



Council of the
European Union

Brussels, 28 September 2017
(OR. en)

12618/17

**Interinstitutional File:
2017/0090 (COD)**

EF 213
ECOFIN 760
CODEC 1471

NOTE

From: Presidency
To: Delegations

Subject: 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
= Presidency compromise text

Delegations will find below a Presidency compromise text on the above Commission proposal.

With respect to the original Commission proposal, the new text is marked in **underlined bold** and deletions are indicated in ~~striketrough~~.

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 Bank¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure³,

Whereas:

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

³ Position of the European Parliament of ... (OJ ...) and decision of the Council of ...

- (1) Regulation (EU) No 648/2012 of the European Parliament and of the Council⁴ 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 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 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).

- (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~~, **and transparent commercial terms. Clearing members or clients should only be permitted to restrict access to those services to control the risks connected to the clearing services offered, in particular counterparty risks.**

- (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 solely 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~~ both of the counterparties is ~~are~~ non-financial ~~counterparty~~ counterparties should therefore be exempted from the reporting obligation.

- (13) The requirement to report exchange-traded ~~derivative contracts~~ **derivatives** ('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 Council⁵ 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~~ **and their clients,** as well as for ensuring the accuracy of the details reported, **should fall solely on the CCP. To ensure that the CCP has all of the details required to fulfil this reporting obligation, the clearing members and, where relevant, their clients should provide the CCP with all details pertaining to the transaction which the CCP cannot reasonably be expected to possess. [Clearing members and their clients may, however, choose to report their ETD transactions. In that case, the responsibility for reporting and for the accuracy of the data will remain with the clearing member or the their client, as applicable.]**
- (14) To reduce the burden of reporting for small non-financial counterparties, the financial counterparty should **[, as a rule,]** be **solely** responsible, ~~and legally liable,~~ for reporting on behalf of both itself and ~~the~~ **a** 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 ensure that the financial counterparty has all of the data required to fulfil this reporting obligation, the non-financial counterparty should [in this case] provide the financial counterparty which will report on its behalf with all details pertaining to the transaction which the financial counterparty cannot reasonably be expected to possess. [Small non-financial counterparties may, however, choose to report their transactions with financial counterparties. In that case, the responsibility for reporting and for the accuracy of the data will remain with the small non-financial counterparty.]**

⁵ 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).

- (15) The responsibility for reporting ~~other~~ derivative contracts **where one or both of the counterparties is an undertaking for collective investment in transferable securities ('UCITS') or an alternative investment fund ('AIF')** should also be determined. It should therefore be specified that the management company of ~~an undertaking for collective investment in transferable securities ('UCITS')~~ **a 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')~~ **AIF should be responsible 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~~ **competent authorities** 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 2012⁶ and the public quantitative disclosure standards for central counterparties published in 2015⁷, 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 **client** 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 **with regard to assets and positions recorded in those accounts referred to in Article 39(2), 39(3), 39(4) and 39(5) of Regulation (EU) No 648/2012.**
- (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.

⁶ <http://www.bis.org/cpmi/publ/d106.pdf>

⁷ <http://www.bis.org/cpmi/publ/d125.pdf>

- (20) Third country authorities should have access to data reported to Union trade repositories where certain conditions guaranteeing the treatment of those data are 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 Council⁸ 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, **since some counterparties are not required to report their derivative transactions to a trade repository**, trade repositories should grant **those** counterparties, upon request, access to all data reported on their behalf to allow ~~those counterparties~~**them** to verify the accuracy of those data.

⁸ 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).

- (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 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 Council⁹.

⁹ 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).

- (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: **and the terms and conditions, the arrangements and the required documentation under which trade repositories grant access to entities referred to in Article 81(3).**
- 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 Council¹⁰, Regulation (EU) No 1094/2010 of the Parliament and of the Council¹¹ and Regulation (EU) No 1095/2010 of the Parliament and of the Council¹².

¹⁰ 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).

¹¹ 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).

¹² 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).

- (28) The Commission should also be empowered to adopt implementing technical standards developed by ESMA by means of implementing acts pursuant to Article 291 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 **and the format of the application for an extension of the registration of a trade repository that is already registered under Regulation (EU) 2015/2365.**
- (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 Council¹³ and delivered an opinion on [...].
- (32) Regulation (EU) No 648/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

¹³ 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).

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 **following legal persons**:

- (a) an investment firm authorised in accordance with Directive 2014/65/EC of the European Parliament and of the Council¹⁴;
- (b) a credit institution authorised in accordance with Regulation (EU) No 575/2013;
- (c) an insurance ~~or~~ **for** reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council¹⁵;
- (d) a UCITS **and, where relevant, its management company**, 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;

¹⁴ 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).

¹⁵ 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).

- (e) an AIF as defined in alternative investment fund within the meaning of Article 4(1)(a) of ~~directive~~Directive 2011/61/EU, which is either established in the Union or managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU;
- (f) a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council¹⁶ ~~and~~or 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 Council¹⁷; ;.

¹⁶ 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).

¹⁷ 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).

(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, **and transparent** commercial terms.

Clearing members or clients shall only be permitted to restrict access to the services referred to in the first subparagraph to control the risks connected to the clearing services offered, in particular counterparty risks.

The Commission shall be empowered to adopt a delegated act in accordance with Article 82 to ~~specify~~ **supplement this Regulation by specifying** the conditions under which commercial terms referred to in the first subparagraph are considered to be fair, reasonable ~~and~~, non-discriminatory"; **and transparent, based on the following:**

(a) transparency requirements with respect to fees, prices, discount policies and other contractual terms and conditions regarding the price list;

(b) requirements on what constitutes reasonable commercial terms;

(c) requirements to facilitate clearing services on the basis of costs and risks on a fair and non-discriminatory basis so that any differences in prices charged are proportionate to costs, risks and benefits, and

(d) criteria to restrict access to control the risks for the clearing member or client connected to the clearing services offered.";

(3) The following Article 4a is inserted:

“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 **or the competent authorities** 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 **by way of implementing act** 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.

ESMA shall review the suspension after 9 months have passed from the initial suspension.”;

(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~~**both** of the counterparties ~~is~~**are** non-financial ~~counterparty~~**counterparties**.”;

(b) the following paragraph 1a is inserted:

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

(a) **[subject to the condition outlined in the third sub-paragraph of this paragraph,]** CCPs shall be **solely** responsible for reporting on behalf of both counterparties **and their clients** the details of derivative contracts that are not OTC derivative contracts as well as for ensuring the accuracy of the details reported;

(aa) [subject to the condition outlined in the third sub-paragraph of this paragraph,] financial counterparties shall be responsible for reporting on behalf of both counterparties, **as well as for ensuring the accuracy of,** the details of **the following:**

(i) 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;~~;

(ii) derivative contracts that are not OTC derivative contracts not subject to the procedure described in point (a);

(b) 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;

(c) 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;

(d) counterparties and CCPs shall ensure that the details of their derivative contracts are reported accurately and without duplication.

Counterparties not required to report the details of the derivative contracts pursuant to points (a) and (aa) shall provide the reporting counterparties with all details necessary for them to correctly fulfill the reporting obligation [and which the reporting counterparties cannot reasonably be expected to possess]. For the purposes of point (a), that obligation shall apply only to the clearing members and their clients.

Small-financial counterparties referred to in points (a) and (aa) may choose to keep the responsibility for reporting the details of their derivative contracts to a trade repository. In this case the procedures described in points (a) and (aa) shall not apply.

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’);~~

(ii) unique product identifiers;

~~(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**12** 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.";

* 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 912 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 ~~these accounts~~ **referred to in paragraphs 2, 3, 4 and 5** 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:

- (i) an application for registration;
- (ii) 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:

- (i) the details of the application for the registration referred to in paragraph 1(a);
- (ii) 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 912 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:

- (i) the format of the application for registration referred to in paragraph 1(a);
- (ii) 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 912 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 “the following:”;

” (b) for the infringements referred to in points (a), (b) and (d) to (k) of Section I of Annex I, and in points (a), (b) and (h) of Section II of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed 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.~~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~~ 12 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~~12 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)(~~eb~~), 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)(~~ec~~), 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

Annex I is amended as follows:

(22) In Section I, the following points (i), (j) and (k) are added:

“(i) a trade repository infringes Article 78(9)(a) by not establishing adequate procedures for the reconciliation of data between trade repositories;

(j) a trade repository infringes Article 78(9)(b) by not establishing adequate procedures to ensure the completeness and accuracy of the reported data;

(k) a trade repository infringes Article 78(9)(c) by not establishing adequate policies for the orderly transfer of data to other trade repositories where requested by the counterparties and CCPs referred to in Article 9 or where otherwise necessary.”;

In Section IV, the following point (d) is inserted:

“(d) a trade repository infringes Article 55(4) by not notifying ESMA in due time of material changes to the conditions for its registration.”.
