

# Final Report

Extension of emergency measures on CCP collateral requirements



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# 1 Executive Summary

## Reasons for publication

To alleviate liquidity pressures observed in cleared energy markets in spring and summer 2022, ESMA adopted on 14 October 2022 a Final Report revising its regulatory technical standards (RTS) for central counterparties to temporarily expand the pool of eligible collateral by central counterparties (CCPs) to uncollateralised bank guarantees for Non-Financial Counterparties (NFCs) acting as clearing members and to public guarantees for all types of counterparties. These measures contained in Delegated Regulation adopted by the European Commission on 22 October 2022, which amends the RTS, are expiring on 29 November 2023.

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Section 2 provides background on the initial decision to adopt temporary measures expanding the pool of eligible collateral by CCPs during the energy crisis in 2022. Section 3 reviews the current state of energy markets, the uptake of new collateral possibilities by CCPs and their members, as well as the potential interactions with ongoing legislative discussions to review the regulatory framework applicable to EU CCPs.

ESMA concludes that the emergency measures on CCP collateral requirements should be extended for a period of six months, until the colder season impacting energy markets has ended and the co-legislators have finalised the review of EMIR, in order to safeguard the smooth functioning of the Union financial and energy markets.

The Annexes contain the mandate for ESMA to develop these draft RTS (Annex I), the current applicable provisions on eligible collateral contained in Delegated Regulation 153/2013 (Annex II) and the draft RTS (Annex III).

ESMA has not conducted open public consultations on the draft RTS, in relation to the particular urgency of the matter as permitted under Article 10(1) of Regulation (EU) 1095/2010 (ESMA Regulation), and has not consulted the Securities and Markets Stakeholder Group (SMSG), due to the urgency of the matter as foreseen in Article 37(1) of the ESMA Regulation.

As required under Article 46(3) of EMIR, ESMA consulted the EBA, the ESRB and the ESCB. Where relevant, ESMA also took into account available information from a diverse set of public and supervisory sources.

## Next Steps

The Final Report will be sent to the European Commission for endorsement and then subject to non-objection by the European Parliament and the Council.

## 2 Background

1. The unprovoked and unjustified invasion of Ukraine by Russia and the resulting disruption of energy supply routes in Europe caused significant price and volatility increases on energy markets, which in turn triggered substantial margin increases by CCPs to cover the related exposures throughout spring and summer 2022. These margin increases created significant liquidity strains on clearing participants, in particular on non-financial counterparties (NFCs) which typically have fewer and less liquid assets to meet margin requirements, forcing them to either reduce their positions or leaving them unproperly hedged and exposed to further price variations.
2. On 13 September 2022, the European Commission requested that ESMA consider whether the applicable Level 2 provisions, in particular the Commission Delegated Regulation (EU) No 153/2013<sup>1</sup>, should be amended to temporarily alleviate some of the liquidity pressures faced by NFCs, while preserving the overarching goal of EMIR of safeguarding financial stability.
3. Considering the urgency of the situation, ESMA launched an expedited process to revise the regulatory technical standards (RTS) under Article 46(3) of Regulation (EU) No 648/2012<sup>2</sup> (EMIR) and adopted on 14 October 2022 a set of emergency measures temporarily expanding the pool of collateral eligible by CCPs.
4. As part of these emergency measures, ESMA agreed to temporarily lift the requirement that commercial bank guarantees posted as margin be fully collateralised for NFCs acting as clearing members and active on electricity and gas derivatives markets. All other conditions on commercial bank guarantees in the regulatory technical standard continued applying, as well as all the other requirements on collateral more generally, including the requirements on concentration limits.
5. The revised RTS also expanded collateral eligibility to guarantees issued or backed by public entities for all types of counterparties and all types of assets cleared, with the aim to increase the ability and willingness of banks to provide liquidity without materially transferring risks from the real energy sector to banks or CCPs. In addition, ESMA also adopted a Q&A clarifying the eligibility of bonds and commercial paper under the existing requirements.
6. The European Commission adopted on 21 October 2022 Delegated Regulation (EU) 2022/2311<sup>3</sup> amending Delegated Regulation 153/2013 with regards to the regulatory technical standard on requirements for central counterparties. The Delegated Regulation entered into force on 29 November 2022 and its provisions are set to expire on 29 November 2023.

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<sup>1</sup> Commission Delegated Regulation (EU) No 153/2013 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 requirements for central counterparties. OJ L 137, 26.5.2016, p.1

<sup>2</sup> 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

<sup>3</sup> Commission Delegated Regulation (EU) 2022/2311 of 21 October 2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards temporary emergency measures on collateral requirements. OJ L 307, 28.11.2022, p.31

### 3 Extension of emergency measures

7. Since the peak of the crisis on energy markets in August 2022, prices have largely subsided, in particular in gas derivatives markets with prices falling below 50 EUR/MWh since April 2023. Nonetheless, energy markets remain particularly prone to sharp volatility increases and very sensitive to any event potentially impacting energy supply, as observed once more in August 2023 when fears of potential disruptions in gas supply in a third-country triggered price spikes on European energy markets.
8. In addition, ESMA notes that energy markets typically exhibit seasonal features, with a potential for greater volatility and a higher propensity to observe price peaks in anticipation of cold-weather due to heightened heating consumption, mainly during the autumn and winter period. ESMA will continue to monitor the situation on energy markets closely during this period, in particular gas derivatives markets according to its mandate under the Council Regulation establishing a Market Cap Mechanism<sup>4</sup> which is due to expire on 1 February 2024.
9. As of today, 2 EU CCPs have reported using the emergency measures extending the types of eligible collateral. One EU CCP has reported that uncollateralised bank guarantees are used by two of its clearing members, while another EU CCP reports that three of its clearing members have made use of them. Their use is subject to specific limits which are closely monitored and reviewed by the relevant national competent authorities.
10. This limited uptake can be explained by the fact that only 5 EU CCPs provide clearing services in electricity and/or gas derivatives and out of them, only 2 EU CCPs allow NFCs to connect as direct clearing members, as well as the limited time period for which such arrangements are available. ESMA also notes that no EU CCP has reported that it had used public guarantees as eligible collateral, despite it being available to all types of counterparties and for all products.
11. The expiry of the temporary measures on 29 November 2023 would require that the 2 EU CCPs transition to other types of collateral for the relevant clearing members, thereby limiting the collateral options for those NFCs to meet their margin requirements at a potentially more volatile period on energy markets.
12. In the meantime, the European Commission published on 7 December 2022 a proposal<sup>5</sup> to amend EMIR, including the provisions relevant to CCP collateral requirements. As explained in the Explanatory Memorandum, “Article 46 is amended to allow bank guarantees and public guarantees to be considered eligible as highly liquid collateral provided that they are unconditionally available upon request within the liquidation period and making sure a CCP takes them into account when calculating its overall exposure to the bank.” ESMA understands that the Commission’s proposal as – as it stands – would require ESMA to amend the relevant technical standards and that these provisions are actively discussed by Council and the European Parliament, including the possibility

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<sup>4</sup> Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices. OJ L 335, 29.12.2022, p. 45

<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets

to clarify the eligibility of uncollateralised bank guarantees for NFCs acting as clients via tri-party arrangements with their clearing members.

12. In light of the latent volatility in energy markets and the use made by EU CCPs of the extended pool of eligible collateral, ESMA is of the view that the emergency measures on CCP collateral requirements should be extended to also take into account the ongoing legislative developments and the possibility for the co-legislators to express a clear view on the regulatory framework applicable to CCP collateral requirements.
13. However, as amendments may be expected to change the mandate empowering ESMA to develop an RTS specifying the types of collateral and the related conditions, ESMA would not consider it appropriate to propose the adoption of a long extension period or more permanent changes to the existing RTS for the time being, and therefore supports a temporary extension to avoid overstepping on the prerogatives of the co-legislators.
14. ESMA has not found evidence to this date that the temporary measures have created unmanageable risks for the CCPs and the EU financial system, as the risk management safeguards of the CCP and all other applicable requirements on collateral, as laid down in Delegated Regulation (EU) No 153/2013, continue to apply. Therefore, ESMA finds that a temporary extension should not add new risks that the CCPs cannot properly manage today.
15. In this context, ESMA concludes that an extension of the emergency measures as they currently stand by six months would allow them to expire on 29 May 2024 and should help avoid unnecessary disruptions on energy markets, while limiting risks of contagion to the financial sector.

## 4 Annexes

### 4.1 Annex I

Legal mandate under EMIR

#### *Article 46*

##### **Collateral requirements**

1. A CCP shall accept highly liquid collateral with minimal credit and market risk to cover its initial and ongoing exposure to its clearing members. For non-financial counterparties, a CCP may accept bank guarantees, taking such guarantees into account when calculating its exposure to a bank that is a clearing member. It shall apply adequate haircuts to asset values that reflect the potential for their value to decline over the interval between their last revaluation and the time by which they can reasonably be assumed to be liquidated. It shall take into account the liquidity risk following the default of a market participant and the concentration risk on certain assets that may result in establishing the acceptable collateral and the relevant haircuts.

2. A CCP may accept, where appropriate and sufficiently prudent, the underlying of the derivative contract or the financial instrument that originates the CCP exposure as collateral to cover its margin requirements.

3. In order to ensure consistent application of this Article, ESMA shall, after consulting EBA, the ESRB and the ESCB, develop draft regulatory technical standards specifying:

- (a) the type of collateral that could be considered highly liquid, such as cash, gold, government and high-quality corporate bonds and covered bonds;
- (b) the haircuts referred to in paragraph 1; and
- (c) the conditions under which commercial bank guarantees may be accepted as collateral under paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

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

## 4.2 Annex II

Current provisions on eligible collateral in Delegated Regulation 153/2013 including amendments by Commission Delegated Regulation (EU) 2022/2311 of 21 October 2022

### *Article 39*

#### **Financial instruments**

For the purposes of Article 46(1) of Regulation (EU) No 648/2012, financial instruments, bank guarantees and gold that meet the conditions set out in Annex I shall be considered as, highly liquid collateral.

Until 29 November 2023, for the purposes of Article 46(1) of Regulation (EU) No 648/2012, public guarantees that meet the conditions set out in Annex I shall be considered as highly liquid collateral.

### *Article 62*

#### **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.

Point (h) Section 2 of Annex I shall apply from three years after the date of entry into force of this Regulation in respect of transactions on derivatives, as referred to in points (b) and (d) of Article 2(4) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council.

However, Section 2, paragraph 1, point (h), of Annex I shall not apply in respect of transactions on derivatives, as referred to in Article 2(4), points (b) and (d), of Regulation (EU) No 1227/2011 from 29 November 2022 to 29 November 2023.

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

### *ANNEX I*

#### **Conditions applicable to financial instruments, bank guarantees and gold considered as highly liquid collateral**

##### *SECTION 1*

#### ***Financial instruments***

For the purposes of Article 46(1) of Regulation (EU) No 648/2012, highly liquid collateral in the form of financial instruments shall be financial instruments meeting the conditions provided for in point 1 of Annex II to this Regulation or transferable securities and money-market instruments which meet each of the following conditions:



- (a) the CCP can demonstrate to the competent authority that the financial instruments have been issued by an issuer that has low credit risk based upon an adequate internal assessment by the CCP. In performing such an assessment, the CCP shall employ a defined and objective methodology that shall not fully rely on external opinions and that takes into consideration the risk arising from the establishment of the issuer in a particular country;
- (b) the CCP can demonstrate to the competent authority that the financial instruments have a low market risk based upon an adequate internal assessment by the CCP. In performing such an assessment, the CCP shall employ a defined and objective methodology that shall not fully rely on external opinions;
- (c) they are denominated in one of the following currencies:
  - (i) a currency the risk of which the CCP can demonstrate to the competent authorities that it is able to manage;
  - (ii) a currency in which the CCP clears contracts, in the limit of the collateral required to cover the CCP's exposures in that currency;
- (d) they are freely transferable and without any regulatory or legal constraint or third party claims that impair liquidation;
- (e) they have an active outright sale or repurchase agreement market, with a diverse group of buyers and sellers, to which the CCP can demonstrate reliable access, including in stressed conditions;
- (f) they have reliable price data published on a regular basis;
- (g) they are not issued by:
  - (i) the clearing member providing the collateral, or an entity that is part of the same group as the clearing member, except in the case of a covered bond and only where the assets backing that bond are appropriately segregated within a robust legal framework and satisfy the requirements set out in this section;
  - (ii) a CCP or an entity that is part of the same group as a CCP;
  - (iii) an entity whose business involves providing services critical to the functioning of the CCP, unless that entity is an EEA central bank or a central bank of issue of a currency in which the CCP has exposures;
- (h) they are not otherwise subject to significant wrong-way risk.

## SECTION 2

### **Bank guarantees**

1. A commercial bank guarantee, subject to limits agreed with the competent authority, shall meet the following conditions to be accepted as collateral under Article 46(1) of Regulation (EU) No 648/2012:
  - (a) it is issued to guarantee a non-financial clearing member;

- (b) it has been issued by an issuer that the CCP can demonstrate to the competent authority that it has low credit risk based upon an adequate internal assessment by the CCP. In performing such assessment the CCP shall employ a defined and objective methodology that shall not fully rely on external opinions and that takes into consideration the risk arising from the establishment of the issuer in a particular country;
  - (c) it is denominated in one of the following currencies:
    - (i) a currency the risk of which the CCP can demonstrate to the competent authorities that it is able to adequately manage;
    - (ii) a currency in which the CCP clears contracts, in the limit of the collateral required to cover the CCP's exposures in that currency;
  - (d) it is irrevocable, unconditional and the issuer cannot rely on any legal or contractual exemption or defence to oppose the payment of the guarantee;
  - (e) it can be honoured, on demand, within the period of liquidation of the portfolio of the defaulting clearing member providing it without any regulatory, legal or operational constraint;
  - (f) it is not issued by:
    - (i) an entity that is part of the same group as the non-financial clearing member covered by the guarantee;
    - (ii) an entity whose business involves providing services critical to functioning of the CCP, unless that entity is an EEA central bank or a central bank of issue of a currency in which the CCP has exposures;
  - (g) it is not otherwise subject to significant wrong-way risk;
  - (h) it is fully backed by collateral that meets the following conditions:
    - (i) it is not subject to wrong way risk based on a correlation with the credit standing of the guarantor or the non-financial clearing member, unless that wrong way risk has been adequately mitigated by haircutting of the collateral
    - (ii) the CCP has prompt access to it and it is bankruptcy remote in case of the simultaneous default of the clearing member and the guarantor.
  - (i) the suitability of the guarantor has been ratified by the board of the CCP after a full assessment of the issuer and of the legal, contractual and operational framework of the guarantee in order to have a high level of comfort on the effectiveness of the guarantee, and notified to the competent authority.
2. A bank guarantee issued by a central bank shall meet the following conditions to be accepted as collateral under Article 46(1) of Regulation (EU) No 648/2012:
- (a) it is issued by an EEA central bank or a central bank of issue of a currency in which the CCP has exposures;
  - (b) it is denominated in one of the following a currencies:

- (iii) a currency the risk of which the CCP can demonstrate to the competent authorities that it is able to adequately manage;
  - (iv) a currency in which the CCP clears transactions, in the limit of the collateral required to cover the CCP's exposures in that currency;
- (c) it is irrevocable, unconditional and the issuing central bank cannot rely on any legal or contractual exemption or defence to oppose the payment of the guarantee;
- (d) it can be honoured within the period of liquidation of the portfolio of the defaulting clearing member providing it without any regulatory, legal or operational constraint or any third party claim on it.

#### *SECTION 2a*

#### ***Public guarantees***

Until 29 November 2023, a public guarantee that does not meet the conditions for a central bank guarantee set out in Section 2, paragraph 2, shall meet all of the following conditions to be accepted as collateral under Article 46(1) of Regulation (EU) No 648/2012:

- (a) it is explicitly issued or guaranteed by any of the following:
- (i) a central government in the EEA;
  - (ii) regional governments or local authorities in the EEA, where there is no difference in risk between exposures of regional governments or local authorities and the central government of that Member State because of the specific revenue-raising powers of the former, and the existence of specific institutional arrangements the effect of which is to reduce their risk of default;
  - (iii) the European Financial Stability Facility, the European Stability Mechanism, or the Union, where applicable;
  - (iv) a multilateral development bank as listed under Article 117(2) of Regulation (EU) No 575/2013 of the European Parliament and of the Council and established in the Union;
- (b) the CCP can demonstrate that it has low credit risk based upon an internal assessment by the CCP;
- (c) it is denominated in one of the following currencies:
- (i) a currency the risk of which the CCP can demonstrate to the competent authorities that it is able to adequately manage;
  - (ii) a currency in which the CCP clears transactions, in the limit of the collateral required to cover the CCP's exposures in that currency;
- (d) it is irrevocable, unconditional and the issuing and guaranteeing entities cannot rely on any legal or contractual exemption or defence to oppose the payment of the guarantee;

- (e) it can be honoured within the period of liquidation of the portfolio of the defaulting clearing member providing it without any regulatory, legal or operational constraint or any third party claim on it.

For the purposes of point (b), the CCP shall employ, in performing the assessment referred to in that point, defined and objective methodology that shall not fully rely on external opinions.

## 4.3 Annex III

Draft RTS amending Delegated Regulation 153/2013

**COMMISSION DELEGATED REGULATION (EU) .../...**

**of XX Month YYYY**

**amending the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards the extension of temporary emergency measures on CCP collateral requirements**

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (1), and in particular Article 46(3) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) No 153/2013 (2) lays down regulatory technical standards on requirements for central counterparties (CCPs) to accept highly liquid collateral with minimal credit and market risk.

(2) On 22 October 2022, Commission Delegated Regulation (EU) 2022/2311 amended the regulatory technical standards laid down in Delegated Regulation (EU) No 153/2013 as regards temporary emergency measures on collateral requirements. It temporarily expanded for a period of 12 months the pool of eligible collateral available to non-financial clearing members active on gas and derivatives regulated markets to include uncollateralised bank guarantees. The revised regulatory technical standards also temporarily permitted the use of guarantees issued or backed by public entities as eligible collateral for financial and non-financial counterparties by the CCP.

(3) The temporary changes brought by Commission Delegated Regulation (EU) 2022/2311 are due to expire on 29 November 2023.

(4) In order to avoid unnecessary liquidity stress on users of cleared energy markets happening again in view of the approaching colder season and a potential higher volatility on energy markets, and to allow sufficient time for the ongoing legislative developments impacting the regulatory framework

applicable to EU CCPs to be finalised, the temporary measures enabling the use of larger pool of eligible collateral by CCPs should be extended for a further period of six months.

(5) Delegated Regulation (EU) No 153/2013 should therefore be amended accordingly.

(6) To ensure the smooth functioning of the Union financial and energy markets, this Regulation should therefore enter into force as a matter of urgency.

(7) This Regulation is based on draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA), after consulting the European Banking Authority, the European Systemic Risk Board and the European System of Central Banks.

(8) ESMA has not conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, nor did it analyse the potential costs and benefits, as this would have been highly disproportionate to the scope and impact of the amendments to be adopted, taking into account the urgent nature and the limited scope of the proposed changes. Given the urgency, ESMA has not requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council (3). The Securities and Markets Stakeholder Group will be informed thereof pursuant to that provision.

HAS ADOPTED THIS REGULATION:

*Article 1*

Delegated Regulation (EU) No 153/2013 is amended as follows:

(1) in Article 39, the second paragraph is replaced by the following:

‘Until [6 months after the date of entry into force of this amending Regulation /insert date], for the purposes of Article 46(1) of Regulation (EU) No 648/2012, public guarantees that meet the conditions set out in Annex I shall be considered as highly liquid collateral.’;

(2) in Article 62, the second paragraph is replaced by the following:

‘Section 2, paragraph 1, point (h), of Annex I shall apply from three years after the date of entry into force of this Regulation in respect of transactions on derivatives, as referred to in points (b) and (d) of Article 2(4) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council. However, Section 2, paragraph 1, point (h), of Annex I shall not apply in respect of transactions on derivatives, as referred to in Article 2(4), points (b) and (d), of Regulation (EU) No 1227/2011 from

29 November 2022 to [6 months after the date of entry into force of this amending Regulation /insert date].’;

(3) Annex I is amended in accordance with the Annex to this Regulation.

*Article 2*

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, DD MM YYYY.

*For the Commission*

*The President*

**ANNEX**

Annex I to Delegated Regulation (EU) No 153/2013 is modified as follows:

(1) the title of Annex I is replaced by the following:

‘Conditions applicable to financial instruments, bank guarantees, public guarantees and gold considered as highly liquid collateral’

(2) In Section 2a, the first paragraph is amended as follows:

‘Until [6 months after the date of entry into force of this amending Regulation /insert date], a public guarantee that does not meet the conditions for a central bank guarantee set out in Section 2, paragraph 2, shall meet all of the following conditions to be accepted as collateral under Article 46(1) of Regulation (EU) No 648/2012:’

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(1) OJ L 201, 27.7.2012, p. 1.

(2) Commission Delegated Regulation (EU) No 153/2013 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 requirements for central counterparties (OJ L 52, 23.2.2013, p. 41)

(3) 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).