



European Securities and
Markets Authority

Consultation Paper

Clearing Obligation under EMIR (no. 6)



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the questions listed in this Consultation Paper on the Clearing Obligation under EMIR (no. 6).

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Please follow the instructions given in the document 'Reply form for the Consultation Paper on the Clearing Obligation under EMIR (no. 6) also published on the ESMA website.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

Please note that the length of the consultation period has been set to six weeks as the scope of this consultation paper is relatively limited. ESMA will consider all comments received by **30 August 2018**.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal Notice'.

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from financial and non-financial counterparties of OTC derivative transactions as well as central counterparties (CCPs) and clearing members.

Table of Contents

Introduction	6
1 Current temporary exemption	8
2 Proposed amendment	8
Annex I - Commission mandate to develop technical standards	10
Annex II – Extract from Commission Delegated Regulation (EU) 2015/2205 on the clearing obligation, with regards to intragroup transactions with a third country group entity	11
Annex III – Amending Draft Regulatory Technical Standards on the Clearing Obligation with regards to Intragroup Transactions	13
Annex VI – Impact assessment	16



Acronyms used

AIF	Alternative Investment Fund
AIFM	Alternative Investment Fund Manager
AIFMD	Alternative Investment Fund Managers Directive (Directive 2011/61/EU)
CCP	Central Counterparty
CDS	Credit Default Swap
CFD	Contract for difference
Class+	Class of OTC derivatives subject (or proposed to be subject) to the clearing obligation
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories – also referred to as “the Regulation”
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETD	Exchange Traded Derivatives
FC	Financial Counterparty
FX	Foreign Exchange
IRS	Interest Rate Swap
LEI	Legal Entity Identifier
MiFID	Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and the Council
MTF	Multilateral Trading Facility
NCA	National Competent Authority
NFC	Non-Financial Counterparty
NFC+	Non-Financial Counterparty subject to the clearing obligation, as referred to in Article 10(1)(b) of EMIR
OTC	Over-the-counter
Q&A on EMIR	Questions and Answers on the implementation of EMIR available on ESMA's website
RTS	Regulatory Technical Standards
RTS on OTC Derivatives	Commission Delegated Regulation (EU) No 149/2013
RTS on CCP	Commission Delegated Regulation (EU) No 153/2013
SPV	Special Purpose Vehicle
TR	Trade Repository

Executive Summary

Reasons for publication

This consultation paper seeks stakeholders' views on the regulatory technical standards (RTS) on the clearing obligation that ESMA is drafting under Article 5(2) of the Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR). The consultation paper deals with an amending draft RTS with regards to the treatment of intragroup transactions with a third country group entity.

As of the date of publication of this consultation paper, there are three Commission Delegated Regulations on the clearing obligation that have entered into force, which mandate a range of interest rate and credit derivative classes to be cleared. These Commission Delegated Regulations contain a deferred date of application of the clearing obligation for intragroup transactions satisfying certain conditions and where one of the counterparties is in a third country, in the absence of the relevant equivalence decision. However, the deferred dates are soon approaching and there have not been any equivalence decisions to date with regards to the clearing obligation. The consultation paper looks into the reasons to extend the deferred dates of application.

The input from stakeholders will help ESMA in finalising the relevant technical standards to be drafted and submitted to the European Commission for endorsement in the form of Commission Regulations, i.e. a legally binding instrument directly applicable in all Member States of the European Union. One essential element in the development of draft technical standards is the analysis of the costs and benefits that those legal provisions will imply. Input in this respect and any supportive data will be highly appreciated and kept confidential where required.

Contents

This paper provides explanations on the draft regulatory technical standards amending the current Commission Delegated Regulations on the clearing obligation with respect to the deferred date of application for certain intragroup transactions with a third country group entity.

Next steps

The public consultation on the draft RTS on the clearing obligation runs until 30 August 2018. ESMA will then review all the responses to this consultation submitted by the deadline in order to finalise the draft RTS. The draft RTS will then be submitted to the European Commission for endorsement in the form of Commission Delegated Regulations. In addition ESMA will consult the ESRB and, where relevant, the competent authorities of third-countries when developing the draft RTS on the clearing obligation.

Introduction

1. With the overarching objective of reducing systemic risk, the European Market Infrastructure Regulation (“EMIR”) introduces the obligation to clear certain classes of OTC derivatives in Central Counterparties (CCPs) that have been authorised (for European CCPs) or recognised (for Third-country CCPs) under the EMIR framework. Ensuring that the clearing obligation reduces systemic risk requires a process of identification of classes of derivatives that should be subject to mandatory clearing.
2. EMIR foresees two possible processes for the identification of the relevant classes of OTC derivatives:
 - The “bottom-up” approach described in EMIR Article 5(2), according to which the determination of the classes to be subject to the CO will be done based on the classes which are already cleared by authorised or recognised CCPs; and
 - The “top-down” approach described in EMIR Article 5(3), according to which ESMA will on its own initiative identify classes which should be subject to the clearing obligation but for which no CCP has yet received authorisation.
3. As explained, the bottom-up clearing obligation procedure is based on the classes, which are already cleared by authorised or recognised CCPs. The Public Register lists all the CCPs authorised (and their extensions of authorisations in the case they extended their scope) or recognised that clear OTC derivatives¹
4. In accordance with the clearing obligation procedure and the Commission mandate shown in Annex I, ESMA shall develop and submit to the European Commission for endorsement draft technical standards specifying:
 - (a) the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;
 - (b) the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and
 - (c) the minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1)(b)(ii).
5. The determination process described above has led to three Commission Delegated Regulations on the clearing obligation that have entered into force and that are based on draft RTS developed by ESMA that cover a range of OTC derivative classes in the interest rate and credit derivative asset classes. The details of the classes and the associated implementation calendar are maintained in the Public Register referenced above.
6. These three Delegated Regulations are thus the result of several analyses conducted by ESMA. In fact, this consultation paper is the sixth consultation paper on the clearing obligation developed by

¹ The “Public Register for the Clearing Obligation under EMIR” is available under the post-trading section of : <http://www.esma.europa.eu/page/Registries-and-Databases>

ESMA². It follows a large number of ESMA publications³ on the clearing obligation under EMIR: a discussion paper, five consultation papers⁴ on the clearing obligation (on interest rate derivative classes, credit derivative classes and foreign-exchange non-deliverable forward classes as well as on financial counterparties with a limited volume of activity), four final reports on the clearing obligation (on interest rate derivative classes, on credit derivative classes and on financial counterparties with a limited volume of activity), a feedback statement on non-deliverable forward classes and the EMIR Review Report No.4. This consultation paper therefore builds on all the analysis and the comments received in relation to these prior documents on the clearing obligation.

7. The focus of this sixth consultation paper is the treatment in the current Commission Delegated Regulation of intragroup transactions with a third country group entity. Specifically, it re-assesses the date or dates from when the requirements are due to apply for these contracts.

² To be noted that an additional consultation paper was developed jointly with the ESAs on the clearing obligation following the amendments to EMIR that were introduced in the Securitisation Regulation:
https://www.esma.europa.eu/sites/default/files/library/jc_2018_14_cp_on_the_amendments_to_co_under_the_securitisation_regulation.pdf.

³ These documents are listed and available on ESMA's webpage at the following link: <https://www.esma.europa.eu/regulation/post-trading/otc-derivatives-and-clearing-obligation>

⁴ To be noted that an additional consultation paper was developed jointly with the ESAs on the clearing obligation following the amendments to EMIR that were introduced in the Securitisation Regulation:
https://www.esma.europa.eu/sites/default/files/library/jc_2018_14_cp_on_the_amendments_to_co_under_the_securitisation_regulation.pdf.

1 Current temporary exemption

8. The three Commission Delegated Regulations on the clearing obligation, i.e. Commission Delegated Regulation (EU) 2015/2205 and Commission Delegated Regulation (EU) 2016/1178 regarding interest rate derivative classes as well as Commission Delegated Regulation (EU) 2016/592 regarding credit derivative classes, include a provision related to intragroup transactions with a third-country group entity, under Article 3(2) of EMIR. The provision provides for a deferred date of application of the clearing obligation of up to three years for these transactions, in the absence of the relevant equivalence decision (See extract of Article 3(2) text in Annex II).

9. A Recital present in the three Commission Delegated Regulations on the clearing obligation (Recital 12 of Commission Delegated Regulation (EU) 2015/2205, Recital 11 of Commission Delegated Regulation (EU) 2016/592 and Recital 12 of Commission Delegated Regulations (EU) 2016/1178) provides the rationale for this temporary exemption:

For OTC derivative contracts concluded between a counterparty established in a third country and another counterparty established in the Union belonging to the same group and which are included in the same consolidation on a full basis and are subject to an appropriate centralised risk evaluation, measurement and control procedures, a deferred date of application of the clearing obligation should be provided. The deferred application should ensure that those contracts are not subject to the clearing obligation for a limited period of time in the absence of implementing acts pursuant to Article 13(2) of Regulation (EU) No 648/2012 covering the OTC derivative contracts set out in the Annex to this Regulation and regarding the jurisdiction where the non-Union counterparty is established. Competent authorities should be able to verify in advance that the counterparties concluding those contracts belong to the same group and fulfil the other conditions of intragroup transactions pursuant to Regulation (EU) No 648/2012.

10. The three Commission Delegated Regulations on the clearing obligation entered into force on three different dates, which means that the three year deadline expires on three different dates for each of them:

- a. 21 December 2018 for the first Commission Delegated Regulation on IRS,
- b. 9 May 2019 for the Commission Delegated Regulation on CDS, and
- c. 9 July 2019 for the second Commission Delegated Regulation on IRS.

11. As a result, the temporary exemption will expire in less than a year with regards to the OTC derivative classes covered in all three Commission Delegated Regulation, with the first deadline expiring in only a few months later this year.

2 Proposed amendment

12. However, to date, no implementing act on equivalence on legal, supervisory and enforcement framework of a third-country under Article 13(2) of EMIR in respect of the clearing obligation has been adopted.

13. The adoption by the Commission of implementing acts on equivalence under Article 13 establishing that third-countries are considered as having legal, supervisory and enforcement frameworks equivalent to EMIR is required for the exemption to clear derivatives subject to the clearing obligation for intragroup transactions with third-country group entities. As previously mentioned by ESMA, any provision that has an effect equivalent to that of an implementing act on equivalence under Article 13, although limited in time and scope, but without the assessment provided by the examination procedure referred to in Article 13(2), may have unintended consequences with respect to the objectives of EMIR and therefore requires a very careful review.
14. Therefore, in order to find the right balance between the objective of the temporary exemption as explained in the abovementioned recitals (Recital 12 of Commission Delegated Regulations (EU) 2015/2205 and 2016/1178, as well as Recital 11 of Commission Delegated Regulation (EU) 2016/592 provide for a bit more time for intragroup transactions satisfying certain conditions, not to be affected by the clearing obligation in the absence of equivalence decisions so far), and the need to contain the risk of unintended consequences as explained in the previous paragraph, ESMA is proposing to prolong these exemptions for a limited and short period of time only.
15. ESMA is proposing to prolong this date by two years for Commission Delegated Regulation (EU) 2015/2205 (interest rate derivative classes denominated in the G4 currencies), i.e. until 21 December 2020. And for simplicity, ESMA is proposing to align the date for the other two Commission Delegated Regulations (EU) 2016/1178 and (EU) 2016/592 to 21 December 2020 as well.
16. The amending draft RTS that reflects this proposal is included in Annex III.

Question 1: Do you consider that the proposed extension of the temporary intragroup exemption is justified? Please explain.

Annex I - Commission mandate to develop technical standards

Article 5 of Regulation (EU) No 648/2012

Clearing obligation procedure

2. Within six months of receiving notification in accordance with paragraph 1 [of Article 5] or accomplishing a procedure for recognition set out in Article 25, ESMA shall, after conducting a public consultation and after consulting the ESRB and, where appropriate, the competent authorities of third countries, develop and submit to the Commission for endorsement draft regulatory technical standards specifying the following:
 - (a) the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;
 - (b) the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and
 - (c) the minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1)(b)(ii).

Power is delegated to the Commission to adopt regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Annex II – Extract from Commission Delegated Regulation (EU) 2015/2205 on the clearing obligation, with regards to intragroup transactions with a third country group entity

Article 3

Dates from which the clearing obligation takes effect

2. By way of derogation from points (a), (b) and (c) of paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and concluded between counterparties other than counterparties in Category 4 which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union, the clearing obligation shall take effect on:

- (a) 21 December 2018 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country; or
- (b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:
 - (i) 60 days after the date of entry into force of the decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country;
 - (ii) the date when the clearing obligation takes effect pursuant to paragraph 1.

This derogation shall only apply where the counterparties fulfil the following conditions:

- (a) the counterparty established in a third country is either a financial counterparty or a non-financial counterparty;
- (b) the counterparty established in the Union is:
 - (i) a financial counterparty, a non-financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements and the counterparty referred to in point (a) is a financial counterparty; or
 - (ii) either a financial counterparty or a non-financial counterparty and the counterparty referred to in point (a) is a non-financial counterparty;
- (c) both counterparties are included in the same consolidation on a full basis in accordance to Article 3(3) of Regulation (EU) No 648/2012;
- (d) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;



(e) the counterparty established in the Union has notified its competent authority in writing that the conditions laid down in points (a), (b), (c) and (d) are met and, within 30 calendar days after receipt of the notification, the competent authority has confirmed that those conditions are met.



Annex III – Amending Draft Regulatory Technical Standards on the Clearing Obligation with regards to Intragroup Transactions

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

amending Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation

of []

(text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories⁵, and in particular Article 5(2) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2015/2205, Commission Delegated Regulation (EU) 2016/592 and Commission Delegated Regulation (EU) 2016/1178 specify, among others, the dates when the clearing obligation shall take effect for contracts pertaining to a class of OTC derivatives set out in the Annexes of these regulations and concluded by specified categories of counterparties.
- (2) In addition, the regulations provide for a deferred application of the clearing obligation for such OTC derivative contracts concluded between a counterparty established in a third country and another counterparty established in the Union belonging to the same group where certain conditions are met. As explained by the relevant recitals of the regulations, the deferred application should ensure that those contracts are not subject to the clearing obligation for a limited period of time in the absence of implementing acts pursuant to Article 13(2) of Regulation (EU) No 648/2012 covering the OTC derivative contracts set

⁵ OJ L 201, 27.7.2012, p. 1.

out in the Annexes to the regulations and regarding the jurisdiction where the non-Union counterparty is established.

- (3) As the rationale behind the initial deferral remains valid, the application of the clearing obligation to contracts set out in the Annexes to the regulations and concluded between the counterparties established in a third country and another counterparty established in the Union belonging to the same group which meet the conditions set out in the regulations, should be further deferred for a limited period of time.
- (4) Therefore, the Commission Delegated Regulation (EU) 2015/2205, Commission Delegated Regulation (EU) 2016/592 and Commission Delegated Regulation (EU) 2016/1178 should be amended to ensure the appropriate functioning of international derivative markets and to avoid distorting the economic and hedging incentives of market participants in the global market of OTC derivatives.
- (5) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (6) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

Article 1
Amendment to Delegated Regulation (EU) 2015/2205

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

1. Article 3(2)(a) is replaced with:
 - (a) 21 December 2020 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country; or”

Article 2
Amendment to Commission Delegated Regulation (EU) 2016/592

Commission Delegated Regulation (EU) 2016/592 is amended as follows:

1. Article 3(2)(a) is replaced with:

- (a) 21 December 2020 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country; or”

Article 3

Amendment to Commission Delegated Regulation (EU) 2016/1178

Commission Delegated Regulation (EU) 2016/1178 is amended as follows:

1. Article 3(2)(a) is replaced with:

- (b) 21 December 2020 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country; or”

Article 4

Entry into force

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

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

Done at Brussels,

*For the Commission
The President*

*[For the Commission
On behalf of the President*

[Position]

Annex IV – Impact assessment

1. Executive Summary

17. Pursuant to Article 10(1) of the Regulation establishing ESMA, ESMA is empowered to develop draft regulatory technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards (RTS) by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts within the scope of action of ESMA. The same article demands that ESMA conducts open public consultations on draft RTS and that they analyse the related potential costs and benefits, where appropriate. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the draft RTS.
18. The purpose of the amending draft RTS presented in Annex III of the consultation paper is to prolong the deferred date of application of the clearing obligation for intragroup transactions satisfying certain conditions and where one of the counterparties is in a third country, in the absence of the relevant equivalence decision, as provided for under Article 3(2) of the three Commission Delegated Regulations (EU) 2015/2205, 2016/592 and 2016/1178.
19. This Annex IV has three sections. The first section is the introduction, which sets out the background for the RTS. The second section details the baseline and thus explains the starting point for assessing the incremental rule related to ESMA's draft RTS. The final section provides an overview of the benefits and costs associated with the proposals set out in the RTS.

2. Introduction

20. Under Article 5 of EMIR, ESMA is mandated to develop and submit to the European Commission for endorsement draft technical standards specifying:
 - (a) the class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4;
 - (b) the date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and
 - (c) the minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1)(b)(ii).
21. Three Commission Delegated Regulations on the clearing obligation, based on draft RTS developed by ESMA under Article 5 of EMIR, have now entered into force. Under Article 3(2) of these three Commission Delegated Regulations contain a deferred date of application of the clearing obligation for intragroup transactions satisfying certain conditions and where one of the counterparties is in a third country, in the absence of the relevant equivalence decision.
22. However, no equivalence decision has been taken to date with regards to the clearing obligation and the deferred dates of application included in the three Commission Delegated Regulations are soon approaching, with the first one on 21 December 2018.
23. The review of the RTS and the analysis in this Annex IV assess the need to prolong these deferred dates.

3. Baseline

24. A deferred date was proposed from the first entry into force of the three Commission Delegated Regulations on the clearing obligation and the rationale for this temporary exemption is explained in Recital 12 of Commission Delegated Regulation (EU) 2015/2205, Recital 11 of Commission Delegated Regulation (EU) 2016/592 and Recital 12 of Commission Delegated Regulation (EU) 2016/1178).
25. These Recitals justify that *“the deferred application should ensure that those contracts are not subject to the clearing obligation for a limited period of time in the absence of implementing acts pursuant to Article 13(2) of Regulation (EU) No 648/2012 covering the OTC derivative contracts set out in the Annex to this Regulation and regarding the jurisdiction where the non-Union counterparty is established”*.

4. Cost benefit analysis

26. Extension of the deferred date of application

Policy objective	Assess whether the deferred date of application should be prolonged.
Technical proposal	Extend the deferred date to 21 December 2020.
Benefits	Leverages on the assessment made at the time the draft RTS on the clearing obligation were developed, i.e. that a deferred date should be provided such that intragroup transactions are not impacted by the clearing obligation while equivalence decisions have not been made, and then validated through the approval and entry into force process of the three Commission Delegated Regulations based on these draft RTS. Ensures continuity and stability of regime.
Costs	No significant one-off or on-going additional costs to regulators or compliance costs for the relevant supervised entities identified.

Question 2: Do you identify other benefits and costs not mentioned above associated to the proposed approach? If you advocated for a different approach in the responses to the previous question, how would it impact this section on the impact assessment? Please provide details.