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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 8.2.2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts

Delegations will find attached document C(2022) 619 final.

Encl.: C(2022) 619 final



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COMMISSION DELEGATED REGULATION (EU) .../...

of 8.2.2022

**amending the regulatory technical standards laid down in Delegated Regulation (EU)
2015/2205 as regards the transition to new benchmarks referenced in certain OTC
derivative contracts**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

With the common objective to ensure the accuracy and integrity of benchmarks, and thus increase contracts' robustness, several jurisdictions have introduced benchmark reforms in recent years. In the EU, this work corresponds to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (Benchmarks Regulation).¹ Following these reforms, a number of benchmarks are due to cease in the near future, notably EONIA and LIBOR which are widely used as benchmarks in a range of financial instruments and contracts, including OTC derivative contracts. Specifically, EONIA for the EUR, as well as LIBOR for GBP and JPY, are due to cease around the year-end, whereas USD LIBOR will continue to be published until June 2023. However, various communications have been made with the objective to stop USD LIBOR from being used as a reference rate in new contracts as soon as possible and in any event by 31 December 2021.

In order to replace these benchmarks, there have been international efforts from regulators and market participants to transition to new benchmarks in a number of currencies (including €STR in EUR, SONIA in GBP or SOFR in USD). More specifically with respect to the OTC derivatives market, this means that new derivative contracts are expected to no longer reference EONIA or LIBOR from 3 January 2022, whereas derivatives referencing €STR in EUR, SONIA in GBP or SOFR in USD are already being traded and cleared.

There are currently three Commission Delegated Regulations on the clearing obligation. They mandate a range of interest rate and credit derivative classes to be cleared. In view of the benchmark transition, there is a need to review the scope of the clearing obligation for the classes and currencies impacted by these changes, namely interest rate derivative classes in EUR, GBP, JPY and USD. Commission Delegated Regulation (EU) 2015/2205 should therefore be amended to reflect the transition to the new benchmarks.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA ran a public consultation until 2 September 2021 with a proposal to amend the scope of the clearing obligation to accompany the benchmark transition. ESMA received around twenty responses from a well-diversified range of stakeholders and has taken this feedback into account in the finalisation of the proposed amendments to the Commission Delegated Regulation (EU) 2015/2205. In parallel, ESMA has continued to monitor the progress made with the benchmark transition, including an analysis of more recent regulatory reporting data, in order to calibrate the changes to be made to the scope of the clearing obligation. Furthermore, ESMA has continued its dialogue with the authorities from other jurisdictions to facilitate coordination and convergence to the extent possible. Finally, ESMA has received input from the European Systemic Risk Board (ESRB) on the amendments to the clearing obligation which have been reflected in the analysis and in this amending regulation. This

¹ Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1–65)

amending regulation is based on ESMA's final report sent to the Commission on 17 November 2021.²

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The delegated act introduces a modification to Commission Delegated Regulation (EU) 2015/2205.

Article 1 modifies Article 3 of Commission Delegated Regulation (EU) 2015/2205 regarding interest rate derivative classes, as well as its annex, in the following way:

- Article 3(1a) is added to specify the date from which the clearing obligation shall take effect for certain transactions referencing €STR and SONIA.
- Article 3(1b) is added to specify the date from which the clearing obligation shall take effect for certain transactions referencing SOFR.
- Article 3(2) is replaced by a new one catering for the introduction of new Article 3(1a) and 3(1b).
- Article 3(3) is replaced by a new one catering for the introduction of new Article 3(1a) and 3(1b).
- The annex is replaced to reflect the deletion of old benchmarks and the introduction of new benchmarks.

² The full document can be found here: [ESMA proposes changes to the scope of the clearing and derivative trading obligations for the benchmark transition \(europa.eu\)](#).

COMMISSION DELEGATED REGULATION (EU) .../...

of 8.2.2022

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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 repositories³, and in particular Article 5(2) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2015/2205⁴ specifies, among others, the classes of over-the-counter (OTC) interest rate derivatives denominated in Euro (EUR), Pound Sterling (GBP), Japanese Yen (JPY) and US Dollar (USD) that are subject to the clearing obligation. Those classes include one class denominated in EUR that references the Euro Overnight Index Average (EONIA) rate as well as several classes denominated in GBP, JPY or USD that reference the London Inter-Bank Offered Rate (LIBOR), whereas EONIA and LIBOR are two benchmarks that are due to cease.
- (2) The European Money Markets Institute, the administrator for EONIA, communicated that the cessation of EONIA will take place at the end of 2021. Similarly, the ICE Benchmark Administrator, the administrator for LIBOR, communicated that the cessation of GBP LIBOR, JPY LIBOR and certain fixings of USD LIBOR will also take place at the end of 2021, whereas the publication of all remaining settings of USD LIBOR will cease in June 2023. On 5 March 2021, the Financial Conduct Authority from the United Kingdom confirmed that all LIBOR settings will indeed either cease to be provided by any administrator or no longer be representative. In addition, the Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued a joint statement to strongly encourage counterparties to stop using any of the LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021.
- (3) After 31 December 2021, counterparties will hence no longer be able to enter into OTC interest rate derivatives referencing EONIA, GBP LIBOR or JPY LIBOR as those benchmarks will have ceased or are expected to no longer enter into OTC

³ OJ L 201, 27.7.2012, p. 1.

⁴ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

interest rate derivatives referencing USD LIBOR. On that date, there will thus be no volume nor liquidity in derivatives referencing EONIA, GBP LIBOR or JPY LIBOR and that those trades will also not be cleared by central counterparties (CCPs). On that same date, there should also not be any material liquidity in derivatives referencing USD LIBOR. Therefore, the classes of derivatives currently in scope of the clearing obligation and that are referencing EONIA, GBP LIBOR or JPY LIBOR will no longer meet two of the conditions to be subject to the clearing obligation set out in Regulation (EU) No 648/2012, i.e. to have a sufficient level of liquidity and to be cleared by an authorised or recognised CCP, while the classes of derivatives currently in scope of the clearing obligation and that are referencing USD LIBOR will no longer meet one of the conditions to be subject to the clearing obligation set out in Regulation (EU) No 648/2012, i.e. to have a sufficient level of liquidity. It follows that those classes should be removed from the scope of the clearing obligation.

- (4) Regulators and market participants have been working on replacement rates for those currencies, and in particular on the development of new risk-free rates, which are now being used as benchmarks in financial instruments and financial contracts. In particular, the euro short-term rate (€STR), the Secured Overnight Financing Rate (SOFR), the Sterling Over Night Index Average (SONIA) and the Tokyo Overnight Average Rate (TONA) risk-free rates are produced for EUR, USD, GBP and JPY respectively. More specifically with respect to the OTC derivative market, it now means that OTC interest rate derivative contracts referencing €STR, SOFR, SONIA and TONA are being traded by counterparties and are being cleared at certain CCPs.
- (5) ESMA has been notified of the classes of OTC interest rate derivatives referencing €STR, SOFR, SONIA or TONA that certain CCPs have been authorised to clear. For each of those classes ESMA has assessed the criteria that are essential for subjecting them to the clearing obligation, including the level of standardisation, the volume and liquidity, and the availability of pricing information. With the overarching objective of reducing systemic risk, ESMA has determined the classes of OTC interest rate derivatives referencing some of those risk-free rates that should be subject to the clearing obligation in accordance with the procedure set out in Regulation (EU) No 648/2012. Those classes should be therefore included in the scope of the clearing obligation.
- (6) In general, different counterparties need different periods of time for putting in place the necessary arrangements to start clearing their OTC interest rate derivatives subject to the clearing obligation. However, in this case, counterparties have had time to prepare for the benchmark transition and for the planned cessation of EONIA, EUR LIBOR, GBP LIBOR or JPY LIBOR taking place at the end of 2021, including with respect to their clearing arrangements. For counterparties already subject to the clearing obligation and clearing OTC interest rate derivatives denominated in EUR or GBP, clearing the classes referencing the new risk-free rates in those currencies does not require significant changes, if any at all, to their clearing contracts or processes. Indeed, when counterparties have clearing arrangements in place to clear OTC interest rate derivatives denominated in EUR or GBP, then clearing OTC interest rate derivatives referencing the risk-free rates in those currencies does not require establishing and implementing brand new clearing arrangements as was the case when they first started clearing OTC interest rate derivatives denominated in those currencies. Because clearing derivatives referencing the new risk-free rates is part of a bigger implementation preparation to transition away from EONIA and LIBOR and on to new benchmarks, there is no need to introduce an additional phase-in in order to

ensure an orderly and timely implementation of that obligation. The changes made to introduce the new classes of OTC interest rate derivatives referencing the risk-free rates and denominated in EUR and GBP should start to apply on the date of entry into force of this Regulation.

- (7) Following the joint statement from the Commission, ESMA, ECB Banking Supervision and EBA to strongly encourage counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, counterparties have had to plan for the end of when they could reference USD LIBOR, including with respect to their clearing arrangements. The same considerations with regards to the ability of counterparties having clearing arrangements in place to clear OTC interest rate derivatives denominated in a certain currency to adapt them rather with a rather short turnaround time in order to clear OTC interest rate derivatives referencing the risk-free rates in that same currency also apply to USD, but some additional elements mean that their preparations are less advanced for USD. In particular, CCPs have not yet communicated when they will convert the currently cleared OTC interest rate derivatives referencing USD LIBOR into OTC interest rate derivatives referencing SOFR and it is not yet clear either how mandatory clearing will be adapted in the domestic market for these derivatives. This additional complexity means that counterparties need more time to prepare for the clearing obligation of OTC interest rate derivatives referencing the USD risk-free rate and thus that there is a need to introduce an additional phase-in in order to ensure an orderly and timely implementation of that obligation. The changes made to introduce the new class of OTC interest rate derivatives referencing the risk-free rate denominated in USD should start to apply three months after the date of entry into force of this Regulation.
- (8) The planned cessation of EONIA, GBP LIBOR and JPY LIBOR is scheduled for the end of 2021 such that it will not be possible to trade or clear OTC interest rate derivatives referencing those benchmarks as of 3 January 2022 onwards. Similarly, following the joint statement from the Commission, ESMA, ECB Banking Supervision and EBA to strongly encourage counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, counterparties will be expected to not trade or clear OTC interest rate derivatives referencing USD LIBOR as of 3 January 2022 onwards. Instead, from 3 January 2022, counterparties will trade or clear other OTC interest rate derivatives, in particular OTC interest rate derivatives referencing the risk-free rates. This Regulation should thus enter into force without delay after its publication.
- (9) Delegated Regulation (EU) 2015/2205 should therefore be amended accordingly.
- (10) This Regulation is based on the draft regulatory technical standards submitted to the Commission by ESMA.
- (11) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, requested the advice of the Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁵, and consulted the European Systemic Risk Board.

⁵ 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).

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2015/2205

Delegated Regulation (EU) 2015/2205 is amended as follows:

(1) Article 3 is amended as follows:

(a) the following paragraphs 1a and 1b are inserted:

’1a. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows D.4.1, D.4.2 of Table 4, the clearing obligation for such contracts shall take effect on ... [*OP: Please insert the date of entry into force of this Regulation*].

1b. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows D.4.3 of Table 4, the clearing obligation for such contracts shall take effect on ... [*OP: Please insert the date: three months after the date of entry into force of this Regulation*].’;

(b) in paragraph 2, the first subparagraph is replaced by the following:

’By way of derogation from paragraphs 1, 1a and 1b, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union, the clearing obligation shall take effect on:

(a) 30 June 2022 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country;

(b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:

(i) 60 days after the date of entry into force of the equivalence decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country;

(ii) the date when the clearing obligation takes effect pursuant to paragraph 1.’;

(c) paragraph 3 is replaced by the following:

’3. By way of derogation from paragraphs 1, 1a, 1b and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect from 18 February 2022 where the following conditions are fulfilled:

(a) the clearing obligation has not been triggered by 18 February 2021;

- (b) the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.’
- (2) Annex is replaced by the text in the Annex to this Regulation.

Article 2
Entry into force

This Regulation shall enter into force on the 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, 8.2.2022

For the Commission
The President
Ursula VON DER LEYEN