



ESA 2023 33

18 December 2023

ESAs Final Report on bilateral margining of equity options

EMIR RTS amending Commission Delegated Regulation (EU) 2016/2251 with regards to the application date of collateral exchange requirements to single-stock equity options and index options



Contents

1. Executive Summary	2
2. Introduction	4
3. Proposed amendments	5
4. Way forward	7
5. Annexes	8

1. Executive Summary

Reasons for publication

1. This final report presents new amending draft regulatory technical standards (RTS) on the risk mitigation techniques for OTC derivative contracts not cleared by a CCP (bilateral margining) that the European Supervisory Authorities (ESAs) have developed under Article 11(15) of Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR). The draft RTS propose to amend Commission Delegated Regulation (EU) No 2016/2251 that sets out the detailed bilateral margin requirements.
2. More specifically, the draft RTS relate to the exchange of bilateral margins with regard to OTC derivative contracts on single-stock equity options and index options not cleared by a CCP. These contracts are currently exempted from bilateral margining. This exemption is set to expire on 4 January 2024.
3. In June 2023, the ESAs approached the Commission and the Co-legislators on the matter. In their letter, the ESAs advocated for defining what should be the long-term treatment for equity options with respect to bilateral margining and to include it in EMIR as part of the on-going legislative review. In particular, the ESAs highlighted that there are merits both in favour of keeping the exemption or in favour of removing it. The ESAs noted in the letter that “on the one hand, it can be argued that there are no prudential grounds for an exemption, neither in the EU nor in the internationally agreed framework. On the other hand, the equity option exemption would be consistent with the approaches taken in other jurisdictions and preserve the competitiveness of EU counterparties in this area.”
4. It is to be noted that the co-legislators have since started to address this issue with a long-term approach, i.e. with specific provisions in Level 1. Notably, the ESAs take note of the text approved by Members of the ECON Committee in the European Parliament on 28 November¹ as well as the text approved at Coreper for the Council on 6 December², introducing specific provisions on the treatment of equity options, including an exemption.
5. Considering the above-mentioned arguments regarding the merits of the exemption and the fact that the ordinary legislative procedure amending EMIR has not been finalised yet, it appears appropriate to further phase-in for a period of two years the application of requirements related to the exchange of bilateral margins to OTC derivative contracts on single-stock equity options and index options not cleared by a CCP. This would avoid the risk

¹ [PR COD 1consamCom \(europa.eu\)](#)

² [Capital markets Union: Council reaches agreement on improvements to EU clearing services - Consilium \(europa.eu\)](#)

of creating undue instability in the operations of market participants with respect to the applicable regulatory framework, i.e. it would avoid the possible situation where market participants would suddenly need to implement the necessary operational and legal arrangements as the exemption expires, and then to stop them as the exemption is later reintroduced by the co-legislators in the finalisation of the EMIR review.

6. Despite this further extension of the phase-in, the ESAs remain of the view that a long-term solution should be found by the co-legislators on the bilateral margining of equity options.
7. In addition, it should also be noted that the situation justifying the exemption (i.e. the need to avoid market fragmentation and to ensure a global level playing field for counterparties established in the Union) has not changed since the last time this exemption was renewed through Commission Delegated Regulation (EU) 2021/236.

Contents

8. This Report provides explanations on the draft RTS amending the application date for margin requirements on non-cleared OTC derivative contracts on single-stock equity options and index options.

Next steps

9. This Final Report is sent to the European Commission, and the ESAs are submitting the draft technical standards presented in the Annex for endorsement, in the form of a Commission Delegated Regulation, i.e. a legally binding instrument directly applicable in all Member States of the European Union. Following the endorsement, they are then subject to non-objection by the European Parliament and the Council.

2. Introduction

10. The temporary exemption from bilateral margining for equity options foreseen in Commission Delegated Regulation 2016/2251 is due to expire on 4 January 2024.
11. The ESAs sent a letter to the Commission and the co-legislators on 13 June 2023 on this exemption, indicating notably that “the ESAs would welcome clarifications from the Commission and the co-legislators as part of this EMIR review on what should be the applicable regime for equity options from 4 January 2024 onwards”.
12. It is to be noted that the co-legislators have since started to address this issue with a long-term approach, i.e. with specific provisions in Level 1. Notably, the ESAs take note of the text approved by Members of the ECON Committee in the European Parliament on 28 November as well as the text approved at Coreper for the Council on 6 December, introducing specific provisions on the treatment of equity options, including an exemption.
13. However, the negotiations on the EMIR review are still ongoing, such that amendments to EMIR will not be published in the Official Journal and applicable by 4 January 2024. In particular there is a lack of visibility for market participants on the expected treatment of equity options from 4 January 2024 onwards.
14. It is not the intention of the ESAs to interfere in any political negotiations that may finally introduce a long-term treatment for equity options as regards bilateral margins. However, considering that the ordinary legislative procedure amending EMIR has not been finalised yet, and taking into account the fact that the situation justifying the exemption (i.e. the need to avoid market fragmentation and to ensure a global level playing field for counterparties established in the Union) has not changed since the last time this exemption was renewed, it appears appropriate to further phase-in for a period of two years the application of requirements related to the exchange of bilateral margins to OTC derivative contracts on single-stock equity options and index options not cleared by a CCP.
15. This would avoid the risk of creating undue instability in the operations of market participants with respect to the applicable regulatory framework, i.e. it would avoid the possible situation where market participants would suddenly need to implement the necessary operational and legal arrangements as the exemption expires, and then to stop them as the exemption is later reintroduced by the co-legislators in the finalisation of the EMIR review.

3. Proposed amendments

16. Commission Delegated Regulation (EU) 2016/2251 on bilateral margining contains a range of implementation timelines, including a phase-in for the initial margin requirements as well as deferred dates of application for certain contracts and counterparties. In particular, the requirements for single-stock equity options or index options transactions have been deferred until 4 January 2020 in the Commission Delegated Regulation on bilateral margining and furthered phased-in until 4 January 2024 in a subsequent amendment to this Delegated Regulation (article 38(1) of the RTS on bilateral margining).
17. Recital 43 of the Commission Delegated Regulation on bilateral margining provides the rationale behind the initial three-year temporary exemption. It states that: “In order to avoid market fragmentation and ensure a level playing field for Union counterparties established in the Union on a global level, and acknowledging the fact that in some jurisdictions the exchange of variation and initial margin for single-stock options and equity index options is not subject to equivalent margin requirements, the treatment of those products should be phased-in. This phase-in period will provide time for monitoring regulatory developments in other jurisdictions and ensuring that appropriate requirements are in place in the Union to mitigate counterparty credit risk in respect of such contracts whilst avoiding scope for regulatory arbitrage.”
18. Three years later, the situation had not materially changed. Certain jurisdictions had not implemented these requirements for these contracts or had also introduced temporary exemptions in the meantime.
19. In the Final Report on the RTS on bilateral margining published by the ESAs on 23 November 2020 , the ESAs reiterated the view that, from a prudential point of view, the international framework agreed on by all the participant authorities in the BCBS and IOSCO discussions is a crucial pillar in ensuring safer derivatives markets, limiting the counterparty risk between counterparties trading derivatives, and thus that its coordinated implementation is key in reaching this objective.
20. However, considering it is unlikely that the international context would evolve any time soon and taking into consideration the call from the co-legislators for international regulatory convergence with regard to other classes of derivatives, the reasons described above for the initial exemption and the subsequent extension were rendered relevant again.
21. Therefore, and in line with the call for international regulatory convergence from the co-legislators expressed in Recital 21 of Regulation (EU) 2019/834 amending EMIR (“EMIR Refit”), the ESAs considered it appropriate to further postpone the temporary exemption for bilateral margins on equity options until 4 January 2024.

22. In December 2022 the European Commission initiated an ordinary legislative procedure to amend EMIR. The ESAs recently advocated for the inclusion of a long-term solution as regards the margining of equity options as part of the on-going EMIR review. Considering that the legislative process amending EMIR is still on-going, taking also into account the fact that the situation justifying the exemption has not changed since the last time this exemption was renewed, and in view of avoiding any undue instability in the operations of market participants with respect to the applicable regulatory framework, the ESAs are proposing a further extension of the temporary exemption for equity options until 4 January 2026.
23. It is to be noted that the co-legislators have since started to address this issue with a long-term approach. Notably, the ESAs take note of the text approved by Members of the ECON Committee in the European Parliament on 28 November as well as the text approved at Coreper for the Council on 6 December, introducing specific provisions for equity options, including an exemption and a mandate for a regular report with the objective to monitor the international situation and adapt the EU framework if necessary.

4. Way forward

24. Commission Delegated Regulation (EU) 2016/2251 on bilateral margining contains a range of implementation timelines, including a phase-in for the initial margin requirements as well as deferred dates of application for certain contracts and counterparties. In particular, the requirements for single-stock equity options or index options transactions have been deferred until 4 January 2020 in the Commission Delegated Regulation on bilateral margining and furthered phased-in until 4 January 2024 in a subsequent amendment to this Delegated Regulation (article 38(1) of the RTS on bilateral margining).
25. From a process point of view, it is important to note that the adjustments introduced in the proposed draft RTS are limited in nature. They are also in line with the international framework and take into account the status of the implementation of this framework at the international level.
26. The current date of application of bilateral margin requirements to equity options is approaching (4 January 2024). There is an urgency to provide a regulatory solution to avoid creating an unlevel playing field for counterparties based in the EU. Market participants would benefit in knowing as early as possible on whether and how to prepare for these requirements. The suggested change has also been called for by a large range of market participants.
27. As a result, the ESAs are of the view that it would be disproportionate to conduct open public consultations, taking into account the scope and impact of the change concerned in the draft RTS and the urgency of the matter. Therefore, in accordance with Article 10(1) of the EBA, EIOPA and ESMA Regulations, the ESAs have not conducted any open public consultation. However, the stakeholder groups of each of the ESAs have been consulted.
28. These amendments are thus submitted directly to the European Commission for review and endorsement. The process that follows the adoption of draft RTS by the European Commission without significant amendments is a review period by the European Parliament and Council before they can then be published in the Official Journal and subsequently enter into force.

5. Annexes

5.1 Annex 1 - Draft regulatory technical standards on the risk mitigation techniques for OTC derivatives not cleared with regards to bilateral margining

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

amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral

of []

(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 11(15) thereof,

Whereas:

1. Commission Delegated Regulation (EU) 2016/2251⁴ specifies, among others, the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in Article 11(3) of Regulation (EU) 648/2012, that financial counterparties are required to have for the purpose of the exchange of collateral, with respect to their OTC derivative contracts not cleared by a central counterparty. Delegated Regulation (EU) 2016/2251 implements the international framework for the exchange of collateral that has been

³ OJ L 201, 27.7.2012, p. 1.

⁴ Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 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 for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

agreed at the global level by the Basel Committee on Banking Supervision (BCBS) and the International Organisation of Securities Commissions (IOSCO).

2. Delegated Regulation (EU) 2016/2251 provides for a phase-in over a number of years which reflects the implementation schedule agreed by the BCBS and the IOSCO. That phase-in aims at ensuring international consistency and thus at minimising possibilities for regulatory arbitrage. The phase-in also aims at facilitating a proportionate and effective implementation of the requirements concerned by giving counterparties, depending on the category of counterparty, on the type of contract and on when the contract was entered into or novated, sufficient time to adapt their internal systems and processes to the requirements concerned. Finally, the phase-in provided for in Delegated Regulation (EU) 2016/2251 takes into account the scope and level of implementation for the requirements concerning the exchange of collateral that was agreed by the BCBS and the IOSCO for other jurisdictions, thus avoiding market fragmentation and ensuring a global level playing field for counterparties established in the Union. In particular, Delegated Regulation (EU) 2016/2251 provides for more time for certain products that are not subject to equivalent margin requirements in other jurisdictions.
3. To avoid market fragmentation and to ensure a global level playing field for counterparties established in the Union, international regulatory convergence should also be ensured with regard to risk-management procedures for other classes of OTC derivatives that are not subject to equivalent margin requirements. In particular, acknowledging the fact that in some jurisdictions single-stock equity options and index options are not subject to equivalent margin requirements, Commission Delegated Regulation (EU) 2021/236⁵ phased-in the treatment of those products until 4 January 2024. That further phase-in period allowed for monitoring of regulatory developments in other jurisdictions and ensuring that appropriate requirements are in place in the Union to mitigate counterparty credit risk in respect of such contracts whilst avoiding scope for regulatory arbitrage.
4. Given that the situation has not changed since the adoption of Delegated Regulation (EU) 2021/236 and that it is unlikely that those jurisdictions will move anytime soon towards more regulatory convergence with regard to those products, the treatment of those products should be further phased-in for another period of two years which will also take into account the ongoing legislative developments⁶.
5. Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly.
6. This Regulation is based on the draft regulatory technical standards submitted by the ESAs to the Commission.

⁵ Commission Delegated Regulation (EU) 2021/236 of 21 December 2020 amending technical standards laid down in Delegated Regulation (EU) 2016/2251 as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral (OJ L 56, 17.2.2021, p. 1–5)

⁶ European Commission published on 7 December 2022 a proposal for amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets.

7. The amendments to Delegated Regulation (EU) 2016/2251 are limited adjustments of the existing regulatory framework, in line with international developments. Given the limited scope of the amendments and the urgency of the matter, it would be disproportionate for the ESAs to conduct open public consultations or analyses of the potential related costs and benefits. The ESAs nevertheless requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010, the opinion of the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010, and the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.
8. In order for market participants to adapt adequately and as quickly as possible and comply with the requirements of this Delegated Regulation (EU) 2016/2251, in particular with respect to the requirements for which the currently applicable deadline is rapidly approaching, this Regulation should enter into force, as a matter of urgency, on the day following that of its publication.

HAS ADOPTED THIS REGULATION:

Article 1
Amendment to Delegated Regulation (EU) 2016/2251

Delegated Regulation (EU) 2016/2251 is amended as follows:

In Article 38, paragraph 1 is replaced by the following:

1. ‘By way of derogation from Articles 36(1) and 37, in respect of all non-centrally cleared OTC derivatives which are single-stock equity options or index options, the Articles referred to in Articles 36(1) and 37 shall apply from 4 January 2026.’.

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,

*For the Commission
The President*

*[For the Commission
On behalf of the President]*

[Position]

5.2 Annex 2 – Consultation of the ESAs Stakeholder Groups

29. The Stakeholder Groups of the three ESAs were consulted in parallel fast-tracked procedures and due to the time limitations, members of the Stakeholder Groups were also invited to provide feedback individually. Resulting from this, the ESAs did not receive feedback at the group level from the Stakeholder Groups but did receive a number of responses from some of their Members.

30. All feedback received was largely supportive of the proposed draft RTS and few other considerations were also shared. In view of the responses, there was no particular reason to consider changes to the proposed RTS.

31. The individual responses are listed below for reference.

a) EBA Stakeholder Group:

- Seven members from the Banking Stakeholder Group provided a joint response:

As members of the EBA Banking Stakeholders Group, we welcome the ESAs recommendation and urge the Commission to adopt the amended RTS as promptly as possible, in order to provide visibility to market participants.

We concur with the ESAs letter to the Commission and co-legislators in July 2023 that “on one hand, it can be argued that there are no prudential grounds for an exemption, neither in the EU nor in the internationally agreed framework. On the other hand, the equity option exemption would be consistent with the approaches taken in other jurisdictions and preserve the competitiveness of EU counterparties in this area.” We thus welcome the proposal to extend the exemption for bilateral margins for single-stock and equity index options. The exemption is in line with practice in other non-EU jurisdictions, thus fostering international regulatory convergence and enabling a level playing field between EU counterparties and their international peers.

We welcome that the Co-legislators are currently working on providing a permanent response to this issue at Level 1, through the ongoing review of EMIR (EMIR3). While the text is not yet finalized, and will not enter into force prior to January 4th, 2024, the vote at the ECON committee on November 28th, as well as the Council compromise text dated October 20th, both suggest that EMIR3 final text will include a permanent exemption, in line with the implementation in other main jurisdictions.

Indeed, given the global nature of capital markets and derivatives markets in particular, a more conservative framework in the EU would have a significant impact on the competitiveness of the European markets and would be opposed to equal treatment with other jurisdictions. End-investors willing to hedge their single-name equity or index exposures would incur a significantly higher cost and

administrative burden when dealing with EU market makers than when dealing with 3rd party banks or investment firms, worsening the existing competitiveness gap. EU listed companies would also see their access to equity markets impacted, as buying a share or an index which is more expensive to hedge is obviously less attractive for investors, leading to a potential shrinkage of the existing large share of international investors acting in the EU equity markets. Such outcome would worsen the situation of EU equity markets, whose limited size, liquidity and fragmentation are already weighing on EU competitiveness.

It should also be noted that the current prudential treatment ensures that any derivative counterparty risk exposure which is not covered by initial or variation margins is covered by a counterparty risk charge under the SA-CCR framework, which calibration is itself significantly more conservative than in some other jurisdictions.

Finally, we remind that equity derivatives represent, according to BIS statistics, a very small proportion of the global OTC derivatives market, with 1% of total notional amounts outstanding and 3% of gross market value, as shown in Figure 1.

Figure 1: Global OTC derivatives market by asset class
In billions of US dollars

H1 2023	Notional amounts outstanding				Gross market value			
	H2 2021	H1 2022	H2 2022	H1 2023	H2 2021	H1 2022	H2 2022	H1 2023
All contracts	598,416	632,113	617,959	714,744	12,439	18,347	20,750	19,832
▶ Foreign exchange contracts	104,249	109,585	107,576	120,250	2,548	4,727	4,846	4,311
▶ Interest rate contracts	475,271	502,462	490,626	573,697	8,612	11,805	14,635	14,389
▶ Equity-linked contracts	7,280	6,989	6,919	7,838	655	595	504	570

Source: BIS statistics - <https://stats.bis.org/statx/srs/table/d5.1>

The exemption is therefore not expected to generate any significant financial stability risk, as recent episodes of equity market volatility have confirmed.

In this context, and as we do not expect any change in other jurisdictions, we welcome the ESAs recommendation to the Commission to extend the temporary exemption by another 2 years, thus bridging the gap between the current exemption expiry date and the expected entry into force of EMIR3.

In the absence of a timely action by the ESAs (ahead of the 4 January deadline) to bridge the gap between 4 January 2024 and entry into force of EMIR 3, EU market participants would have to comply with the bilateral margining requirement, including the exchange of variation and initial margin. This would require market participants to put in place Credit Support Documentation or amend existing documentation and to establish segregated initial margin accounts.

Especially for small buy side participants, it would be disproportionate to put this in place for a few months. It is also highly likely that non-EU clients, especially in the US, would cease trading with EU banks/dealers to avoid having to comply with the bilateral margining requirements.

Given the very short deadline of Jan 4th 2024, we fully support the accelerated process chosen by the ESAs, and welcome the outreach to the EBA BSG and its members to consult on the topic. We urge the Commission to endorse the amended RTS urgently in order to remove the current high degree of uncertainty for market participants and end-users, noting also the subsequent review period by the European Parliament and Council before the amended text can be published in the EU Official Journal. Given the risk that the whole process may not allow a publication before the expiry of the exemption, ESAs should be ready to issue a forbearance statement as soon as possible, in order to provide legal certainty to market participants.

We note that a provision requiring the Commission to continue to monitor international developments and to report at least every 3 years is expected to remain in place in EMIR3 and provides for a potential evolution, in the unlikely case that other jurisdictions may evolve in their implementation of these rules.

b) EIOPA Stakeholder Groups:

- Two members from the Insurance and Reinsurance Stakeholder Group provided separate responses:
 1. First response:

Very supportive of the proposed exemption of single-stock equity options or index options from the initial margin requirement.

2. Second response:

From my perspective I would emphasize the necessity to always strive to achieve adequate risk assessment. In particular the level playing field issues mentioned may not fully reflect the full spectrum of level playing field matters at stake such as e.g. against CCP.

It seems there isn't so much choice but for a renewed postponing against the political context.

Yet this fallback may raise concerns.

- One member from the Occupational Pensions Stakeholder Group provided a response:

Very little to comment. Given the remaining time frame for the Regulators to act by 4th Jan 2024 there might be no other way rather than to prolong the Regulation and review time. In case of evidence of complaints from financial services users or practical cases of impropriety the time frame for the review should be not more than 1 year. Otherwise, nothing speaks against a 2y prolongation.

c) ESMA Stakeholder Group:

- 4 members from the Securities Markets Stakeholder Group provided separate responses:

1. First response:

The ESA proposal would help to bridge the temporal gap between the existing derogations (currently set to expire in January) and the more permanent framework expected (i.e., supported by both Council and Parliament) to be put in place under EMIR3.

The note highlights, correctly, that the proposed amendments are submitted directly to the European Commission for review and endorsement. The process that follows the adoption of draft RTS by the European Commission without significant amendments is a review period by the European Parliament and Council before they can then be published in the Official Journal and subsequently enter into force.

If we assume that the draft RTS are adopted by the Commission as-is, they are still subject to the minimum delay (typically one month, extendable to a second month on request) of Council and EP review. As a result, even in the event of non-objection, the current derogation will expire prior to the extension coming into force.

In order to avoid any disruption in the marketplace, the draft RTS would have to come with a guidance by the ESAs to national competent authorities to exercise their supervisory powers in relation to margin requirements in a proportionate and risk-based manner with respect to equity options between 4 January 2024 and the entry into force of the modified RTS.

2. Second response:

This is very useful indeed. ESAs should grant this temporary derogation in order to avoid difficult to manage market disruptions on bilateral single equity options from 4 January 2024 and until EMIR3 is in application.

3. Third response:

Also supports the proposal to extend the exemption for equity options, together with a pragmatic interim solution if the RTS do not enter into force in good time.

4. Fourth response:

Whilst we did not comment on the bilateral margin exemption for equity options and limited our response and actions to provisions impacting derivative hedging. I checked with our expert and the response is that the proposal is fine.