counterparties to the derivative.
8. A trade repository shall provide the relevant Union securities and markets authorities referred to in Article 81(3)(h) of Regulation (EU) No 648/2012 with access to all transaction data on markets, participants, contracts and underlyings that fall within the scope of that authority according to its respective supervisory responsibilities and mandates.
9. A trade repository shall provide the European Systemic Risk Board, ESMA and the relevant members of the ESCB with transaction level data:
  - (a) for all counterparties within their respective jurisdictions;
  - (b) for derivatives contracts where the reference entity of the derivative contract is located within their respective jurisdiction or where the reference obligation is sovereign debt of the respective jurisdiction.
10. A trade repository shall provide a relevant ESCB member with access to position data for derivatives contracts in the currency issued by that member.
11. A trade repository shall provide, for the prudential supervision of counterparties subject to the reporting obligation, the relevant entities listed in Article 81(3) of Regulation (EU) No 648/2012 with access to all transaction data of such counterparties.

### *Article 3*

#### **Third country authorities**

1. In relation to a relevant authority of a third country that has entered into an international agreement with the Union as referred to in Article 75 of Regulation (EU) No 648/2012, a trade repository shall provide access to the data, taking account of the third country authority's mandate and responsibilities and in line with the provisions of the relevant international agreement.
2. In relation to a relevant authority of a third country that has entered into a cooperation arrangement with ESMA as referred to in Article 76 of Regulation (EU) No 648/2012, a trade repository shall provide access to the data, taking account of the third country authority's mandate and responsibilities and in line with the provisions of the relevant cooperation arrangement.

### *Article 4*

#### **Operational standards for aggregation and comparison of data**

1. A trade repository shall provide access to the entities listed in Article 81(3) of Regulation (EU) No 648/2012 in accordance with communication procedures, standards for messaging and reference data that are commonly used at international level.
2. The counterparties to a trade shall generate a unique trade identifier for each derivative contract to enable trade repositories to aggregate and compare data across different trade repositories.

### *Article 5*

#### **Operational standards for access to data**

1. A trade repository shall record information regarding the access to data given to the entities listed in Article 81(3) of Regulation (EU) No 648/2012.
2. The information referred to in paragraph 1 shall include:
  - (a) the scope of data accessed;
  - (b) a reference to the legal provisions granting access to such data under Regulation (EU) No 648/2012 and this Regulation.

### *Article 6*

#### **Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 19.12.2012

*For the Commission*  
*The President*  
*José Manuel BARROSO*