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Clearing obligation, reporting requirements and risk-mitigation techniques for OTC derivatives, and trade repositories ***I

European Parliament legislative resolution of 18 April 2019 on the 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 (COM(2017)0208 – C8-0147/2017 – 2017/0090(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

– having regard to the Commission proposal to Parliament and the Council (COM(2017)0208),

– having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0147/2017),

– having regard to Article 294(3) of the Treaty on the Functioning of the European Union,

– having regard to the opinion of the European Central Bank of 11 October 2017[1],

– having regard to the opinion of the European Economic and Social Committee of 20 September 2017[2],

– having regard to the provisional agreement approved by the committee responsible under Rule 69f(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 6 March 2019 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,

– having regard to Rule 59 of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs

1 OJ C 385, 15.11.2017, p. 10.
2 OJ C 434, 15.12.2017, p. 63..

(A8-0181/2018),

1. Adopts its position at first reading hereinafter set out;

2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;

3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

P8_TC1-COD(2017)0090

Position of the European Parliament adopted at first reading on 18 April 2019 with a view to the adoption of Regulation (EU) 2019/… 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 derivative 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 Bank[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with the ordinary legislative procedure[3],

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1 OJ C 385, 15.11.2017, p. 10.
2 OJ C 434, 15.12.2017, p. 63.
3 Position of the European Parliament of 18 April 2019.

Whereas:

(1) Regulation (EU) No 648/2012 of the European Parliament and of the Council[1] entered into force on 16 August 2012. The requirements it contains, namely, central clearing of standardised over-the-counter (OTC) derivative contracts, margin requirements and 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, ▌ 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.

[1] 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).

(2) The simplification of certain areas covered by Regulation (EU) No 648/2012 and a more proportionate approach to those areas are in line with the Commission's Regulatory Fitness and Performance programme which emphasises the need for cost reduction and simplification so that Union policies achieve their objectives in the most efficient way, and aim, in particular, at reducing regulatory and administrative burdens. ***That simplification and a more proportionate approach should, however, be without prejudice to the overarching objectives of promoting financial stability and mitigating systemic risks in line with the statement by G20 leaders at the 26 September 2009 Summit in Pittsburgh.***

(3) Efficient and resilient post-trading systems and collateral markets are essential elements of a well-functioning capital markets union, that underpin the efforts to support investments, growth and jobs, in line with the political priorities of the Commission.

(4) In 2015 and 2016, the Commission carried out two public consultations on the application of Regulation (EU) No 648/2012 ▌. The Commission also received input on the application of that Regulation from the European ***Supervisory Authority (European*** Securities and Markets Authority***)*** (▌ESMA▌) ***established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council***[1], the European Systemic Risk Board (▌ESRB▌) ***established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council***[2] 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 general report in accordance with Regulation (EU) No 648/2012. Although not all the provisions of Regulation (EU) No 648/2012 ***were*** fully applicable ▌ and therefore a comprehensive evaluation of that Regulation ***was*** not ▌ possible, ***that*** report identified areas for which targeted action ***was*** necessary to ensure that the objectives of Regulation (EU) No 648/2012 ***were*** reached in a more proportionate, efficient and effective manner.

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1 ***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).***

2 ***Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board (OJ L 331, 15.12.2010, p. 1).***

(5) Regulation (EU) No 648/2012 should cover all financial counterparties that might pose ***an*** important systemic risk for the financial system. The definition of financial counterparty should therefore be amended.

(6) Employee share purchase plans are schemes, usually established by an undertaking by which persons can directly or indirectly subscribe, purchase, receive or own shares of that undertaking or of another undertaking within the same group, provided that that plan benefits at least the employees or former employees of that undertaking or of another undertaking within the same group, or the members or former members of the board of that undertaking or of another undertaking within the same group. The Commission's communication of 8 June 2017 on the Mid-Term Review of the Capital Markets Union Action Plan identifies measures relating to employee share purchase plans as a possible measure to strengthen the capital markets union with a view to fostering retail investment. Therefore, and in accordance with the principle of proportionality, an undertaking for collective investment in transferable securities (UCITS) or an alternative investment fund (AIF) that is set up exclusively for the purpose of serving one or more employee share purchase plans, should not be qualified as a financial counterparty.

(7) ***Certain*** financial counterparties ***have*** a volume of activity in OTC derivatives markets that is too low to pose an important systemic risk for the financial system and ▌ is too low for central clearing to be economically viable***. Those counterparties, commonly referred to as small financial counterparties,*** should be exempted from the clearing obligation, but they should remain subject to the requirement to exchange collateral to mitigate any systemic risk. However, where the position taken by the financial counterparty exceeds the clearing threshold for at least one class of OTC ***derivatives, calculated at the group level,*** the clearing obligation should apply to all classes of OTC derivatives, given the interconnectedness of financial counterparties and the possible systemic risk to the financial system that might arise if those OTC derivative contracts ***were*** not centrally cleared. ***The financial counterparty should have the possibility to demonstrate at any time that its positions no longer exceed the clearing threshold for any class of OTC derivatives, in which case the clearing obligation should cease to apply.***

(8) Non-financial counterparties are less interconnected than financial counterparties. Also, they are often ***predominantly*** active in only one class of OTC ***derivatives***. 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 ***that choose to calculate their positions every 12 months against the clearing thresholds*** should therefore be narrowed***. Those*** non-financial counterparties ***should be*** subject to the clearing obligation only with regard to the ▌ classes ***of OTC derivatives*** that exceed the clearing threshold. Non-financial counterparties should nonetheless remain subject to the requirement to exchange collateral where any of the clearing thresholds is exceeded***. Non-financial counterparties that choose not to calculate their positions against the clearing thresholds, should be subject to the clearing obligation for all classes of OTC derivatives. The non-financial counterparty should have the possibility to demonstrate at any time that its positions no longer exceed the clearing threshold for a class of OTC derivatives in which case the clearing obligation for that class of OTC derivatives should cease to apply.***

(9) ***In order to take account of any development in financial markets, ESMA should periodically review the clearing thresholds and update them where necessary. That periodic review should be accompanied by a report***.

(10) The requirement to clear certain OTC derivative contracts concluded before the clearing obligation takes effect creates legal uncertainty and operational complications, while providing limited benefits. In particular, ***that*** requirement creates additional costs and ***burdens*** for the counterparties to those contracts, and might also affect the smooth functioning of the market without significantly improving the uniform and coherent application of Regulation (EU) No 648/2012 or establishing a level playing field for market participants. That requirement should therefore be removed.

(11) Counterparties that have a limited volume of activity in the OTC derivatives market face difficulties in accessing central clearing, whether as a client of a clearing member or through indirect clearing arrangements. ▌ Clearing members and clients of clearing members that provide clearing services, either directly to other counterparties or indirectly by allowing their own clients to provide those services to other counterparties, should therefore be ▌ required to do so under fair, reasonable***, non-discriminatory and transparent commercial terms. While this requirement should not result in price regulation or an obligation to contract, clearing members and clients should be permitted to control the risks related to the clearing services offered, such as counterparty risks.***

(12) Information on the financial instruments covered by the authorisations of CCPs might not specify all classes of OTC derivatives which a CCP is authorised to clear. To ensure that ESMA can carry out its tasks and duties in relation to the clearing obligation, competent authorities should notify ESMA without delay of any information received from a CCP regarding the CCP's intention to start clearing a class of OTC derivatives that is covered by its existing authorisation.

(13) It should be possible to temporarily suspend the clearing obligation in certain ***exceptional*** situations. ***Such a*** suspension should be possible where the criteria on the basis of which ▌ specific ***classes*** of OTC ***derivatives have*** been made subject to the clearing obligation are no longer met. That could be the case where particular ***classes*** of OTC ***derivatives become*** unsuitable for mandatory central clearing or where there has been a material change to one of those criteria in respect of ▌ particular ***classes*** of OTC ***derivatives***. A suspension of the clearing obligation should also be possible where a CCP ceases to offer a clearing service for ▌ specific ***classes*** of OTC ***derivatives*** or for a specific type of counterparty and other CCPs cannot step in fast enough to take over those clearing services. ▌ The ***suspension of the*** clearing obligation should also be possible where ***it*** is considered necessary to avoid a serious threat to financial stability in the Union. ***In order to ensure financial stability and to avoid market disruption, ESMA should, while keeping in mind the G20 objectives, ensure that, where the abolition of the clearing obligation is appropriate, that abolition is instigated during the suspension of the clearing obligation and in sufficient time to enable the amendment of the relevant regulatory technical standards.***

(14) The obligation laid down in Regulation (EU) No 600/2014 of the European Parliament and of the Council[1] for counterparties to trade derivatives that are subject to the clearing obligation on trading venues is, in accordance with the trading obligation procedure detailed in that Regulation, triggered when a class of derivatives is declared to be subject to the clearing obligation. The suspension of the clearing obligation might prevent counterparties from being able to comply with the trading obligation. As a consequence, where the suspension of the clearing obligation has been requested, and where it is considered to be a material change in the criteria for the trading obligation to take effect, it should be possible for ESMA to propose the concurrent suspension of the trading obligation on the basis of Regulation (EU) No 648/2012 instead of Regulation (EU) No 600/2014.

(15) The reporting of historic contracts has proven to be difficult because certain details which are now required to be reported were not required to be reported before the entry into force of Regulation (EU) No 648/2012. This has resulted in a high reporting failure rate and the poor quality of reported data, while the burden of reporting those contracts remains significant. There is therefore a high likelihood that those historic data will remain unused. Moreover, by the time the deadline for reporting historic contracts becomes effective, a number of those contracts will have already expired and, with them, the corresponding exposures and risks. For that reason, the requirement to report historic contracts should be removed.

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1 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).

(16) Intragroup transactions involving non-financial counterparties represent a relatively small fraction of all OTC derivative contracts 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 such transactions imposes significant costs and burdens on non-financial counterparties. ▌
Transactions ***between counterparties within a group,*** where at least one of the counterparties is a non-financial counterparty, should therefore be exempted from the reporting obligation***, regardless of the place of establishment of the non-financial counterparty***.

▌

(17) ***In 2017, the Commission launched a fitness check on public reporting by companies. The purpose of that check is to gather evidence on the consistency, coherence, effectiveness and efficiency of the Union reporting framework. Against that background, the possibility of avoiding unnecessary duplication of reporting and the possibility of reducing or simplifying the reporting of non-OTC derivative contracts should be further analysed, taking into account the need for timely reporting and the measures adopted pursuant to Regulations (EU) No 648/2012 and (EU) No 600/2014. In particular, that analysis should consider the details reported, the accessibility of the data by relevant authorities, as well as measures to further simplify reporting chains for non-OTC derivative contracts without undue loss of information, in particular with respect to non-financial counterparties that are not subject to the clearing obligation. A more general assessment of the effectiveness and efficiency of the measures that were introduced in Regulation (EU) No 648/2012 to improve the functioning and reduce the burden of reporting OTC derivative contracts should be considered, when sufficient experience and data on the application of that Regulation is available, in particular regarding the quality and accessibility of data reported to trade repositories and regarding the take-up and implementation of delegated reporting.***

(18) To reduce the burden of reporting ***OTC derivative contracts*** for ▌ non-financial counterparties ***that are not subject to the clearing obligation***, the financial counterparty should***, as a rule,*** be ***solely*** responsible, ▌ and legally liable, ▌ for reporting on behalf of both itself and non-financial counterparties that are not subject to the clearing obligation with regard to OTC derivative contracts entered into by ***those counterparties,*** as well as for ensuring the ***correctness*** of the ▌ details reported***. To ensure that the financial counterparty has the data it needs to fulfil its reporting obligation, the non-financial counterparty should provide the details relating to the OTC derivative contracts that the financial counterparty cannot be reasonably expected to possess. However, it should be possible for non-financial counterparties to choose to report their OTC derivative contracts. In such cases, the non-financial counterparty should inform the financial counterparty accordingly and should be responsible, and legally liable, for reporting that data and for ensuring their correctness***.

(19) The responsibility for reporting ***OTC*** derivative contracts ***where one or both of the counterparties are UCITSs or AIFs*** should also be determined. It should therefore be specified that the management company of ***an 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 correctness of the ▌ ***details*** reported. Similarly, an ***AIF manager should*** be responsible ▌ and legally liable ▌ for reporting on behalf of that AIF with regard to OTC derivative contracts entered into by that AIF, as well as for ensuring the correctness of the ▌ ***details*** reported.

(20) To avoid inconsistencies across the Union in the application of the risk-mitigation techniques, ***due to the complexity of the risk-***management procedures requiring the timely, accurate and appropriately segregated exchange of collateral of counterparties ***which involve the use of internal models, competent authorities should validate those risk-management procedures*** or any significant change to those procedures, before they are applied.

(21) ***The need for international regulatory convergence and the need for non-financial counterparties and small financial counterparties to reduce the risks associated with their currency risk exposures make it necessary to set out special risk-management procedures for physically settled foreign exchange forwards and physically settled foreign exchange swaps. In view of their specific risk profile, it is appropriate to restrict the mandatory exchange of variation margins on physically settled foreign exchange forwards and physically settled foreign exchange swaps to transactions between the most systemic counterparties in order to limit the build-up of systemic risk and to avoid international regulatory divergence. International regulatory convergence should also be ensured with regard to risk-management procedures for other classes of derivatives.***

(22) ***Post-trade risk reduction services include services such as portfolio compression. Portfolio compression is excluded from the scope of the trading obligation established in Regulation (EU) No 600/2014. In order to align Regulation (EU) No 648/2012 with Regulation (EU) No 600/2014, where necessary and appropriate, while taking into account the differences between those two Regulations, the potential to circumvent the clearing obligation and the extent to which post-trade risk reduction services mitigate or reduce risks, the Commission, in cooperation with ESMA and the ESRB, should assess which trades resulting from post-trade risk reduction services, if any, should be granted an exemption from the clearing obligation.***

(23) 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 should provide them 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 ***Organisation*** of Securities Commissions, in particular with the disclosure framework published in December 2012 and the public quantitative disclosure standards for CCPs published in 2015, which are 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.

(24) ***Member States' national insolvency laws should not prevent CCPs from being able to perform*** with sufficient legal certainty ***the*** transfer ***of*** client positions ***or to*** pay the proceeds of a liquidation directly to clients ***in case of insolvency of a clearing member with regard to assets held in omnibus and individual segregated client accounts***. To provide incentives for clearing and to improve access to it, ***Member States' national insolvency laws should not prevent CCPs from following the default procedures in accordance with Regulation (EU) No 648/2012 with regard to assets and positions held in omnibus and individual segregated client accounts held at the clearing member and at the CCP. Where indirect clearing arrangements are established, indirect clients should continue nevertheless to benefit from protection which is equivalent to that provided for under the segregation and portability rules and default procedures laid down in Regulation (EU) No 648/2012.***

(25) The fines imposed by ESMA 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 derivative positions and exposures. The amounts of fines initially provided for in Regulation (EU) No 648/2012 have proven 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 in relation to trade repositories. The upper limit of the basic amounts of fines should therefore be increased.

(26) Third-country authorities should have access to data reported to Union trade repositories where certain conditions guaranteeing the treatment of those data are met 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.

(27) Regulation (EU) 2015/2365 of the European Parliament and of the Council[1] allows for a simplified registration procedure for trade repositories that are already registered in accordance with Regulation (EU) No 648/2012 and that 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 ***derivative*** contracts.

[1] 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).

(28) The insufficient quality and transparency of data made available by trade repositories makes it difficult for entities that have been granted access to those data to use them to monitor 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 of Regulation (EU) No 648/2012 with those of ***Regulations*** (EU) 2015/2365 and ▌ (EU) No 600/2014, further harmonisation of the reporting rules and requirements is necessary, in particular, further harmonisation of data standards, ***formats,*** methods, and arrangements for reporting, as well as further harmonisation of the procedures to be applied by trade repositories for the validation of data reported as to their completeness and ***correctness*** and of the procedures for the reconciliation of data with other trade repositories. Moreover, trade repositories should grant ***non-reporting*** counterparties access to all data reported on their behalf ***on reasonable commercial terms*** upon request.

(29) 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 such switching and to ensure the continued availability of data without duplication, trade repositories should establish appropriate policies to ensure the orderly transfer of data reported to other trade repositories where requested by a counterparty that is subject to the reporting obligation.

(30) Regulation (EU) No 648/2012 establishes that the clearing obligation is not to apply to pension scheme arrangements until an appropriate technical solution is developed by CCPs for the transfer of non-cash collateral as variation margins. As no viable solution facilitating the participation of pension scheme arrangements in central clearing has been developed so far, that transitional period should be extended to apply for ***at least*** a further ***two*** years. Central clearing should however remain the ultimate aim, considering that current regulatory and market developments enable market participants to develop appropriate technical solutions within that period. With the assistance of ESMA, the European Supervisory Authority (European Banking Authority) (EBA), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council[1], the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (EIOPA) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council[2] and the ESRB, the Commission should monitor the progress made by CCPs, clearing members and pension scheme arrangements towards viable solutions facilitating the participation of pension scheme arrangements in central clearing and prepare a report on that progress. That report should also cover the solutions and the related costs for pension scheme arrangements, 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 that were not foreseen at the time of adoption of this Regulation, the Commission should be empowered to extend that transitional period ***twice for a period of one year***, after having carefully assessed the need for such an extension.

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1 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).

2 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).

(31) The transitional period during which pension scheme arrangements were exempted from the clearing obligation expired on 16 August 2018. For reasons of legal certainty, and to avoid any discontinuity, it is necessary to retroactively apply the extension of that transitional period to OTC derivative contracts entered into by pension scheme arrangements from 17 August 2018 until … [day before the date of entry into force of this amending Regulation].

(32) ***In order to simplify the regulatory framework, consideration should be given to the extent to which it is necessary and appropriate to align the trading obligation under Regulation (EU) No 600/2014 with changes made under this Regulation to the clearing obligation for derivatives, in particular, to the scope of the entities that are subject to the clearing obligation. A more general assessment of the effects of this Regulation on the level of clearing by different types of counterparty and on the distribution of clearing within each type of counterparty, as well as of the accessibility of clearing services, including the efficiency of the changes made under this Regulation with regard to the provision of clearing services under fair, reasonable, non-discriminatory and transparent commercial terms in facilitating access to clearing, should be undertaken when sufficient experience and data on the application of this Regulation are available.***

(33) ***To ensure the consistent harmonisation of when commercial terms relating to the provision of clearing services are considered to be fair, reasonable, non-discriminatory and transparent, and in order to allow additional time for market participants to develop clearing solutions for pension scheme arrangements under certain conditions,*** the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union ***(TFEU)*** 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***,*** non-discriminatory ***and transparent***, and in respect of ***extending*** the ***transitional*** period ***during*** which the clearing obligation should not apply to OTC derivative contracts entered into by pension scheme arrangements. ***It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[1]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.***

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1 ***OJ L 123, 12.5.2016, p. 1.***

(34) To ensure uniform conditions for the implementation of this Regulation, and in particular with regard to the ***suspension of the clearing obligation and of the trading obligation and with regard to direct access by the relevant authorities of third countries to*** information contained in ▌ trade repositories ***established in the Union***, 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 Council[1] ▌ . ***The Commission should adopt immediately applicable implementing acts to suspend the clearing obligation and the trading obligation for specific classes of OTC derivatives because it is necessary to have a swift decision ensuring legal certainty about the outcome of the suspension procedure and therefore there are duly justified imperative grounds of urgency.***

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[1] 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).

(35) To ensure consistent harmonisation of rules on risk-mitigation techniques, registration of trade repositories and reporting requirements, the Commission should ***be empowered to*** adopt regulatory technical standards developed by EBA ***or*** ESMA ***with regard to*** the ***following:*** supervisory procedures to ensure initial and ongoing validation of the risk-management procedures that require the timely, accurate and appropriately segregated ***exchange of*** collateral***;*** the details of the simplified application for an extension of the registration of a trade repository that is already registered under Regulation (EU) 2015/***2365; the procedures for the reconciliation of data between trade repositories,*** the procedures to be applied by the trade repository to verify ***the*** compliance with the reporting requirements by the reporting counterparty or submitting entity ***and to verify***, the completeness and ***correctness of the data reported; the terms and conditions, the arrangements and the required documentation under which certain entities are granted access to*** trade repositories. The Commission should adopt those regulatory technical standards by means of delegated acts pursuant to Article 290 ***TFEU*** and in accordance with Articles 10 to 14 of ***Regulations*** (EU) No 1093/2010 ▌ and ▌ (EU) No 1095/2010 ▌ .

(36) The Commission should also be empowered to adopt implementing technical standards developed by ESMA ▌ with regard to the data standards for the information to be reported for different classes of derivatives and with regard to 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. The Commission should adopt those implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1095/2010.***

(37) Since the objectives of this Regulation, namely, to ensure that the rules are proportionate, do not lead to unnecessary administrative burdens or compliance costs, do not put financial stability at risk, and increase the transparency of OTC derivative 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.

(38) The application of certain provisions of this Regulation should be deferred to establish all essential implementing measures and to allow market participants to take the necessary steps for compliance purposes.

(39) Regulation (EU) No 648/2012 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

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:***

(a) an investment firm authorised in accordance with Directive 2014/65/EU of the European Parliament and of the Council[*]***;***

(b) a credit institution authorised in accordance with ***Directive 2013/36/EU of the European Parliament and of the Council[**];***

(c) an insurance undertaking ***or*** reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council[***]***;***

(d) a UCITS ***and, where relevant, its management company,*** authorised in accordance with Directive 2009/65/EC, ***unless that UCITS is set up exclusively for the purpose of serving one or more employee share purchase plans;***

(e) an institution for occupational retirement provision ***(IORP), as defined in*** point (1) of Article 6 of Directive (EU) 2016/2341 of the European Parliament and of the Council[****]***;***

(f) ***an alternative investment fund*** (AIF), as defined in point (a) of Article 4(1) of Directive 2011/61/EU, ***which is either established in the Union or managed by an alternative investment fund manager (AIFM) authorised or registered in accordance with that Directive, unless that AIF is set up exclusively for the purpose of serving one or more employee share purchase plans, or unless that AIF is a securitisation special purpose entity as referred to in point (g) of Article 2(3) of Directive 2011/61/EU, and, where relevant, its AIFM established in the Union;***

(g) a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council[*****] ▌;

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[*] 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).

[**] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

[***] 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).

[****] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

[*****] 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).”;

(2) Article 4 is amended as follows:

(a) paragraph 1 is amended as follows:

(i) points (a)(i) to (a)(iv) are replaced by the following:

“(i) between two financial counterparties that ***meet*** the conditions set out in the second subparagraph of Article 4a(1);

(ii) between a financial counterparty that ***meets*** the conditions set out in the second subparagraph of Article 4a(1) and a non-financial counterparty that ***meets*** the conditions set out in the second subparagraph of Article 10(1);

(iii) between two non-financial counterparties that ***meet*** the conditions set out in the second subparagraph of Article 10(1);

(iv) between, on the one side, a financial counterparty that ***meets*** the conditions set out in the second subparagraph of Article 4a(1) or a non-financial counterparty that ***meets*** the conditions set out in the second subparagraph of Article 10(1), and, on the other side, an entity established in a third country that would be subject to the clearing obligation if it were established in the Union;";

(ii) point (b) is replaced by the following:

"(b) they are entered into or novated on ▌ or after ▌ the date on which the clearing obligation takes effect, ***provided that, on the date they are entered into or novated, both counterparties meet the conditions set out in point (a)***;";

(b) the following paragraph is inserted:

"3a. ***Without being obliged to contract,*** clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable***, non-discriminatory and transparent commercial terms. Such clearing members and clients shall take all reasonable measures to identify, prevent, manage and monitor conflicts of interest, in particular between the trading unit and the clearing unit, that may adversely affect the fair, reasonable, non-discriminatory and transparent provision of clearing services. Such measures shall also be taken where trading and clearing services are provided by different legal entities belonging to the same group.***

Clearing members and clients shall be permitted to control the risks related to the clearing services offered.

The Commission is empowered to adopt delegated acts in accordance with Article 82 to ***supplement this Regulation by specifying*** the conditions under which the commercial terms referred to in the first subparagraph of this paragraph are to be considered to be fair, reasonable ***,*** non-discriminatory ***and transparent, based on the following:***

(a) fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;

(b) factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;

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

(d) risk control criteria for the clearing member or client related to the clearing services offered.";

(3) the following article is ***inserted***:

"Article 4a

Financial counterparties that are subject to the clearing obligation

1. ***Every 12 months***, a financial counterparty taking positions in OTC derivative contracts ***may*** calculate its aggregate month-end average position for the ***previous 12*** months ▌ in accordance with paragraph 3.

Where a financial counterparty does not calculate its positions, or where the result of that calculation exceeds ***any of*** the clearing thresholds specified pursuant to point (b) of Article 10(4), the financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof**,** ***and, where relevant, indicate the period used for the calculation***;

▌

(b) establish clearing arrangements within four months after the notification referred to in point (a) of this subparagraph; and

(c) become subject to the clearing obligation referred to in Article 4 for all OTC derivative contracts pertaining to any class of OTC derivatives which is subject to the clearing obligation entered into or novated more than four months following the notification referred to in point (a) of this subparagraph.

2. A financial counterparty that is subject to the clearing obligation referred to in Article 4 on ... [date of entry into force of this amending Regulation] or that becomes subject to the clearing obligation in accordance with the second subparagraph of paragraph 1, shall remain subject to that obligation and shall continue clearing until that financial counterparty demonstrates to the relevant competent authority that its aggregate month-end average position for the previous 12 months does not exceed the clearing threshold specified pursuant to point (b) of Article 10(4).

The financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of that position.

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.

Notwithstanding the first subparagraph, for UCITS and AIFs, the positions referred to in paragraph 1 shall be calculated at the level of the fund.

UCITS management companies which manage more than one UCITSs and AIFMs which manage more than one AIF shall be able to demonstrate to the relevant competent authority that the calculation of positions at the fund level does not lead to:

(a) a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; and

(b) a circumvention of the clearing obligation.

The relevant competent authorities of the financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.";

(4) Article 5 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. Where a competent authority authorises a CCP to clear a class of OTC derivatives under Article 14 or 15, or where a class of OTC derivatives which a CCP intends to start clearing is covered by an existing authorisation granted in accordance with Article 14 or 15, the competent authority shall immediately notify ESMA of that authorisation or of the class of OTC derivatives which the CCP intends to start clearing.";

(b) in paragraph 2, point (c) is deleted;

(5) Article 6 is amended as follows:

(a) in paragraph 2, point (e) is deleted;

(b) paragraph 3 is replaced by the following:

"3. Where a CCP is no longer authorised or recognised in accordance with this Regulation to clear a specific class of OTC derivatives, ESMA shall immediately remove that CCP from the public register in relation to that class of OTC derivatives.";

(6) the following article is ***inserted***:

"Article ***6a***

Suspension of clearing obligation ▌

1. ▌ ESMA may request that the Commission suspend the clearing obligation referred to in Article 4(1) for ▌ specific ***classes*** of OTC ***derivatives*** or for a specific type of counterparty, where one of the following conditions is met:

   (a) the ***specific classes*** of OTC ***derivatives are*** no longer suitable for central clearing in accordance with the criteria referred to in the first subparagraph of ***Article 5(4)*** and in ***Article 5(5)***;

   (b) a CCP is likely to cease clearing ***those*** specific ***classes*** of OTC ***derivatives*** and no other CCP is able to clear ***those*** specific ***classes*** of OTC ***derivatives*** without interruption;

   (c) the suspension of the clearing obligation for ▌ those specific ***classes*** of OTC ***derivatives*** or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability ***or to the orderly functioning of financial markets*** in the Union and that suspension is proportionate to ***those aims***.

For the purposes of point (c) of the first subparagraph, prior to the request referred to in the first subparagraph***, ESMA shall consult the ESRB and the competent authorities designated in accordance with Article 22.***

The request referred to in the first subparagraph shall be accompanied by evidence that at least one of the conditions set out therein is met.

Where the suspension of the clearing obligation is considered by ESMA to be a material change in the criteria for the trading obligation to take effect referred to in Article 32(5) of Regulation (EU) No 600/2014, the request referred to in the first subparagraph of this paragraph may also include a request to suspend the trading obligation laid down in Article 28(1) and (2) of that Regulation for the same specific classes of OTC derivatives that are subject to the request to suspend the clearing obligation.

2. Under the conditions set out in paragraph 1 of this Article, the competent authorities responsible for the supervision of clearing members and the competent authorities designated in accordance with Article 22 may request that ESMA submit a request for a suspension of the clearing obligation to the Commission. The request by the competent authority shall provide reasons and submit evidence showing that at least one of the conditions set out in the first subparagraph of paragraph 1 of this Article is met.

ESMA shall, within 48 hours of receipt of the request from the competent authority referred to in the first subparagraph of this paragraph, on the basis of the reasons and evidence provided by the competent authority, either request that the Commission suspend the clearing obligation referred to in Article 4(1) or reject the request referred to in the first subparagraph of this paragraph. ESMA shall inform the competent authority concerned of its decision. Where ESMA rejects the request by the competent authority, it shall provide reasons therefor in writing.

3. The ***requests*** referred to in ***paragraphs 1 and 2*** shall not be made public.

4. The Commission shall, ***without undue delay after receipt*** of the request referred to in paragraph 1, on the basis of the reasons and evidence provided by ESMA, either suspend the clearing obligation for the specific ***classes*** of OTC ***derivatives*** or for the specific type of counterparty referred to in paragraph 1 ***by way of an implementing act***, or reject the requested suspension. ***Where the Commission rejects the requested suspension, it shall provide reasons therefor in writing to ESMA. The Commission shall immediately inform the European Parliament and the Council thereof and forward them the reasons provided to ESMA. Such information shall not be made public.***

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the procedure referred to in Article 86(3).

5. Where requested by ESMA in accordance with the fourth subparagraph of paragraph 1 of this Article, the implementing act suspending the clearing obligation for specific classes of OTC derivatives may also suspend the trading obligation laid down in Article 28(1) and (2) of Regulation (EU) No 600/2014 for the same specific classes of OTC derivatives that are subject to the suspension of the clearing obligation.

6. The suspension of the clearing ***obligation and, where applicable, the trading*** 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.

7. ***The*** suspension of the clearing obligation ***referred to in paragraph 4*** shall be valid for ***an initial*** period ***of no more than*** three months from the date of application of that suspension.

   The suspension of the trading obligation referred to in paragraph 5 shall be valid for the same initial period.

8. ***Where the grounds for the suspension continue to apply,*** the Commission ▌ may, ***by way of an implementing act,*** extend the suspension referred to in ***paragraph 4*** for additional periods ***of no more than*** three months, with the total period of the suspension of no more than 12 months. Any extensions of the suspension shall be published in accordance with ***paragraph*** 6.

▌

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the procedure referred to in Article 86(3).

ESMA shall, in sufficient time before the end of the suspension period referred to in paragraph 7 of this Article or of the extension period referred to in the first subparagraph of this paragraph, issue an opinion to the Commission on whether the grounds for the suspension continue to apply. For the purposes of point (c) of the first subparagraph of paragraph 1 of this Article, ESMA shall consult the ESRB and the competent authorities designated in accordance with Article 22. ESMA shall send a copy of that opinion to the European Parliament and to the Council. That opinion shall not be made public.

The implementing act extending the suspension of the clearing obligation may also extend the period of the suspension of the trading obligation referred to in paragraph 7.

The extension of the suspension of the trading obligation shall be valid for the same period as the extension of the suspension of the clearing obligation.";

(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 paragraphs 1a to 1f of this Article 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.

Notwithstanding Article 3, the reporting obligation shall not apply to ***derivative contracts within the same group where at least*** one of the counterparties is a non-financial counterparty ***or would be qualified as a non-financial counterparty if it were established in the Union, provided that:***

(a) both counterparties are included in the same consolidation on a full basis;

(b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures; and

(c) the parent undertaking is not a financial counterparty.

Counterparties shall notify their competent authorities of their intention to apply the exemption referred to in the third subparagraph. The exemption shall be valid unless the notified competent authorities do not agree upon fulfilment of the conditions referred to in the third subparagraph within three months of the date of notification.";

(b) the following ***paragraphs are*** inserted:

"1a. ***Financial counterparties*** shall be ***solely*** responsible, ***and legally liable,*** for reporting on behalf of both counterparties***,*** the details of ▌ OTC derivative contracts ***concluded with a non-financial counterparty that does not meet the conditions referred to in the second subparagraph of Article 10(1),*** as well as for ensuring the correctness of the ▌ ***details*** reported***.***

To ensure that the financial counterparty has all the data it needs to fulfil the reporting obligation, the non-financial counterparty shall provide the financial counterparty with the details of the OTC derivative contracts concluded between them, which the financial counterparty cannot be reasonably expected to possess. The non-financial counterparty shall be responsible for ensuring that those details are correct.

Notwithstanding the first subparagraph, non-financial counterparties who have already invested in a reporting system may decide to report the details of their OTC derivative contracts with financial counterparties to a trade repository. In that case, the non-financial counterparties shall inform the financial counterparties with which they have concluded OTC derivative contracts of their decision prior to reporting those details. In that situation, the non-financial counterparties shall be responsible, and legally liable, for reporting those details and for ensuring their correctness.

A non-financial counterparty that does not meet the conditions referred to in the second subparagraph of Article 10(1) and that concludes an OTC derivative contract with an entity established in a third country shall not be required to report pursuant to this Article and shall not be legally liable for reporting or ensuring the correctness of the details of such OTC derivative contracts, provided that:

(a) that third-country entity would be qualified as a financial counterparty if it were established in the Union;

(b) the legal regime for reporting to which that third-country entity is subject has been declared equivalent pursuant to Article 13; and

(c) the third-country financial counterparty has reported such information pursuant to that third-country legal regime for reporting to a trade repository that is subject to a legally binding and enforceable obligation to grant the entities referred to in Article 81(3) direct and immediate access to the data.

1b. ***The management company of a UCITS*** shall be responsible, ***and legally liable,*** for reporting ▌ the details of OTC derivative contracts ***to which that UCITS is a*** counterparty ▌ , as well as for ensuring the ***correctness*** of the details reported.

1c. The ***AIFM*** shall be responsible, ***and legally liable,*** for reporting the details of OTC derivative contracts to which the relevant ***AIF*** is a counterparty, as well as for ensuring the ***correctness of the details reported.***

1d. ***The authorised entity that is responsible for managing and acting on behalf of an IORP that, in accordance with national law, does not have legal personality shall be responsible, and legally liable, for reporting the details of OTC derivative contracts to which that IORP is a counterparty, as well as for ensuring the correctness*** of the details reported.

1e. ▌ Counterparties and CCPs that are ***required to report the details of derivative contracts*** shall ensure that such details are reported ▌ correctly and without duplication.

1f. Counterparties and CCPs that are 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***, in close cooperation with the ESCB,*** 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 ▌);

(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 ▌ .

In developing those draft ***implementing*** 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) ▌ 2015/2365* and Article 26 of Regulation (EU) No 600/2014.

ESMA shall submit those draft implementing technical standards to the Commission by … [***12*** months after the date of entry into force of this ***amending*** 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.

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* 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) Article 10 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

"1. ***Every 12 months,*** a non-financial counterparty taking positions in OTC derivative contracts ***may*** calculate its aggregate month-end average position for the ***previous 12*** months ▌ in accordance with paragraph 3.

▌

Where a non-financial counterparty does not calculate its positions, or where the result of that calculation in respect of one or more classes of OTC derivatives exceeds the clearing thresholds specified pursuant to point (b) of the first subparagraph of paragraph 4, that non-financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof, and, where relevant, indicate the period used for the calculation;

(b) establish clearing arrangements within four months of the notification referred to in point (a) of this subparagraph;

(c) become subject to the clearing obligation referred to in Article 4 for the OTC derivative contracts entered into or novated more than four months following the notification referred to in point (a) of this subparagraph that pertain to those asset classes in respect of which the result of the calculation exceeds the clearing thresholds or, where the non-financial counterparty has not calculated its position, that pertain to any class of OTC derivatives which is subject to the clearing obligation.

2. ***A non-financial counterparty that is subject to the clearing obligation referred to in Article 4 on ... [date of entry into force of this amending Regulation] or that becomes subject to the clearing obligation*** in accordance with the second subparagraph of ***paragraph 1 of this Article, shall remain subject to that obligation and shall continue clearing until that non-financial counterparty*** demonstrates to the relevant competent authority that its aggregate month-end average position for the ***previous 12*** months ▌ does not exceed the clearing threshold ***specified pursuant*** to ***point (b) of paragraph*** 4 of this Article.

The non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of the position.";

(b) the following paragraph is inserted:

"2a. The relevant competent authorities of the non-financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.";

(c) in paragraph 4, the fourth subparagraph is replaced by the following:

"After consulting the ESRB and other relevant authorities, ESMA shall periodically review the clearing thresholds referred to in point (b) of the first subparagraph ***and, where necessary taking into account, in particular, the interconnectedness of financial counterparties, propose to amend the regulatory technical standards in accordance with this paragraph.***

That periodic review shall be accompanied by a report by ESMA on the subject.";

(9) in Article 11, paragraph 15 is amended as follows:

(a) the first subparagraph is amended as follows:

(i) 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;";***

(ii) the following point is inserted:

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

(b) the third subparagraph is replaced by the following:

"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 … [12 months after the date of entry into force of this amending Regulation].";

(10) in Article 38, the following paragraphs are added:

"6. A CCP shall provide its clearing members with a simulation tool allowing them to determine the amount of additional initial margin, on a gross basis, 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:

(a) clearly explain the design of the initial margin model and how it operates;

(b) clearly describe the key assumptions and limitations of the initial margin model and the circumstances under which those assumptions are no longer valid;

(c) be documented.";

(11) in Article 39, the following paragraph is added:

"11. ***Member States' national insolvency laws shall not prevent a CCP from acting in accordance with Article 48(5), (6) and (7) with regard to*** the assets and positions recorded in ***accounts as referred to in paragraphs 2 to 5 of this Article.";***

(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:

(a) an application for registration;

(b) an application for an extension of the registration where the trade repository is already registered under Chapter III of Regulation (EU) 2015/2365.";

(b) paragraph 3 is replaced by the following:

"3. To ensure the consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the following:

(a) the details of the application for the registration referred to in point (a) of paragraph 1;

(b) the details of the simplified application for the extension of the registration referred to in point (b) of paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by … [***12*** months after the date of entry into force of this ***amending*** Regulation].

Power is delegated to the Commission to ***supplement this Regulation by adopting*** 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:

(a) the format of the application for registration referred to in point (a) of paragraph 1;

(b) the format of the application for an extension of the registration referred to in point (b) of paragraph 1.

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 … [***12*** months after the date of entry into force of this ***amending*** 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) in Article 62, paragraph 5 is replaced by the following:

"5. If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires a national competent authority to be authorised by a judicial authority in accordance with national rules, ESMA shall also apply for such authorisation. ESMA may also apply for such authorisation as a precautionary measure.";

(14) Article 63 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

"1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections on any business premises, land or property of the legal persons referred to in Article 61(1). Where the proper conduct and efficiency of the inspection so require, ESMA may conduct the on-site inspection without prior announcement.

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises, land or property of the legal persons who are subject to an investigation decision adopted by ESMA and shall have all the powers referred to in Article 62(1). They shall also have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.";

(b) paragraph 8 is replaced by the following:

"8. If the on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7 requires a national competent authority to be authorised by a judicial authority in accordance with national rules, ESMA shall also apply for such authorisation. ESMA may also apply for such authorisation as a precautionary measure.";

(15) Article 64 is amended as follows:

(a) paragraph 4 is replaced by the following:

"4. When submitting the file with the findings referred to in paragraph 3 to ESMA, the investigation officer shall notify the persons who are subject to the investigations. Such persons shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or to ESMA's internal preparatory documents.";

(b) paragraph 8 is replaced by the following:

"8. ESMA shall refer matters to the relevant authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts that it knows to be liable to constitute a criminal offence under the applicable law. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where it is aware that a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law.";

(16) in Article 65, paragraph 2 is amended as follows:

(a) in point (a), "EUR 20 000" is replaced by "EUR 200 000";

(b) ▌ point (b) ▌ 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 is added:

"(c) for the infringements referred to in Section IV of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed EUR 10 000.";

(17) in Article 67, paragraph 1 is replaced by the following:

"1. Before taking any decision under Article 73(1) and on a periodic penalty payment under Article 66, ESMA shall give the persons who are subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons who are subject to the proceedings have had an opportunity to comment.

The first subparagraph of this paragraph shall not apply to the decisions referred to in points (a), (c) and (d) of Article 73(1) if urgent action is needed in order to prevent significant and imminent damage to the financial system or to prevent significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including to the stability or the correctness of data reported to a trade repository. In such a case, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.";

(18) in Article 72, paragraph 2 is replaced by the following:

“2. The amount of any fee charged to a trade repository shall cover all ***reasonable*** administrative costs incurred by ESMA in relation to its registration and ESMA's supervisory activities and shall be proportionate to the turnover of the trade repository concerned and the type of registration and supervision exercised by ESMA.**”**;

(19) the following article 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 that the Commission has adopted an implementing act in accordance with paragraph 2 to that effect.

2. Upon the submission of a request by the authorities referred to in paragraph 1 of this Article, 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 and enforcement of trade repositories takes place in that third country on an ongoing basis;

(c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and they are at least equivalent to those set out in this Regulation;

(d) trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to grant the entities referred to in Article 81(3) direct and immediate access to the data.";

(20) in Article 78, the following paragraphs 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 ***verify*** the completeness and ***correctness*** of the ***data*** reported ▌;

(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 the 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 ***correctness*** of the ***data*** reported under Article 9.

ESMA shall submit those draft regulatory technical standards to the Commission by ***... [12*** months after the date of entry into force of this ***amending*** Regulation].

Power is delegated to the Commission to ***supplement this Regulation by adopting*** the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.***"***;

(21) in Article 80, the following paragraph is inserted:

"5a. Upon request, a trade repository shall provide counterparties that are not required to report the details of their OTC derivative contracts pursuant to Article 9(1a) to (1d) and counterparties and CCPs which have delegated their reporting obligation pursuant to Article 9(1f) with access to the information reported on their behalf.";

(22) Article 81 is amended as follows:

(a) in paragraph 3, the following point is added:

"(q) the relevant authorities of a third country in respect of which an implementing act pursuant to Article ***76a*** has been adopted.";

(b) paragraph 5 is replaced by the following:

"5. In order to ensure the 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 ***trade*** 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 … [***12*** months after the date of entry into force of this ***amending*** Regulation].

In developing those draft ***regulatory*** 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 ***supplement this Regulation by adopting*** the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.";

(23) in ***Article*** 82, paragraphs 2 ***to 6 are*** replaced by the following:

"2. The delegation of power referred to in Articles 1(6), 4(3a), 64(7), Article 70, Articles 72(3), ▌ and 85(2) shall be conferred to the Commission for an indeterminate period of time.

3. ***The delegation of power referred to in Articles 1(6), 4(3a), 64(7), Article 70, Articles 72(3) and 85(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.***

4. ***Before adopting a delegated act, the Commission shall endeavour to consult ESMA and shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.***

5. ***As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.***

6. A delegated act adopted pursuant to Articles 1(6), 4(3a), 64(7), Article 70, Articles 72(3) and 85(2) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.";

(24) Article 85 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. By ***... [five years after*** the date of entry into ***force of this amending Regulation***] 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 ***to*** the Council, together with any appropriate proposals.";

(b) the following paragraph is inserted:

"1a. By … [12 months before the date referred to in paragraph 1] ESMA shall submit a report to the Commission on the following:

(a) the impact of Regulation (EU) 2019/...[+] of the European Parliament and of the Council[*] on the level of clearing by financial and non-financial counterparties and on the distribution of clearing within each type of counterparty, in particular with regard to financial counterparties that have a limited volume of activity in OTC derivatives and with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);

(b) the impact of Regulation (EU) 2019/...[+] on the quality and accessibility of the data reported to trade repositories, as well as the quality of the information made available by trade repositories;

(c) the changes to the reporting framework, including the take-up and implementation of delegated reporting as laid down in Article 9(1a) and in particular its impact on the reporting burden for non-financial counterparties that are not subject to the clearing obligation;

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(d) the accessibility of clearing services, in particular whether the requirement to provide clearing services, directly or indirectly, under fair, reasonable, non-discriminatory and transparent commercial terms referred to in Article 4(3a) has been effective in facilitating access to clearing.

****Regulation (EU) 2019/… of the European Parliament and of the Council of … 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 derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (OJ L , …, p.).";***

(c) paragraphs 2 and 3 are replaced by the following:

"2. By ***… [12 months after the*** date of entry into force ***of this amending Regulation], and every 12 months thereafter until the final extension referred to in the third subparagraph***, the Commission shall prepare a report assessing whether viable technical solutions have been developed for the transfer by pension scheme arrangements of cash and non-cash collateral as variation margins and the need for any measures to facilitate those viable technical solutions.

ESMA shall, by ***… [six months after the*** date of entry into force ***of this amending Regulation], and every 12 months thereafter until the final extension referred to in the third subparagraph***, in cooperation with EIOPA, EBA and the ESRB, submit a report to the Commission, assessing the following:

(a) whether CCPs, clearing members and pension scheme arrangements have ***undertaken an appropriate effort and have*** developed viable technical solutions facilitating the participation of such arrangements in central clearing by posting cash and non-cash collateral as variation margins, including the implications of those solutions on market liquidity and procyclicality ***and their potential legal or other implications***;

(b) the volume and the nature of the activity of pension scheme arrangements in cleared and non-cleared OTC derivatives markets, within each asset class, and any related systemic risk to the financial system;

(c) the consequences of pension scheme arrangements 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 specified pursuant to point (b) of Article 10(4) for pension scheme arrangements;

(e) the impact of other legal requirements on the cost differentials between cleared and non-cleared OTC derivative contracts, including margin requirements for non-cleared derivatives and the calculation of the leverage ratio in accordance with Regulation (EU) No 575/2013;

(f) whether any further measures are necessary to facilitate a clearing solution for pension scheme arrangements.

The Commission ***may*** adopt a delegated act in accordance with Article 82 to extend the ***two***-year period referred to in Article 89(1) ***twice***, each time by ***one year***, 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.

CCPs, clearing members and pension scheme arrangements shall make their best efforts to contribute to the development of viable technical solutions that facilitate the clearing of OTC derivative contracts by such arrangements.

The Commission shall set up an expert group composed of representatives of CCPs, clearing members, pension scheme arrangements and other relevant parties to such viable technical solutions to monitor their efforts and assess the progress made in the development of viable technical solutions that facilitate the clearing of OTC derivative contracts by pension scheme arrangements, including the transfer by such arrangements of cash and non-cash collateral as variation margins. That expert group shall meet at least every six months. The Commission shall consider the efforts made by CCPs, clearing members and pension scheme arrangements when drafting its report pursuant to the first subparagraph.

3. ***By … [18 months after the date of entry into force of this amending Regulation] the Commission shall prepare a report assessing:***

(a) ***whether the obligations to report transactions under Article 26 of Regulation (EU) No 600/2014 and under this Regulation create a duplicative transaction reporting obligation for non-OTC derivatives and whether reporting of non-OTC transactions could be reduced or simplified for all counterparties without undue loss of information;***

(b) the necessity and appropriateness of aligning the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/…[+] to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation;

(c) whether any trades that directly result from post-trade risk reduction services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1), taking into account the extent to which those services mitigate risk, in particular counterparty credit risk and operational risk, the potential for circumvention of the clearing obligation and the potential disincentive to central clearing.

The Commission shall submit the report referred to in the first subparagraph to the European Parliament and to the Council, together with any appropriate proposals.

(d) the following paragraph is inserted:

[+] OJ: please insert the number of this Regulation.

"3a. By … [11 months after the date of entry into force of this amending Regulation], ESMA shall submit a report to the Commission. That report shall assess:

(a) the consistency of the reporting requirements for non-OTC derivatives under Regulation (EU) No 600/2014 and under Article 9 of this Regulation, both in terms of the details of the derivative contracts that are to be reported and access to data by the relevant entities and whether those requirements should be aligned;

(b) the feasibility of further simplifying the reporting chains for all counterparties, including for all indirect clients, taking into account the need for timely reporting and taking into account the measures adopted pursuant to Article 4(4) of this Regulation and Article 30(2) of Regulation (EU) No 600/2014;

(c) the alignment of the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/...[+] to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation;

(d) in cooperation with the ESRB, whether any trades that directly result from post-trade risk reduction services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1); that report shall:

(i) investigate portfolio compression and other available non-price forming post-trade risk reduction services which reduce non-market risks in derivatives portfolios without changing the market risk of the portfolios, such as rebalancing transactions;

(ii) explain the purposes and functioning of such post-trade risk reduction services, the extent to which they mitigate risk, in particular counterparty credit risk and operational risk, and assess the need to clear such trades or to exempt them from clearing, in order to manage systemic risk; and

(iii) assess to what extent any exemption from the clearing obligation for such services discourages central clearing and may lead to counterparties circumventing the clearing obligation;

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(e) whether the list of financial instruments that are considered highly liquid with minimal market and credit risk, in accordance with Article 47, could be extended and whether that list could include one or more money market funds authorised in accordance with Regulation (EU) 2017/1131[*].

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[*] Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (OJ L 169, 30.6.2017, p. 8).***";***

(25) in Article 86, the following paragraph is added:

"3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.";

(26) in Article 89(1), the first subparagraph is replaced by the following:

"1. Until ***... [two years after the*** date of entry into force ***of this amending Regulation***], the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks that directly relate to the financial solvency of pension scheme arrangements, and to entities established to provide compensation to members of such arrangements in case of default. ▌

The clearing obligation set out in Article 4 shall not apply to OTC derivative contracts as referred to in the first subparagraph of this paragraph entered into by pension scheme arrangements from 17 August 2018 until … [day before the date of entry into force of this amending Regulation].";

(27) 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.

It shall apply from the date of entry into force, except for *the following****:***

(a) ***provisions set out in points (10) and (11) of Article 1 of this Regulation, as regards Articles 38(6) and (7) and 39(11) of Regulation (EU) No 648/2012, shall apply from ... [six months after the date of entry into force of this amending Regulation];***

(b) ***provisions set out in point (7)(b) of Article 1 of this Regulation, as regards Article 9(1a) to (1d) of Regulation (EU) No 648/2012, shall apply from ... [12 months after the date of entry into force of this amending Regulation];***

(c) ***provisions set out in points (2)(b) and (20) of Article 1 of this Regulation, as regards Articles 4(3a) and 78(9) and (10) of Regulation (EU) No 648/2012, shall apply from ... [24 months after the date of entry into force of this amending Regulation].***

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

Done at ...,

For the European Parliament	*For the Council*
The President	*The President*

ANNEX

Annex I is amended as follows:

(1) in Section I, the following points are added:

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

(j) a trade repository infringes point (b) of Article 78(9) by not establishing adequate procedures to ***verify*** the completeness and ***correctness*** of the ***data*** reported ▌;

(k) a trade repository infringes point (c) of Article 78(9) 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.";

(2) in Section IV, the following point is ***added***:

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