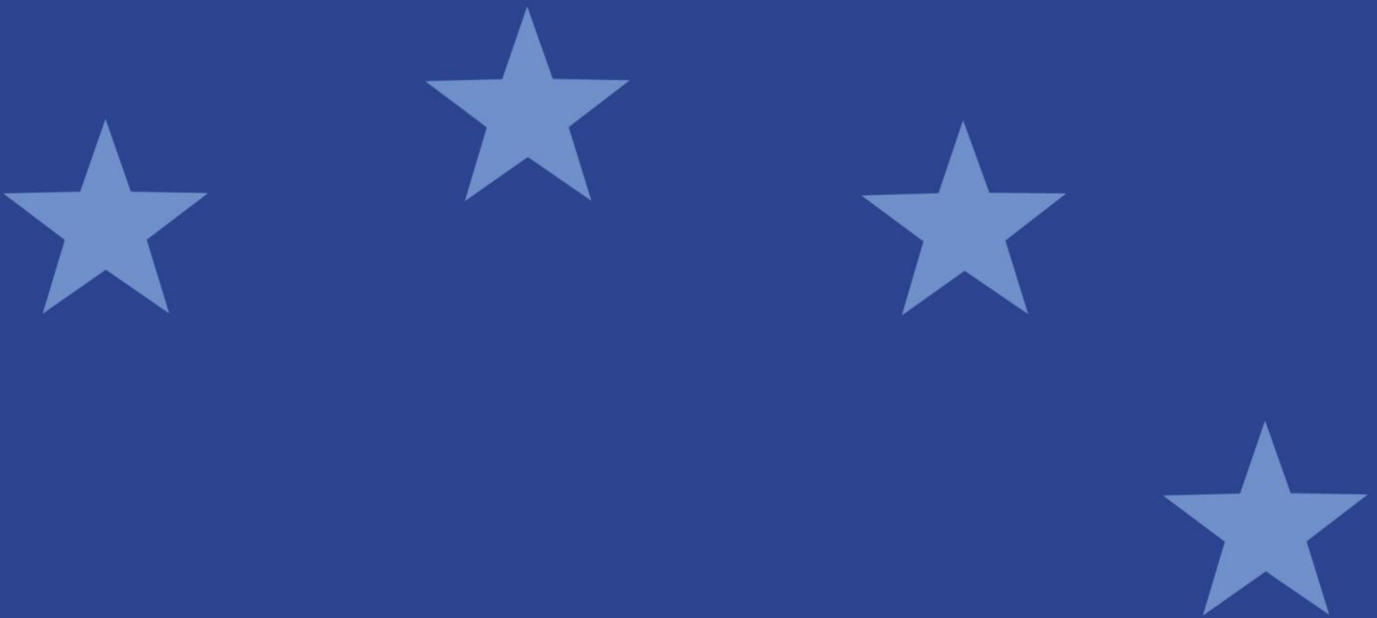
Final Report

EMIR RTS amending the bilateral margin requirements with regards to intragroup contracts



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Acronyms used

Bilateral margining RTS	Commission Delegated Regulation (EU) No 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); also referred to as "bilateral margin RTS".
CCP	Central Counterparty
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1) – also referred to as "the Regulation"
EBA	European Banking Authority
EBA Regulation	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)
EIOPA	European Insurance and Occupational Pensions Authority
EIOPA Regulation	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)
ESAs	European Supervisory Authorities, namely the EBA, EIOPA and ESMA
ESMA	European Securities and Markets Authority
ESMA Regulation	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)
ESRB	European Systemic Risk Board
NCA	National Competent Authority
OTC	Over-the-counter
RTS	Regulatory Technical Standards
TEU	Treaty on the European Union

esma European Securities and Markets Authority

EBA EUROPEAN BANKING AUTHORITY

eiopa EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY

1 Executive Summary

Reasons for publication

This final report presents new draft amending 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 EMIR[1] . The draft RTS proposes to amend Commission Delegated Regulation (EU) No 2016/2251 setting out the detailed bilateral margin requirements, with respect to the treatment of OTC derivative contracts concluded between counterparties that 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.

Under EMIR, bilateral margining requirements would apply regarding intragroup contracts with a third-country group entity when no equivalence decision under Article 13 has been adopted. The bilateral margin RTS introduced a deferred date of application of this requirement in order to provide time for the European Commission (EC) to take the relevant equivalence decisions. This deferred date of application is currently set for 30 June 2022. Despite the eight equivalence decisions adopted so far under Article 13 of EMIR, the EC has indicated that reaching similar decisions with regards to other relevant third-country jurisdictions in relation to which any such implementing act may be warranted has turned out to pose challenges, and that a number of issues would need to be resolved in order to be able to move forward. In addition, the ESAs are also mindful of the regulatory efforts to ensure that EU counterparties reduce reliance and exposure to certain third-country entities. In this context, the dependency of the Capital Requirements Regulation (CRR) on the equivalence mechanism under EMIR can also cause certain challenges to restrict the scope of the CVA intragroup exemption under CRR. Based on the observed difficulties the ESAs are of the view that a review of the EMIR framework for intragroup exemptions for contracts with third countries, and its interaction with CRR, would be desirable.

Stakeholders have raised concerns about negative consequences if the deferred date of application was not extended beyond 30 June 2022.

Taking into account the challenges posed in reaching the necessary equivalence decisions until the deferred date of application, the possible negative consequences in case of no changes as well as the scheduled upcoming review of EMIR which offer the possibility to fix

[1] Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories

the mentioned challenges, the draft RTS is proposing to extend the deferred date of obligation set in the bilateral margin RTS by three years.

The proposed amendment is an adaptation of the timelines to facilitate the current implementation of the bilateral margin RTS, and the proposed amendment is limited in nature. Moreover, the deadline related to these provisions is due to expire soon. Given the limited scope of the amendments and the urgency of the matter, in accordance with Article 10(1) of the EBA, EIOPA and ESMA Regulations respectively, it would have been disproportionate for the ESAs to conduct open public consultations or full analyses of the potential related costs and benefits. However, the advice of the stakeholder groups of each of the ESAs has been requested.

Contents

This Report provides explanations on the draft RTS amending the current bilateral margin RTS with respect to the treatment of intragroup contracts. More specifically, the report develops the rationale for the ESAs' proposal to extend the deferred date of application for intragroup contracts by three years.

Next Steps

The draft RTS presented in the Annex are submitted to the EC by the ESAs for endorsement, in the form of a Commission Delegated Regulation, i.e. a legally binding instrument applicable in all Member States of the European Union. Following their endorsement, they are subject to non-objection by the European Parliament and the Council.

2 Final report

2.1 Introduction

1. The Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) designed and agreed international standards for the exchange of bilateral margin along with a calendar to facilitate a consistent implementation across jurisdictions. In particular, this international framework contains a phase-in for the implementation of the initial margin requirements, which has been spread over several years, and this implementation is still ongoing. The last initial margin phase is scheduled for September 2022.

2. These international standards have been implemented in the EU regulatory framework through a Commission Delegated Regulation. Under the mandate of Article 11(15) of EMIR, the ESAs developed draft RTS on bilateral margining that took into account the international framework and submitted them to the EC. Then, Commission Delegated Regulation (EU) No 2016/2251 ("bilateral margin RTS"), which is based on the ESAs RTS, was adopted by the EC on 4 October 2016. Following a period of non-objection by the European Parliament and Council, the bilateral margin RTS was published in the Official Journal on 15 December 2016, which triggered the start of the implementation of the requirements in the EU.

3. Since then, the bilateral margin RTS has been amended a few times, notably to adapt its timelines in order to take into account the implementation of the BCBS and IOSCO framework at the international level. The last update dates back to 17 February 2021, when Commission Delegated Regulation (EU) 2021/236, based on draft amending RTS developed by the ESAs, was published in the Official Journal[2].

4. The bilateral margin RTS contains a deferred date of application with regards to the treatment of OTC derivative contracts concluded between counterparties that 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 (intragroup contracts). This deferred date was introduced to ensure that such OTC derivative intragroup contracts were not subject to the bilateral margin requirements before the assessment and the adoption of an implementing act pursuant to Article 13(2) of EMIR could be undertaken for the jurisdictions where it might be warranted. The deferred date is 30 June 2022.

[2] Commission Delegated Regulation (EU) 2021/236 of 21 December 2020

5. The Final report presents the considerations taken into account by the ESAs with respect to that deferred date and leading to the proposed draft RTS presented in Annex II.

2.2 Intragroup OTC derivative contracts

2.2.1 Background

2.2.1.1 Proportion of intragroup contracts

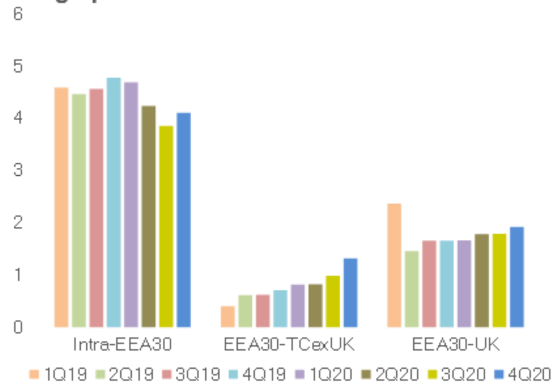
6. Intragroup OTC derivative contracts can be used for centralised risk management purposes, thus aggregating risks within certain group entities and enabling certain efficiencies in the management of these risks.

7. ESMA publishes a set of Annual Statistical Reports (ASR) analysing the EU derivatives and securities markets based on data submitted under EMIR and the Markets in Financial Instruments Directive (MiFID). The last ASR was published on 17 December 2021 providing an overview of EU/EEA markets in 2020. As part of this yearly exercise, ESMA has analysed the data related to intragroup OTC derivative booking activity with respect to derivatives activity.

8. The analysis indicates that the largest part of intragroup OTC interest rate derivative booking is intra-EEA, which is thus not affected by the considerations regarding third countries developed in this final report. Following intra-EEA intragroup contracts, then comes intragroup contracts with UK entities and then intragroup contracts with entities from other third countries, which are the intragroup contracts being considered in this final report. Over the period analysed, intragroup contract activity has steadily increased.

Figure 1

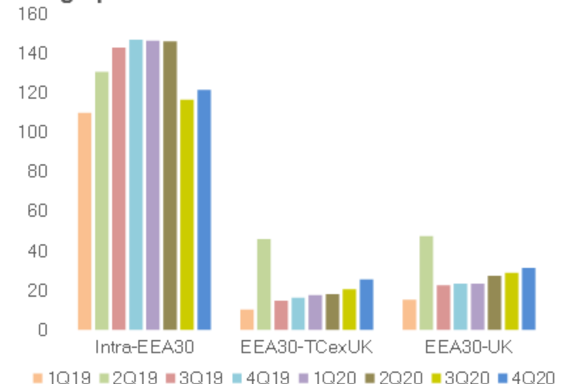
Geographical distribution – notional amounts



Note: Total notional amounts for interest rate derivatives subject to clearing obligation in G4 currencies (EUR, USD, GBP, JPY) outstanding by zone of both counterparties, in EUR trillions. TCexUK denotes non-EEA30 and non-UK.
Sources: TRs, ESMA.

Figure 2

Geographical distribution –transaction numbers



Note: Total oustanding intragroup transactions amounts for interest rate derivatives subject to clearing obligation in G4 currencies (EUR, USD, GBP, JPY) distributed by zone of both counterparties, in thousands of records. TCexUK for third-country non-UK.
Sources: TRs, ESMA.

9. However, to put things into perspective, the ASR derivatives report also clarifies that intragroup contracts on interest rate derivatives (the largest part of intragroup OTC derivative activity) only represents 7% in terms of notional and 8% in terms of trade count of the OTC interest rate derivative market[3]. ESMA will continue monitoring this distribution of trades as part of the next ASR annual exercise.

2.2.1.2 Applicable regime

10. Under EMIR, there are two regimes for intragroup contracts, with regards to whether and when the bilateral margining requirements may apply. More specifically, there is:

    - a permanent regime in Level 1 (EMIR), specifically an intragroup exemption regime where one of the conditions is an equivalence decision under Article 13 with regards to the given third country, and

    - a temporary regime in Level 2 (bilateral margin RTS), specifically a deferred date of application of the bilateral margin requirements as mentioned in paragraph 4.

11. The temporary regime had been introduced in the RTS in order to provide time for the EC to prepare the relevant equivalence decisions for the permanent regime to apply.

12. To date, the EC has issued a total of 8 equivalence decisions under Article 13(2) of EMIR, all relating to bilateral margining, thus none covering the full scope of Article 13(2), i.e. none of these 8 decisions are covering the clearing obligation. It can also be noted that 6 of them have been issued after the last amendment of the bilateral margin

[3] See in particular the statistics table on page 5 of the ASR: esma50-165-2001_emir_asr_derivatives_2021.pdf (europa.eu)

requirements made in February 2021 (including an extension of the deferred date of application to the current deferred date of 30 June 2022). The 8 equivalence decisions relate to Australia, Brazil, Canada, Hong Kong, Japan, Singapore and the United States of America (2 separate decisions)[4].

13. The temporary regime is not an automatic and blanket exemption approval of all possible intragroup contracts regarding any potential third countries. Article 36(3) defines a number of conditions that need to be met to benefit from this deferred date, such that the relevant competent authority can assess the risk management framework of the counterparty seeking to benefit from that deferred date under the temporary regime. Based on this assessment, the relevant competent authority may or may not decide to accept it. It can also be noted that when an equivalence decision has been taken, then the permanent regime takes over, which triggers similar conditions to be met and assessed as in the temporary regime for that counterparty to benefit from an exemption under EMIR.

14. The temporary regime is now due to expire on 30 June 2022.

2.2.1.3 Concerns

15. If the temporary regime were to expire on 30 June 2022, then this would impact a certain number of groups with cross border activity, with regards to their risk management practices and their arrangements with group entities for which no equivalence decision has been adopted so far.

16. Stakeholders raised these concerns to the ESAs and the EC in a letter sent by several trade associations (EACB, EBF, EFET, FIA, GFMA, ISDA and NSA) on 17 November 2021[5]. The stakeholders requested an extension of the temporary regime by 3 more years. The ESAs responded in December 2021 saying that they are aware of the situation and in contact with the EC about it.

17. The EC then sent a letter (in Annex IV) to the ESAs at the end of December 2021 asking the ESAs to consider an extension of the temporary regime based on a number of considerations:

18. First of all, the EC mentioned that so far only eight equivalence decisions were adopted. In addition, the EC flagged that these equivalence decisions had been adopted solely for the purpose of EMIR Article 11. This means that they are not fully covering the scope of Article 13(2) and, as a consequence, would not allow for the envisaged exemptions for intragroup contracts. In the absence of these equivalence decisions, EU counterparties would have to start applying margin requirements or the clearing

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[4] List of Implementing and Delegated Acts for (EU) No 648/2012 Equivalence Decisions (europa.eu)
[5] Industry-Urges-EU-to-Extend-Relief-for-Cross-Border-Intragroup-Transactions.pdf (isda.org)

obligation to their intragroup contracts, incurring undue costs and introducing a level playing field issue for EU firms.

19. Secondly, the EC indicated that reaching the existing decisions has however turned out to pose challenges, and that a number of issues would need to be resolved in order to be able to move forward. The scheduled upcoming reviewof EMIR could be the opportunity to address some of these challenges.

20. Last but not least, it should be noted that the ESAs are also mindful of the regulatory efforts to restrict the scope of the CVA intragroup exemption under CRR to ensure better alignment with the Basel standards by removing its dependency on equivalence decisions under Article 13 of EMIR. As stated in the December 2019 EBA response to the EC's Call for Advice[6], the *"main issue with the EU intragroup treatment of CVA risk in terms of compliance with international standards is its potential extension to third countries considered 'equivalent', which stems from cross-references to EMIR, rather than the provisions in the prudential framework, and which ideally should be removed."*.

2.2.2 Proposed amendments

21. The ESAs are thus of the view that the EMIR framework for intragroup exemptions, as well as its interaction with CRR, should be reviewed. The scheduled upcoming review of EMIR should indeed take all the concerns described above into account in order to address these issues and ensure an adequate intragroup exemption framework in Level 1.

22. The changes to the intragroup regime in EMIR should be done in a manner that ensures that the risk management of Union currencies is done in the EEA, to prevent circumvention risk via certain booking practices, e.g. back to back trades to essentially maintain everything in a third-country. The changes to the intragroup regime should also ensure ruling out exemptions for intragroup contracts with group entities from certain jurisdictions, e.g. jurisdictions not meeting certain standards or subject to sanctions.

23. A possibility to achieve this might be through the addition of new conditions to be met in order to benefit from an intragroup exemption. With regards to the first aspect, one

[6] See paragraph 38 of EBA response to the EC's Call for Advice https://www.eba.europa.eu/eba-updates-estimates-impact-implementation-basel-iii-and-provides-assessment-its-effect-eu-economy: "*However, as noted in the report on CVA, it is worth clarifying that the exemption of intragroup transactions does not constitute per se a divergence from Basel but rather the specification of a treatment of intragroup transactions, which reflects the application of the Basel standards at the consolidated level of EU parent institutions. The main issue with the EU intragroup treatment of CVA risk in terms of compliance with international standards is its potential extension to third countries considered 'equivalent', which stems from cross-references to EMIR, rather than the provisions in the prudential framework, and which ideally should be removed.*"

of the conditions could be that EUR and Union currencies risks are centrally managed within the EEA, i.e. by an EEA group entity.

24. With regards to the second aspect, a condition could be introduced to ensure that the third country in which the group entity is established or authorised is not considered by the EU institutions as having strategic deficiencies in its national anti-money laundering and counter financing of terrorism regime that poses significant threats to the financial system of the Union, nor has been subject to economic sanctions issued by the EU institutions. It can be noted that ESMA has made these proposals in its high-level response to the EC consultation on the targeted review of EMIR that was published on 5 April 2022[7].

25. However, it will take some time for the co-legislators to complete a review of Level 1 and therefore, there are valid reasons why the temporary intragroup regime could be extended. First of all, it would avoid unintended consequences on the centralised risk management practices of cross-border groups when the current exemption expires in June 2022.

26. Secondly, an extension would provide time for the EC and the co-legislators to review and possibly change the Level 1 framework, i.e. to define a new permanent regime applicable to intragroup contracts, in line with the EC letter. Without an extension, groups will have to exchange collateral for their intragroup contracts with the associated costs.

27. Thirdly, introducing the requirements now will expose groups to multiple changes: a) additional equivalence decisions can be adopted and therefore all the arrangements put in place to exchange collateral might no longer be needed for the additional equivalent countries; b) changes to the Level 1 framework are expected, so the application of bilateral margins to intragroup contracts might be limited in time and groups exposed to multiple changes of the applicable framework.

28. Fourthly, such an extension would remain a temporary measure with some controls in place, as the deferred date of application does not apply automatically, as explained in paragraph 13. Groups have to submit a request and meet certain conditions. If not, competent authorities would not grant such a request.

29. However, it should also be noted that the ESAs will continue to pay particular attention to any possible implications of such an extension of the temporary regime on booking models between EU subsidiaries and branches of third-country firms, primarily in light of Brexit.

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[7] ESMA responds to European Commission consultation on EMIR Review (europa.eu)

30. Taking all this into account, the ESAs support a review of the intragroup exemption regime in Level 1 and are proposing an extension of the temporary regime via the amending RTS in annex. With the objective of providing time for redefining a new permanent regime for intragroup contracts under the EMIR Review, the ESAs are proposing an extension of three years.

31. The ESAs are of the view that these three years should allow for the Level 1 regime to be reviewed and/or for the relevant equivalence decisions to be adopted. The ESAs expect groups to monitor the regulatory developments carefully. They should not rely by default on a further extension after the three-year period provided with this amendment.

32. Lastly, it should also be noted that similar considerations are made and a similar amendment is being considered in parallel by ESMA regarding the intragroup regime with respect to the clearing obligation of OTC derivative intragroup contracts.

2.3 Way forward

33. From a process point of view, it is important to note that the proposed amendment is an adaptation of the timelines to facilitate the current implementation of the bilateral margin RTS, and the proposed amendment is limited in nature.

34. In addition, the current deadline regarding the deferred date of application for intragroup contracts is soon approaching (30 June 2022). Market participants would thus benefit in knowing as early as possible on whether and how to prepare for these requirements.

35. Finally, the proposed change has also been called for by a large range of market participants.

36. As a result, the ESAs are of the view that it would have been disproportionate to conduct open public consultations and analyses of the potential related costs and benefits, 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 advice of the stakeholder groups of each of the ESAs has been requested.

37. This amendment is thus submitted directly to the EC for review and endorsement. The process that follows the adoption of draft RTS by the EC 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.

3 Annexes

3.1 Annex I - ESAs mandate to develop draft technical standards

Article 11(15) of Regulation (EU) No 648/2012

Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP

In order to ensure consistent application of this Article, the ESAs shall develop common draft regulatory technical standards specifying:

(a) the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in paragraph 3;

(aa) the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures;

(b) the procedures for the counterparties and the relevant competent authorities to be followed when applying exemptions under paragraphs 6 to 10;

(c) the applicable criteria referred to in paragraphs 5 to 10 including in particular what is to be considered as a practical or legal impediment to the prompt transfer of own funds and repayment of liabilities between the counterparties.

The level and type of collateral required with respect to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a securitisation special purpose entity in connection with a securitisation within the meaning of this Regulation and meeting the conditions of Article 4(5) of this Regulation and the requirements set out in Article 18, and in Articles 19 to 22 or 23 to 26 of Regulation (EU) 2017/2402 (the Securitisation Regulation) shall be determined taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.

The ESAs shall submit those draft regulatory technical standards, except for those referred to in point (aa) of the first subparagraph, to the Commission by 18 July 2018.

EBA, in cooperation with ESMA and EIOPA, shall submit the draft regulatory technical standards referred to in point (aa) of the first subparagraph to the Commission by 18 June 2020.

Depending on the legal nature of the counterparty, power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010.

3.2 Annex II - Draft technical standards

COMMISSION DELEGATED REGULATION (EU) …/..

of [ ]

amending the regulatory techical standards laid down in Delegated Regulation (EU) 2016/2251 as regards the timing from when certain risk management procedures will start to apply to certain types of intragroup contracts for the purpose of the exchange of collateral

(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 repositories[8], and in particular Article 11(15) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2016/2251[9] 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 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 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 deferred date of application of the bilateral margin requirements for non-centrally cleared OTC derivative contracts 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. That deferred date of application was necessary to ensure that such OTC derivative contracts were not subject to the bilateral margin requirements before the

[8] OJ L 201, 27.7.2012, p. 1.

[9] 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).

adoption of an implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012.

(3) Despite the eight implementing acts adopted so far pursuant to Article 13(2) of Regulation (EU) No 648/2012, efforts are still being undertaken to analyse any other relevant third-country jurisdictions in relation to which any such implementing act may be warranted. The application of the bilateral margin requirements for non-centrally cleared OTC derivative intragroup contracts should therefore be further deferred to avoid the unintended detrimental economic impact that the expiry of that exemption would have on Union counterparties.

(4) Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly.

(5) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the ESAs.

(6) 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 advice of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[10], the advice 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 of the European Parliament and of the Council[11], and the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[12].

(7) It is necessary to provide market participants legal certainty as quickly as possible so that they can adequately prepare for complying with the requirements laid down in Regulation (EU) No 648/2012, the application of which will be affected by this Delegated Regulation, in particular with respect to the requirements for which the current applicable deadline is approaching rapidly. This Regulation should therefore enter into force as a matter of urgency.

HAS ADOPTED THIS REGULATION:

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[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).

Article 1

Amendment to Delegated Regulation (EU) 2016/2251

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

(1) in Article 36(2), point (a) is replaced by the following:

'(a) from 30 June 2025 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;';

(2) in Article 37(3), point (a) is replaced by the following:

'(a) from 30 June 2025 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;'.

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]

3.3 Annex III – Feedback from the request for advice from the Stakeholder Groups

38. As mentioned at the start of this Report, the advice of the stakeholder groups of each of the ESAs on the amendment covered in the draft RTS has been requested.

39. ESMA asked for the advice from the Securities and Markets Stakeholders Group (SMSG). EBA asked for the advice from the Banking Stakeholders Group (BSG). EIOPA asked for the advice from the Insurance and Reinsurance Stakeholder Group (IRSG) and the Occupational Pensions Stakeholder Group OPSG).

40. While no formal position of each of the 4 Stakeholder Groups of the ESAs could be established in the time provided, no objection was raised and a few subject matter experts from these groups with respect to the topic covered, bilateral margining of uncleared OTC derivatives, provided feedback on the proposed amendments. This feedback was overall positive, expressing full support to introduce such amendments.

41. In addition, one such subject matter expert explained welcoming the ESAs approach linked to the need to include intragroup transactions in the review of EMIR. This respondent highlighted that this was the occasion to take into account the learnings from five years of experience in the handling of margining requirements and exemption requests. This respondent explained that the existing procedures for exempting intragroup transactions from margining requirements had provided satisfactory results, but that a simpler and more pragmatic approach would be welcome; that none of the transactions in respect of which exemptions had been granted had given rise to any issues; and that the equivalence-based approach meant that some entities have been out of scope of the equivalence decisions taken so far and that a set of conditions would be a simpler alternative in order to grant exemptions.

42. The ESAs take note of both the support to introduce the proposed amendments quickly as well as with regards to the experience shared by one respondent on the margining requirements and exemption requests. Therefore, the overall support reinforces the need to proceed rapidly and submit the draft RTS to the Commission.

3.4 Annex IV – Letter from the European Commission

Date: 20/12/2021

Subject: Treatment of intragroup transactions under EMIR

Dear Ms Ross, Ms Hielkema, and Mr Campa,

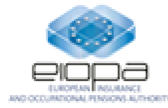
As you know Delegated Regulations (EU) 2016/2251, 2015/2205, 2016/1178 and 2016/592 provide for a deferred date of application of the bilateral margin requirements or the clearing obligation for non-centrally cleared OTC derivative contracts concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union. That deferred date was necessary to ensure that such OTC derivative contracts were not subject to undue EMIR requirements before the adoption of an implementing act pursuant to Article 13(2) of EMIR. Earlier in 2021, on the basis of a final report from the three ESAs for Delegated Regulation (EU) 2016/2251 and from ESMA for the three other Delegated Regulations, the deferred date of application was harmonised across all four Delegated Regulations and extended to 30 June 2022.

The deferred date of application was initially justified by the time needed for the Commission to adopt equivalence decisions pursuant to Article 13(2) for all the jurisdictions relevant to the economic activity of EU counterparties. So far the Commission has only adopted eight of these equivalence decisions, albeit solely for the purpose of EMIR Article 11, therefore not fully covering the scope of Article 13(2) and, as a consequence, not allowing for the envisaged exemptions for intragroup transactions.

Absent “full” Article 13(2) equivalence decisions, EU counterparties would have to start applying margin requirements or the clearing obligation to their intragroup transactions, adding undue costs and introducing a level playing field issue for EU firms. Reaching these decisions has however turned out to pose challenging, and a number of issues would need to be resolved in order to be able to move forward.

Given the time left until 30 June 2022 and the challenges posed in reaching the necessary decisions, I would kindly ask you to consider whether a further delay of the deferred date of application by a sufficient period of time to address the issue with the co-legislators, taking into account the scheduled upcoming reviews of EMIR, would be appropriate.

Taking into account the necessity to give legal certainty on this matter to EU counterparties, I would greatly appreciate if you could give proper consideration to this letter as swiftly as possible so that sufficient time is given for the Commission to assess any proposal you



may submit and for the European Parliament and the Council to exercise their scrutiny power over these amendments.

Yours sincerely,