

## COMMISSION DELEGATED REGULATION (EU) No 149/2013

of 19 December 2012

**supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

to specify technical terms necessary for developing this technical standard, a number of terms should be defined.

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

Having regard to the opinion of the European Central Bank <sup>(1)</sup>,Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <sup>(2)</sup>, and in particular Articles 4(4), 5(1), 6(4), 8(5), 10(4) and 11(14) thereof,

Whereas:

(1) A framework should be provided to encompass rules applicable to the clearing obligation, its application, possible exemptions and risk mitigation techniques to be established when clearing with a central counterparty (CCP) cannot take place. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and efficient access for stakeholders and in particular those subject to the obligations, it is desirable to include most of the regulatory technical standards required under Title II of Regulation (EU) No 648/2012 in a single Regulation.

(2) In view of the global nature of the over the counter (OTC) derivatives market, this Regulation should take into account the relevant internationally agreed guidelines and recommendations on OTC derivatives market reforms and mandatory clearing as well as the related rules developed in other jurisdictions. In particular the framework for the determination of a clearing obligation takes into account the Mandatory Clearing requirements published by the International Organization of Securities Commissions. This will support, as much as possible, convergence with the approach in other jurisdictions.

(3) In order to clearly identify a limited number of concepts stemming from Regulation (EU) No 648/2012, as well as

(4) An indirect clearing arrangement should not expose a CCP, clearing member, client or indirect client to additional counterparty risk and the assets and positions of the indirect client should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangements comply with minimum conditions for ensuring their safety. To that end, the parties involved in indirect clearing arrangements shall be subject to specific obligations. Such arrangements extend beyond the contractual relationship between indirect clients and the client of a clearing member that provides indirect clearing services.

(5) Regulation (EU) No 648/2012 requires a CCP to be a designated system under Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems <sup>(3)</sup>. This implies that clearing members of CCPs should qualify as participants within the meaning of that Directive. Therefore to ensure an equivalent level of protection to indirect clients as granted to clients under Regulation (EU) No 648/2012, it is necessary to ensure that clients providing indirect clearing services are credit institutions, investment firms, or equivalent third country credit institutions or investment firms.

(6) Indirect clearing arrangements should be established so as to ensure that indirect clients can obtain an equivalent level of protection as direct clients in a default scenario. Following the failure of a clearing member that facilitates an indirect clearing arrangement, indirect clients should be included in the transfer of client positions to an alternative clearing member under the portability requirements established by Articles 39 and 48 of Regulation (EU) No 648/2012. Appropriate safeguards against client failure should also exist within indirect clearing arrangements and should support transferring indirect client positions to an alternative provider of clearing services.

<sup>(1)</sup> Not yet published in the Official Journal.

<sup>(2)</sup> OJ L 201, 27.7.2012, p. 1.

<sup>(3)</sup> OJ L 166, 11.6.1998, p. 45.

- (7) As indirect clearing arrangements may give rise to specific risks, all the parties included in an indirect clearing arrangement, including clearing members and CCPs, should routinely identify, monitor and manage any material risks arising from the arrangement. Appropriate sharing of information between clients that provide indirect clearing services and clearing members that facilitate those services is especially important in this context. Clearing members should use information provided by clients for risk management purposes only and should prevent the misuse of commercially sensitive information, including through the use of effective barriers between different divisions of a financial institution to avoid conflicts of interest.
- (8) When it authorises a CCP to clear a class of OTC derivatives, the competent authority is required to notify the European Securities and Markets Authority (ESMA). This notification should include detailed information which is necessary for ESMA to carry out its assessment process, including information on liquidity and volume of the relevant class of OTC derivatives. Although the information flows from the competent authority to ESMA, it is the CCP having requested the authorisation that should initially provide the required information to the competent authorities which may then complement it.
- (9) Although all information to be included in the notification from the competent authority to ESMA for the purpose of the clearing obligation may not always be available, especially for new products, estimates that are available should be provided, including a clear indication of the assumptions made. The notification should also contain information pertaining to the counterparties, such as the type and number of counterparties, the steps required to start clearing with a CCP, their legal and operational capacity or their risk management framework in order to allow ESMA to assess the ability of the active counterparties to comply with the clearing obligation without disruption to the market.
- (10) The notification from the competent authority to ESMA should contain information on the degree of standardisation, liquidity and price availability, in order for ESMA to assess whether a class of OTC derivatives should be subject to the clearing obligation. The criteria related to the standardisation of the contractual terms and operational processes of a relevant class of OTC are an indicator of the standardisation of the economic terms of a class of OTC derivatives as it is only when such economic terms are standardised that the contractual terms and operational processes can be standardised. The criteria related to liquidity and price availability are assessed by ESMA with different considerations than the assessment made by the competent authority while authorising the CCP. Liquidity in this context is assessed on a wider perspective and differs from the liquidity after the clearing obligation would apply. In particular, the fact that a contract is sufficiently liquid to be cleared by one CCP does not necessarily imply that it should be subject to the clearing obligation. ESMA's assessment should not replicate or duplicate the review already performed by the competent authority.
- (11) The information to be provided by the competent authority for the purpose of the clearing obligation should enable ESMA to assess the availability of pricing information. In this respect, the access of a CCP to pricing information at one point in time does not mean that market participants could access pricing information in the future. As a result, the fact that a CCP has access to the necessary price information to manage the risks of clearing derivative contracts within a certain class of OTC derivatives does not automatically imply that this class of OTC derivatives should be subject to the clearing obligation.
- (12) The level of details available in the register of classes of OTC derivative contracts subject to the clearing obligation depends on the relevance of these details to identify each class of OTC derivative contracts. As a result the level of details in the register may differ for different classes of OTC derivative contracts.
- (13) Allowing access by multiple CCPs to a trading venue could broaden participant access to that venue and therefore enhance overall liquidity. It is nonetheless necessary in such circumstances to specify the notion of liquidity fragmentation within a venue in the case that it may threaten the smooth and orderly functioning of markets for the class of financial instruments for which the request is made.
- (14) The assessment of the competent authority of the trading venue to which a CCP has requested access and of the competent authority of the CCP should be based on the mechanisms available to prevent liquidity fragmentation within a trading venue.
- (15) To prevent liquidity fragmentation all participants in a trading venue should be able to clear all transactions executed between them. However, it would not be proportionate to require all clearing members of an existing CCP to become also clearing members of any new CCP serving such trading venue. Where there are entities which are clearing members of both CCPs, they may facilitate the transfer and clearing of transactions executed by market participants separately served by the two CCPs, to limit the risk of liquidity fragmentation. Nevertheless, it is important that a request to access a

- trading venue by a CCP does not fragment liquidity in a manner that would increase the risks to which the existing CCP is exposed.
- (16) According to Article 8(4) of Regulation (EU) No 648/2012, a request to access a trading venue by a CCP should not require interoperability, and, consequently, this Regulation should not prescribe interoperability as the only way to resolve liquidity fragmentation. However, this Regulation should not preclude CCPs from entering into such an arrangement on a voluntary basis if the necessary conditions for its establishment are fulfilled.
- (17) In order to establish which OTC derivative contracts are objectively measurable as reducing risks directly relating to commercial activity or treasury financing activity, non-financial counterparties should apply one of the criteria provided for in this Regulation including the accounting definition based on International Financial Reporting Standards (IFRS) rules. The accounting definition can be used by counterparties even though they do not apply IFRS rules. For those non-financial counterparties that may use local accounting rules, it is expected that most of the contracts classified as hedging under such local accounting rules would fall within the general definition of contracts reducing risks directly related to commercial activity or treasury financing activity provided for in this Regulation.
- (18) In some circumstances, it may not be possible to hedge a risk by using a directly related derivative contract, a contract with exactly the same underlying and settlement date as the risk being covered. In such case, the non-financial counterparty may use proxy hedging through a closely correlated instrument to cover its exposure such as an instrument with a different but very close underlying in terms of economic behaviour. Additionally, certain groups of non-financial counterparties which enter into OTC derivative contracts, via a single entity, to hedge their risk in relation to the overall risks of the group may use macro or portfolio hedging. Those macro, portfolio or proxy hedging OTC derivative contracts may constitute hedging for the purpose of this Regulation and should be considered against the criteria for establishing which OTC derivative contracts are objectively reducing risks.
- (19) A risk may evolve over time and in order to adapt to the evolution of the risk, OTC derivative contracts initially executed for reducing risk related to commercial or treasury financing activity may have to be offset through the use of additional OTC derivative contracts. As a result, hedging of a risk may be achieved by a combination of OTC derivative contracts including offsetting OTC derivative contracts that close out those OTC derivative contracts that have become unrelated to the commercial or treasury financing risk.
- (20) The range of risks directly related to commercial and treasury financing activities is very wide and varies across different economic sectors. Risks related to commercial activities are typically attached to inputs to the production function of a company as well as products and services that it sells or provides. Treasury financing activities typically relate to the management of the short- and long-term funding of an entity, including its debt, and the ways it invests the financial resources it generates or holds, including cash management. Treasury financing and commercial activities can be affected by common sources of risks, such as foreign exchange, commodity prices, inflation or credit risk. Given that OTC derivatives are concluded to hedge a particular risk, when analysing the risks directly related to commercial or treasury financing activities, those risks should be defined in a consistent manner covering both activities. In addition, separating the two concepts might have unintended consequences, given that depending on the sector in which non-financial counterparties operate, a particular risk would be hedged under treasury financing or commercial activity.
- (21) While the clearing thresholds should be set taking into account the systemic relevance of the related risks, it is important to consider that the OTC derivatives that reduce risks are excluded from the computation of the clearing thresholds and that the clearing thresholds allow an exception to the principle of the clearing obligation for those OTC derivative contracts which may be considered as not concluded for hedging purposes. More specifically, the value of the clearing thresholds should be reviewed periodically and should be determined by class of OTC derivative contracts. The classes of OTC derivatives determined for the purpose of the clearing thresholds may be different from the classes of OTC derivatives for the purpose of the clearing obligation. In setting the value of the clearing thresholds, due consideration should be given to the need to define a single indicator reflecting the systemic relevance of the sum of net positions and exposures

per counterparty and per asset class of OTC derivatives. Furthermore, the clearing thresholds being used by non-financial counterparties should be simple to implement.

- (22) The determination of the value of the clearing thresholds should take into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives in accordance with Regulation (EU) No 648/2012. However, it should be considered that these net positions and exposures are different from a net exposure across counterparties and across asset class. Furthermore, in accordance with Regulation (EU) No 648/2012 these net positions should be added up in order to determine the data to be considered for the setting of the clearing thresholds. It is the total gross sum resulting from the addition of these net positions that should be considered when setting the clearing thresholds. The gross notional value resulting from that addition should be used as a reference for setting the clearing thresholds.
- (23) In addition, the structure of the OTC derivatives activity of non-financial counterparties usually leads to a low level of netting as OTC derivative contracts are concluded in the same direction. As a result, the difference between the sum of the net positions and exposures per counterparty and per class of OTC derivatives would be very close to the gross value of contracts. Therefore, and in order to reach the objective of simplicity, the gross value of OTC derivative contracts should be used as a valid proxy of the measure to be taken into account in the determination of the clearing threshold.
- (24) Given that non-financials that do not exceed the clearing threshold are not required to mark-to-market their OTC derivative contracts, it would not be reasonable to use this measure to determine the clearing thresholds as this would impose a heavy burden on non-financial counterparties which would not be proportionate with the risk addressed. Instead, using the notional value of OTC derivative contracts would allow a simple approach which is not exposed to external events for non-financials.
- (25) The excess of one of the values set for a class of OTC derivatives should trigger the excess of the clearing threshold for all classes, given that OTC derivative contracts reducing risks are excluded from the calculation of the clearing threshold, the consequences of exceeding the clearing threshold are not only related to the clearing obligation but extend to risk mitigation techniques, and the approach for the relevant obligations under Regulation (EU) No 648/2012 applicable to non-financial counterparties should be simple in view of the non-sophisticated nature of most of them.
- (26) For those OTC derivative contracts that are not cleared, risk mitigation techniques such as timely confirmation should apply. The confirmation of OTC derivative contracts may refer to one or more master agreements, master confirmation agreements, or other standard terms. It may take the form of an electronically executed contract or a document signed by both counterparties.
- (27) It is essential that counterparties confirm the terms of their transactions as soon as possible following the execution of the transaction, especially when the transaction is electronically executed or processed, in order to ensure common understanding and legal certainty of the terms of the transaction. Counterparties entering into non-standard or complex OTC derivative contracts, in particular, may need to implement tools in order to comply with the requirement to confirm their OTC derivative contracts in a timely manner. The timely confirmation would also anticipate that relevant market practices would evolve in this area.
- (28) To further mitigate risks, portfolio reconciliation enables each counterparty to undertake a comprehensive review of a portfolio of transactions as seen by its counterparty in order to promptly identify any misunderstandings of key transaction terms. Such terms should include the valuation of each transaction and may also include other relevant details such as the effective date, the scheduled maturity date, any payment or settlement dates, the notional value of the contract and currency of the transaction, the underlying instrument, the position of the counterparties, the business day convention and any relevant fixed or floating rates of the OTC derivative contract.

- (29) In view of the different risk profiles and in order for the portfolio reconciliation to be a proportionate risk mitigation technique, the frequency of the reconciliation and size of the portfolio to consider should be different depending on the nature of the counterparties. More demanding requirements should apply to both financial counterparties and non-financial counterparties that exceed the clearing threshold while lower reconciliation frequency should apply for non-financial counterparties that would not exceed the clearing threshold irrespective of the category of its counterparty who would also benefit from this less frequent reconciliation for that part of its portfolio.
- (30) Portfolio compression may also be an efficient tool for risk mitigation purposes depending on circumstances such as the size of the portfolio with a counterparty, the maturity, purpose and degree of standardisation of OTC derivative contracts. Financial counterparties and non-financial counterparties that have a portfolio of OTC derivative contracts not cleared by a CCP above the level determined in this Regulation should have procedures in place in order to analyse the possibility to use portfolio compression that would allow them to reduce their counterparty credit risk.
- (31) Dispute resolution aims at mitigating risks stemming from contracts that are not centrally cleared. When entering into OTC derivative transactions with one another, counterparties should have an agreed framework for resolving any related dispute that may arise. The framework should refer to resolution mechanisms such as third party arbitration or market polling mechanism. The framework intends to avoid unresolved disputes escalating and exposing counterparties to additional risks. Disputes should be identified, managed and appropriately disclosed.
- (32) For the purpose of specifying market conditions that prevent marking-to-market, it is necessary to specify inactive markets. A market may be inactive for several reasons including when there are no regularly occurring market transactions on an arm's length basis, where an arm's length basis should have the same meaning as for accounting purposes.
- (33) This Regulation applies to financial counterparties and non-financial counterparties above the clearing threshold and takes into consideration Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on capital adequacy of investment firms and credit institutions<sup>(1)</sup>, which also sets requirements to be complied with when marking-to-model.
- (34) Although the design of the model used for the marking-to-model may be developed internally or externally, in order to ensure appropriate accountability, the approval of the model is the responsibility of the board of directors or the delegated committee of such board.
- (35) When counterparties can apply the intragroup exemption following their notification to the competent authorities but without waiting for the end of the non-objection period by such competent authorities, it is important to ensure that the competent authorities get timely, appropriate and sufficient information in order to assess whether it should object to the use of the exemption.
- (36) The anticipated size, volumes and frequency of intragroup OTC derivative contracts may be determined on the basis of the historical intragroup transactions of the counterparties as well as the anticipated model and activity expected for the future.
- (37) When counterparties apply an intragroup exemption, they should publicly disclose information in order to ensure transparency in respect of market participants and potential creditors. This is particularly important for the potential creditors of the counterparties in terms of assessing risks. The disclosure aims at preventing misperception that OTC derivative contracts are centrally cleared or subject to risk mitigation techniques when it is not the case.
- (38) The timeframe to achieve timely confirmation requires adaptation efforts including changes of market practice and enhancement of IT systems. Given that the pace of adaptation to compliance may differ depending on the category of counterparties and the asset class of OTC derivatives, setting progressive dates of application which cater for these differences would allow enhancing the timeframe of the confirmation for those counterparties and products that could be ready more rapidly.
- (39) The standards set for portfolio reconciliation, portfolio compression or dispute resolution would require counterparties to set up procedures, policies, processes, and amend documentation which would require time. The entry into force of the related requirements should be delayed in order to grant time for the counterparties to take the necessary steps for compliance purposes.
- (40) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

<sup>(1)</sup> OJ L 177, 30.6.2006, p. 201.

(41) In accordance with Article 10 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council <sup>(1)</sup>, ESMA has conducted open public consultations on the draft regulatory technical standards, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

HAS ADOPTED THIS REGULATION:

## CHAPTER I

### GENERAL

#### Article 1

#### Definitions

For the purposes of this Regulation the following definitions apply:

- (a) 'indirect client' means the client of a client of a clearing member;
- (b) 'indirect clearing arrangement' means the set of contractual relationships between the central counterparty (CCP), the clearing member, the client of a clearing member and indirect client that allows the client of a clearing member to provide clearing services to an indirect client;
- (c) 'confirmation' means the documentation of the agreement of the counterparties to all the terms of an over the counter (OTC) derivative contract.

## CHAPTER II

### INDIRECT CLEARING ARRANGEMENTS

(Article 4(4) of Regulation (EU) No 648/2012)

#### Article 2

#### Structure of indirect clearing arrangements

1. Where a clearing member is prepared to facilitate indirect clearing, any client of such clearing member shall be permitted to provide indirect clearing services to one or more of its own clients, provided that the client of the clearing member is an authorised credit institution, investment firm or an equivalent third country credit institution or investment firm.
2. The contractual terms of an indirect clearing arrangement shall be agreed between the client of a clearing member and the indirect client, after consultation with the clearing member on the aspects that can impact the operations of the clearing member. They shall include contractual requirements on the client to honour all obligations of the indirect client towards the clearing member. These requirements shall refer only to

transactions arising as part of the indirect clearing arrangement, the scope of which shall be clearly documented in the agreed contracts.

#### Article 3

#### Obligations of CCPs

1. Indirect clearing arrangements shall not be subject to business practices of the CCP which act as a barrier to their establishment on reasonable commercial terms. At the request of a clearing member, the CCP shall maintain separate records and accounts enabling each client to distinguish in accounts held with the CCP the assets and positions of the client from those held for the accounts of the indirect clients of the client.
2. A CCP shall identify, monitor and manage any material risks arising from indirect clearing arrangements that could affect the resilience of the CCP.

#### Article 4

#### Obligations of clearing members

1. A clearing member that offers to facilitate indirect clearing services shall do so on reasonable commercial terms. Without prejudice to the confidentiality of contractual arrangements with individual clients, the clearing member shall publicly disclose the general terms on which it is prepared to facilitate indirect clearing services. These terms may include minimum operational requirements for clients that provide indirect clearing services.
2. When facilitating indirect clearing arrangements, a clearing member shall implement any of the following segregation arrangements as indicated by the client:
  - (a) keep separate records and accounts enabling each client to distinguish in accounts with the clearing member the assets and positions of the client from those held for the accounts of its indirect clients;
  - (b) keep separate records and accounts enabling each client to distinguish in accounts with the clearing member the assets and positions held for the account of an indirect client from those held for the account of other indirect clients.
3. The requirement to distinguish assets and positions with the clearing member shall be considered to be met if the conditions specified in Article 39(9) of Regulation (EU) No 648/2012 are satisfied.
4. A clearing member shall establish robust procedures to manage the default of a client that provides indirect clearing services. These procedures shall include a credible mechanism for transferring the positions and assets to an alternative client or clearing member, subject to the agreement of the indirect clients affected. A client or clearing member shall not be obliged to accept these positions unless it has entered into a prior contractual agreement to do so.

<sup>(1)</sup> OJ L 331, 15.12.2010, p. 84.

5. The clearing member shall also ensure that its procedures allow for the prompt liquidation of the assets and positions of indirect clients and the clearing member to pay all monies due to the indirect clients following the default of the client.

6. A clearing member shall identify, monitor and manage any risks arising from facilitating indirect clearing arrangements, including using information provided by clients under Article 4(3). The clearing member shall establish robust internal procedures to ensure this information cannot be used for commercial purposes.

#### Article 5

##### Obligations of clients

1. A client that provides indirect clearing services shall keep separate records and accounts that enable it to distinguish between its own assets and positions and those held for the account of its indirect clients. It shall offer indirect clients a choice between the alternative account segregation options provided for in Article 4(2) and shall ensure that indirect clients are fully informed of the risks associated with each segregation option. The information provided by the client to indirect clients shall include details of arrangements for transferring positions and accounts to an alternative client.

2. A client that provides indirect clearing services shall request the clearing member to open a segregated account at the CCP. The account shall be for the exclusive purpose of holding the assets and positions of its indirect clients.

3. A client shall provide the clearing member with sufficient information to identify, monitor and manage any risks arising from facilitating indirect clearing arrangements. In the event of default of the client, all information held by the client in respect of its indirect clients shall be made immediately available to the clearing member.

#### CHAPTER III

##### NOTIFICATION TO ESMA FOR THE PURPOSE OF THE CLEARING OBLIGATION

(Article 5(1) of Regulation (EU) No 648/2012)

#### Article 6

##### Details to be included in the notification

1. The notification for the purpose of the clearing obligation shall include the following information:

- (a) the identification of the class of OTC derivative contracts;
- (b) the identification of the OTC derivative contracts within the class of OTC derivative contracts;

(c) other information to be included in the public register in accordance with Article 8;

(d) any further characteristics necessary to distinguish OTC derivative contracts within the class of OTC derivative contracts from OTC derivative contracts outside that class;

(e) evidence of the degree of standardisation of the contractual terms and operational processes for the relevant class of OTC derivative contracts;

(f) data on the volume of the class of OTC derivative contracts;

(g) data on the liquidity of the class of OTC derivative contracts;

(h) evidence of availability to market participants of fair, reliable and generally accepted pricing information for contracts in the class of OTC derivative contracts;

(i) evidence of the impact of the clearing obligation on availability to market participants of pricing information.

2. For the purpose of assessing the date or dates from which the clearing obligation takes effect, including any phasing-in and the categories of counterparties to which the clearing obligation applies, the notification for the purpose of the clearing obligation shall include:

(a) data relevant for assessing the expected volume of the class of OTC derivative contracts if it becomes subject to the clearing obligation;

(b) evidence of the ability of the CCP to handle the expected volume of the class of OTC derivative contracts if it becomes subject to the clearing obligation and to manage the risk arising from the clearing of the relevant class of OTC derivative contracts, including through client or indirect client clearing arrangements;

(c) the type and number of counterparties active and expected to be active within the market for the class of OTC derivative contracts if it becomes subject to the clearing obligation;

- (d) an outline of the different tasks to be completed in order to start clearing with the CCP, together with the determination of the time required to fulfil each task;
- (e) information on the risk management, legal and operational capacity of the range of counterparties active in the market for the class of OTC derivative contracts if it becomes subject to the clearing obligation.

3. The data pertaining to the volume and the liquidity shall contain for the class of OTC derivative contracts and for each derivative contract within the class, the relevant market information, including historical data, current data as well as any change that is expected to arise if the class of OTC derivative contracts becomes subject to the clearing obligation, including:

- (a) the number of transactions;
- (b) the total volume;
- (c) the total open interest;
- (d) the depth of orders including the average number of orders and of requests for quotes;
- (e) the tightness of spreads;
- (f) the measures of liquidity under stressed market conditions;
- (g) the measures of liquidity for the execution of default procedures.

4. The information related to the degree of standardisation of the contractual terms and operational processes for the relevant class of OTC derivative contracts provided in point (e) of paragraph 1 shall include, for the class of OTC derivative contracts and for each derivative contract within the class, data on the daily reference price as well as the number of days per year with a reference price it considers reliable over at least the previous 12 months.

#### CHAPTER IV

#### CRITERIA FOR THE DETERMINATION OF THE CLASSES OF OTC DERIVATIVE CONTRACTS SUBJECT TO THE CLEARING OBLIGATION

(Article 5(4) of Regulation (EU) No 648/2012)

##### Article 7

#### Criteria to be assessed by ESMA

1. In relation to the degree of standardisation of the contractual terms and operational processes of the relevant

class of OTC derivative contracts, the European Securities and Markets Authority (ESMA) shall take into consideration:

- (a) whether the contractual terms of the relevant class of OTC derivative contracts incorporate common legal documentation, including master netting agreements, definitions, standard terms and confirmations which set out contract specifications commonly used by counterparties;
- (b) whether the operational processes of that relevant class of OTC derivative contracts are subject to automated post-trade processing and lifecycle events that are managed in a common manner according to a timetable which is widely agreed among counterparties.

2. In relation to the volume and liquidity of the relevant class of OTC derivative contracts, ESMA shall take into consideration:

- (a) whether the margins or financial requirements of the CCP would be proportionate to the risk that the clearing obligation intends to mitigate;
- (b) the stability of the market size and depth in respect of the product over time;
- (c) the likelihood that market dispersion would remain sufficient in the event of the default of a clearing member;
- (d) the number and the value of the transactions.

3. In relation to the availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivative contracts, ESMA shall take into consideration whether the information needed to accurately price the contracts within the relevant class of OTC derivative contracts is easily accessible to market participants on a reasonable commercial basis and whether it would continue to be easily accessible if the relevant class of OTC derivative contracts became subject to the clearing obligation.

#### CHAPTER V

#### PUBLIC REGISTER

(Article 6(4) of Regulation (EU) No 648/2012)

##### Article 8

#### Details to be included in ESMA's Register

1. The ESMA public register shall include for each class of OTC derivative contracts subject to the clearing obligation:

- (a) the asset class of OTC derivative contracts;

- (b) the type of OTC derivative contracts within the class;
- (c) the underlyings of OTC derivative contracts within the class;
- (d) for underlyings which are financial instruments, an indication of whether the underlying is a single financial instrument or issuer or an index or portfolio;
- (e) for other underlyings an indication of the category of the underlying;
- (f) the notional and settlement currencies of OTC derivative contracts within the class;
- (g) the range of maturities of OTC derivative contracts within the class;
- (h) the settlement conditions of OTC derivative contracts within the class;
- (i) the range of payment frequency of OTC derivative contracts within the class;
- (j) the product identifier of the relevant class of OTC derivative contracts;
- (k) any other characteristic required to distinguish one contract in the relevant class of OTC derivative contracts from another.

2. In relation to CCPs that are authorised or recognised for the purpose of the clearing obligation, the ESMA public register shall include for each CCP:

- (a) the identification code, in accordance with Article 3 of Implementing Commission Regulation (EU) No 1247/2012 <sup>(1)</sup>;
- (b) the full name;
- (c) the country of establishment;
- (d) the competent authority designated in accordance with Article 22 of Regulation (EU) No 648/2012.

3. In relation to the dates from which the clearing obligation takes effect, including any phased-in implementation, the ESMA public register shall include:

- (a) the identification of the categories of counterparties to which each phase-in period applies;

- (b) any other condition required pursuant to the regulatory technical standards adopted under Article 5(2) of Regulation (EU) No 648/2012, in order for the phase-in period to apply.

4. The ESMA public register shall include the reference of the regulatory technical standards adopted under Article 5(2) of Regulation (EU) No 648/2012, according to which each clearing obligation was established.

5. In relation to the CCP that has been notified to ESMA by the competent authority, the ESMA public register shall include at least:

- (a) the identification of the CCP;
- (b) the asset class of OTC derivative contracts that are notified;
- (c) the type of OTC derivative contracts;
- (d) the date of the notification;
- (e) the identification of the notifying competent authority.

## CHAPTER VI

### LIQUIDITY FRAGMENTATION

(Article 8(5) of Regulation (EU) No 648/2012)

#### Article 9

#### Specification of the notion of liquidity fragmentation

1. Liquidity fragmentation shall be deemed to occur when the participants in a trading venue are unable to conclude a transaction with one or more other participants in that venue because of the absence of clearing arrangements to which all participants have access.

2. Access by a CCP to a trading venue which is already served by another CCP shall not be deemed to give rise to liquidity fragmentation within the trading venue if, without the need to impose a requirement on clearing members of the incumbent CCP to become clearing members of the requesting CCP, all participants to the trading venue can clear, directly or indirectly, through one of the following:

- (a) at least one CCP in common;
- (b) clearing arrangements established by the CCPs.

3. The arrangements for the fulfilment of the conditions under point (a) or (b) of paragraph 2 shall be established before the requesting CCP starts providing clearing services to the relevant trading venue.

4. Access to a common CCP as referred to in point (a) of paragraph 2 may be established through two or more clearing members, or two or more clients or through indirect clearing arrangements.

<sup>(1)</sup> OJ L 352, 21.12.2012, p. 20.

5. Clearing arrangements referred to in point (b) of paragraph 2 may foresee the transfer of transactions executed by such market participants to clearing members of other CCPs. Although access by a CCP to a trading venue should not require interoperability, an interoperability arrangement which has been agreed by the relevant CCPs and approved by the relevant competent authorities may be used to fulfil the requirement for access to common clearing arrangements.

## CHAPTER VII

### NON-FINANCIAL COUNTERPARTIES

#### Article 10

(Article 10(4)(a) of Regulation (EU) No 648/2012)

#### **Criteria for establishing which OTC derivative contracts are objectively reducing risks**

1. An OTC derivative contract shall be objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group, when, by itself or in combination with other derivative contracts, directly or through closely correlated instruments, it meets one of the following criteria:

- (a) it covers the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the non-financial counterparty or its group owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;
- (b) it covers the risks arising from the potential indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in point (a), resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk;
- (c) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council <sup>(1)</sup>.

#### Article 11

(Article 10(4)(b) of Regulation (EU) No 648/2012)

#### **Clearing thresholds**

The clearing thresholds values for the purpose of the clearing obligation shall be:

- (a) EUR 1 billion in gross notional value for OTC credit derivative contracts;

- (b) EUR 1 billion in gross notional value for OTC equity derivative contracts;
- (c) EUR 3 billion in gross notional value for OTC interest rate derivative contracts;
- (d) EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts;
- (e) EUR 3 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for under points (a) to (d).

## CHAPTER VIII

### RISK-MITIGATION TECHNIQUES FOR OTC DERIVATIVE CONTRACTS NOT CLEARED BY A CCP

#### Article 12

(Article 11(14)(a) of Regulation (EU) No 648/2012)

#### **Timely confirmation**

1. An OTC derivative contract concluded between financial counterparties or non-financial counterparties referred to in Article 10 of Regulation (EU) No 648/2012 and which is not cleared by a CCP shall be confirmed, where available via electronic means, as soon as possible and at the latest:

- (a) for credit default swaps and interest rate swaps that are concluded up to and including 28 February 2014, by the end of the second business day following the date of execution of the OTC derivative contract;
- (b) for credit default swaps and interest rate swaps that are concluded after 28 February 2014, by the end of the business day following the date of execution of the OTC derivative contract;
- (c) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives not provided for in point (a) that are concluded up to and including 31 August 2013, by the end of the third business day following the date of execution of the derivative contract;
- (d) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives not provided for in point (a) that are concluded after 31 August 2013 up to and including 31 August 2014, by the end of the second business day following the date of execution of the derivative contract;

<sup>(1)</sup> OJ L 243, 11.9.2002, p. 1.

(e) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives not provided for in point (a) that are concluded after 31 August 2014, by the end of the business day following the date of execution of the derivative contract.

2. An OTC derivative contract concluded with a non-financial counterparty not referred to in Article 10 of Regulation (EU) No 648/2012, shall be confirmed as soon as possible, where available via electronic means, and at the latest:

(a) for credit default swaps and interest rate swaps that are concluded up to and including 31 August 2013, by the end of the fifth business day following the date of execution of the OTC derivative contract;

(b) for credit default swaps and interest rate swaps that are concluded after 31 August 2013 up to and including 31 August 2014, by the end of the third business day following the date of execution of the OTC derivative contract;

(c) for credit default swaps and interest rate swaps that are concluded after 31 August 2014, by the end of the second business day following the date of execution of the OTC derivative contract;

(d) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives not provided for in point (a) that are concluded up to and including 31 August 2013, by the end of the seventh business day following the date of execution of the derivative contract;

(e) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives not provided for in point (a) that are concluded after 31 August 2013 up to and including 31 August 2014, by the end of the fourth business day following the date of execution of the derivative contract;

(f) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives not provided for in point (a) that are concluded after 31 August 2014, by the end of the second business day following the date of execution.

3. Where a transaction referred to in paragraph 1 or 2 is concluded after 16.00 local time, or with a counterparty located in a different time zone which does not allow confirmation by the set deadline, the confirmation shall take place as soon as

possible and, at the latest, one business day following the deadline set in paragraph 1 or 2 as relevant.

4. Financial counterparties shall have the necessary procedure to report on a monthly basis to the competent authority designated in accordance with Article 48 of Directive 2004/39/EC of the European Parliament and of the Council <sup>(1)</sup> the number of unconfirmed OTC derivative transactions referred to in paragraphs 1 and 2 that have been outstanding for more than five business days.

#### Article 13

(Article 11(14)(a) of Regulation (EU) No 648/2012)

#### Portfolio reconciliation

1. Financial and non-financial counterparties to an OTC derivative contract shall agree in writing or other equivalent electronic means with each of their counterparties on the arrangements under which portfolios shall be reconciled. Such agreement shall be reached before entering into the OTC derivative contract.

2. Portfolio reconciliation shall be performed by the counterparties to the OTC derivative contracts with each other or by a qualified third party duly mandated to this effect by a counterparty. The portfolio reconciliation shall cover key trade terms that identify each particular OTC derivative contract and shall include at least the valuation attributed to each contract in accordance with Article 11(2) of Regulation (EU) No 648/2012.

3. In order to identify at an early stage any discrepancy in a material term of the OTC derivative contract, including its valuation, the portfolio reconciliation shall be performed:

(a) for a financial counterparty or a non-financial counterparty referred to in Article 10 of Regulation (EU) No 648/2012:

(i) each business day when the counterparties have 500 or more OTC derivative contracts outstanding with each other;

(ii) once per week when the counterparties have between 51 and 499 OTC derivative contracts outstanding with each other at any time during the week;

(iii) once per quarter when the counterparties have 50 or less OTC derivative contracts outstanding with each other at any time during the quarter;

<sup>(1)</sup> OJ L 145, 30.4.2004, p. 1.

(b) for a non-financial counterparty not referred to in Article 10 of Regulation (EU) No 648/2012:

- (i) once per quarter when the counterparties have more than 100 OTC derivative contracts outstanding with each other at any time during the quarter;
- (ii) once per year when the counterparties have 100 or less OTC derivative contracts outstanding with each other.

#### Article 14

(Article 11(14)(a) of Regulation (EU) No 648/2012)

#### Portfolio compression

Financial counterparties and non-financial counterparties with 500 or more OTC derivative contracts outstanding with a counterparty which are not centrally cleared shall have in place procedures to regularly, and at least twice a year, analyse the possibility to conduct a portfolio compression exercise in order to reduce their counterparty credit risk and engage in such a portfolio compression exercise.

Financial counterparties and non-financial counterparties shall ensure that they are able to provide a reasonable and valid explanation to the relevant competent authority for concluding that a portfolio compression exercise is not appropriate.

#### Article 15

(Article 11(14)(a) of Regulation (EU) No 648/2012)

#### Dispute resolution

1. When concluding OTC derivative contracts with each other, financial counterparties and non-financial counterparties shall have agreed detailed procedures and processes in relation to:

- (a) the identification, recording, and monitoring of disputes relating to the recognition or valuation of the contract and to the exchange of collateral between counterparties. Those procedures shall at least record the length of time for which the dispute remains outstanding, the counterparty and the amount which is disputed;
- (b) the resolution of disputes in a timely manner with a specific process for those disputes that are not resolved within five business days.

2. Financial counterparties shall report to the competent authority designated in accordance with Article 48 of Directive 2004/39/EC any disputes between counterparties

relating to an OTC derivative contract, its valuation or the exchange of collateral for an amount or a value higher than EUR 15 million and outstanding for at least 15 business days.

#### Article 16

(Article 11(14)(b) of Regulation (EU) No 648/2012)

#### Market conditions that prevent marking-to-market

1. Market conditions that prevent marking-to-market of an OTC derivative contract shall be considered to occur in either of the following situations:

- (a) when the market is inactive;
  - (b) where the range of reasonable fair values estimates is significant and the probabilities of the various estimates cannot reasonably be assessed.
2. A market for an OTC derivative contract shall be considered inactive when quoted prices are not readily and regularly available and those prices available do not represent actual and regularly occurring market transactions on an arm's length basis.

#### Article 17

(Article 11(14)(b) of Regulation (EU) No 648/2012)

#### Criteria for using marking-to-model

For using marking-to-model, financial and non-financial counterparties shall have a model that:

- (a) incorporates all factors that counterparties would consider in setting a price, including using as much as possible marking-to-market information;
- (b) is consistent with accepted economic methodologies for pricing financial instruments;
- (c) is calibrated and tested for validity using prices from any observable current market transactions in the same financial instrument or based on any available observable market data;
- (d) is validated and monitored independently, by another division than the division taking the risk;
- (e) is duly documented and approved by the board of directors as frequently as necessary, following any material change and at least annually. This approval may be delegated to a committee.

*Article 18*

(Article 11(14)(c) of Regulation (EU) No 648/2012)

**Details of the intragroup transaction notification to the competent authority**

1. The application or notification to the competent authority of the details of the intragroup transaction shall be in writing and shall include:

- (a) the legal counterparties to the transactions including their identifiers in accordance with Article 3 of Implementing Regulation (EU) No 1247/2012;
- (b) the corporate relationship between the counterparties;
- (c) details of the supporting contractual relationships between the parties;
- (d) the category of intragroup transaction as specified under paragraph 1 and points (a) to (d) of paragraph 2 of Article 3 of Regulation (EU) No 648/2012;
- (e) details of the transactions for which the counterparty is seeking the exemption, including:
  - (i) the asset class of OTC derivative contracts;
  - (ii) the type of OTC derivative contracts;
  - (iii) the type of underlyings;
  - (iv) the notional and settlement currencies;
  - (v) the range of contract tenors;
  - (vi) the settlement type;
  - (vii) the anticipated size, volumes and frequency of OTC derivative contracts per annum.

2. As part of its application or notification to the relevant competent authority, a counterparty shall also submit supporting information evidencing that the conditions of Article 11(6) to (10) of Regulation (EU) No 648/2012 are fulfilled. The supporting documents shall include copies of documented risk management procedures, historical transaction information, copies of the relevant contracts between the parties and may include a legal opinion upon request from the competent authority.

*Article 19*

(Article 11(14)(d) of Regulation (EU) No 648/2012)

**Details of the intragroup transaction notification to ESMA**

1. The notification by a competent authority of the details of the intragroup transaction shall be submitted to ESMA in writing:

- (a) within one month of the receipt of the notification with respect to a notification under Article 11(7) or (9) of Regulation (EU) No 648/2012;
- (b) within one month from the decision being submitted to the counterparty with respect to a decision of the competent authority under Article 11(6), (8) or (10) of Regulation (EU) No 648/2012.

2. The notification to ESMA shall include:

- (a) the information listed in Article 18;
- (b) whether there is a positive or a negative decision;
- (c) in the case of a positive decision:
  - (i) a summary of the reason for considering that the conditions set in Article 11(6), (7), (8), (9) or (10) of Regulation (EU) No 648/2012 as applicable are fulfilled;
  - (ii) whether the exemption is a full exemption or a partial exemption with respect to of a notification related to Article 11(6), (8) or (10) of Regulation (EU) No 648/2012;
- (d) in the case of a negative decision:
  - (i) the identification of the conditions of Article 11(6), (7), (8), (9) or (10) of Regulation (EU) No 648/2012 as applicable that are not fulfilled;
  - (ii) a summary of the reason for considering that such conditions are not fulfilled.

*Article 20*

(Article 11(14)(d) of Regulation (EU) No 648/2012)

**Information on the intragroup exemption to be publicly disclosed**

The information on an intragroup exemption to be disclosed publicly shall include:

- (a) the legal counterparties to the transactions including their identifiers in accordance with Article 3 of Implementing Regulation (EU) No 1247/2012;
- (b) the relationship between the counterparties;
- (c) whether the exemption is a full exemption or a partial exemption;
- (d) the notional aggregate amount of the OTC derivative contracts for which the intragroup exemption applies.

*Article 21***Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 13, 14 and 15 shall apply six months after the date of entry into force of this Regulation.

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

Done at Brussels, 19 December 2012.

*For the Commission*  
*The President*  
José Manuel BARROSO

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