Final Report

Emergency measures on collateral requirements – draft Regulatory Technical Standards amending Commission Delegated Regulation (RTS) 153/2013

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1 Executive Summary

Reasons for publication

The recent political and market developments have led to significant price and volatility increases on energy markets, which have triggered substantial margin increases by CCPs to cover the related exposures. These margin increases have created liquidity strains 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.

On 13 September 2022, the European Commission requested[1] that ESMA consider whether the applicable Level 2 provisions, in particular the 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 regards to requirements for central counterparties (Delegated Regulation 153/2013), should be temporarily adapted to alleviate some of the burden faced by NFCs, while keeping the overarching goal of EMIR of preserving financial stability. On 22 September 2022, ESMA replied[2] to the Commission outlining concrete proposals to smoothen the functioning of European financial and energy markets and to alleviate the liquidity pressure on NFCs active on gas and electricity regulated markets cleared in EU-based CCPs.

This Report follows up on the ESMA's response and provides draft regulatory technical standards (RTS) amending Delegated Regulation 153/2013 that ESMA has developed under Article 46(3) of Regulation (EU) No 648/2012 (EMIR), to temporarily expand the pool of eligible collateral to uncollateralised bank guarantees for NFCs acting as clearing members and to public guarantees for all types of counterparties.

ESMA has not conducted open public consultations on the draft regulatory technical standards, in relation to the particular urgency of the matter as permitted under Article 10(1) of Regulation (EU) 1095/2010 (ESMA Regulation). The Securities and Markets Stakeholder Group (SMSG) was also not consulted 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 publicly available information from a diverse set of industry sources.

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Section 3 provides background on the recent market developments and their impact on NFCs active on the energy markets, as well as details on the request sent from the European Commission to ESMA.

Section 4 presents the applicable requirements for CCP collateral under EMIR.

Section 5 presents the proposal and rationale to expand the list of eligible collateral for CCPs to uncollateralised commercial bank guarantees (section 5.1) and to public guarantees (section 5.2).

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

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.

[1] https://www.esma.europa.eu/sites/default/files/library/jb-letter_to_esma_-_energy_derivatives.pdf
[2] https://www.esma.europa.eu/sites/default/files/library/esma24-436-1414_-_response_to_ec_commodity_markets.pdf

2 Legislative references, abbreviations and definitions

Legislative references

EMIR	European Market Infrastructures Regulation – Regulation (EU) No 648/2012 of the European Parliament and Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1)
Delegated Regulation 153/2013	Commission Delegated Regulation (EU) 153/2013 of 19 December 2012 supplementing Regulation (EU) 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards for central counterparties (OJ L 52, 23.2.2013, p.41)
CRR	Capital Requirements Regulation – Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1–337)
REMIT	Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ L 326, 8.12.2011, p. 1–16)
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84–119)

Abbreviations

CCP	Central Counterparty
EBA	European Banking Authority
EEA	European Economic Area
ESCB	European System of Central Banks

ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
NCA	National Competent Authority
NFC	Non-Financial Counterparty
PFMI	Principle for Financial Market Infrastructure
RTS	Regulatory Technical Standards
OTC	Over-the-counter
SMSG	Securities and Markets Stakeholder Group

3 Background to amending Delegated Regulation 153/2013

3.1 Margin increases and liquidity constraints

1. Following the invasion of Ukraine by Russia, the significant price and volatility increases observed on energy markets have triggered substantial margin increases by central counterparties (CCPs) to cover the related exposures.

2. Financial clearing members and prudentially supervised entities have been able to cope with increased liquidity pressures, but a number of non-financial clearing members and clients face high liquidity distress, as they typically have fewer and/or less liquid assets than financial institutions to meet initial margin requirements.

3. Unlike in other financial markets, non-financial counterparties play a significant role in energy markets, such as natural gas, power and oil. NFCs, such as energy producers and traders, are important users of energy derivative contracts to hedge themselves against future price movements on spot energy markets.

4. There are important differences in market structure depending on whether NFCs are direct clearing members at the CCP or whether NFCs are serviced through general clearing members. General clearing members in their turn can apply higher margin requirements to clients because of low credit quality or intraday exposures. They can also provide intraday funding of margin calls and collateral transformation, easing the liquidity strains on their clients.

5. According to the information gathered by ESMA, the majority of CCPs margin calls were settled in a timely manner but some CCPs, particularly where NFCs are direct clearing members, experienced issues in the capacity of these entities to meet margin calls swiftly. There are indications that increased margin requirements and the difficulties faced by certain non-financial clearing members to secure sufficient liquidity buffers to meet these margin requirements have (to avoid being put into default by the CCP) pushed them to reduce hedging activities, exposing them to further risks. Moreover, a lack of hedging tool reduces the possibility to provide fixed prices to customers.

6. While ESMA did not observe a strong trend for a move to over-the-counter (OTC) markets on a consolidated level, ESMA has noted a shift to OTC in the Nordic markets, in part due to the liquidity stress observed for NFCs where they are direct clearing members. An increase in uncleared OTC positions may lead to positions that are not properly collateralised, thereby increasing their exposures, and may reduce market transparency. Other markets, where only financial counterparties can act as clearing members, report less issues in meeting margin requirements and no substantial move to OTC markets has been observed.

3.2 Request from the European Commission

7. On 13 September 2022, the European Commission addressed a letter[3] to ESMA regarding possible emergency measures to address to the current level of margins and of excessive volatility in energy derivatives markets.

8. The European Commission in particular asked ESMA to *"urgently consider temporary amendments to Delegated Regulation 153/2013 that would facilitate the provision of collateral by non-financial counterparties active on gas and electricity regulated markets cleared in EU-based CCPs by:*

   1. *expanding the list of eligible collateral considering, for example, the temporary inclusion of, amongst other assets, EU bonds, carbon emission allowances, commercial papers and/or any other type of collateral appropriate given the typical balance sheet of energy companies;*

   2. *reviewing the framework applicable to commercial bank and central bank guarantees to allow for an easier and greater issuance and usage of this type of collateral."*

9. As requested, ESMA sent its response[4] to the European Commission on 22 September 2022, presenting among others its assessment of the potential measures identified by the Commission to alleviate the liquidity pressure on NFCs active on gas and electricity regulated markets.

10. In its response, ESMA highlighted that margins are the primary line of defence for a CCP under EMIR[5]. The proper calculation, the quality of margin and its timely collection are fundamental aspects of the resilience of CCPs and financial stability more broadly.

11. ESMA underlined that changes to these requirements should therefore be carefully considered, limited in time and scope and subject to strict conditions to avoid shifting risks onto to the CCP and creating contagion channels to the rest of the financial system.

12. Regarding the Commission's request to consider a potential expansion of the list of eligible collateral for the specific cases of bonds and commercial paper, ESMA had concluded that it did not believe that Delegated Regulation 153/2013 needed to be amended but rather proposed to provide Questions & Answers (Q&A) to clarify the application and implementation of Article 46 of EMIR as further specified in the Delegated Regulation for such instruments. ESMA is updating in parallel its Q&A under EMIR to that effect.

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[3] https://www.esma.europa.eu/sites/default/files/library/jb-letter_to_esma_-_energy_derivatives.pdf
[4] https://www.esma.europa.eu/sites/default/files/library/esma24-436-1414_-_response_to_ec_commodity_markets.pdf
[5] EMIR, Recital 70

13. ESMA also stated that, while it was not favourable to enabling emission allowances ('EUAs') to be accepted as general collateral for reasons linked to the specific features of this instrument (e.g., high volatility, limited legal protections), ESMA clarified that in accordance with Article 46(2) of EMIR these can already be used by CCPs which clear this type of derivatives and have the adequate knowledge and capacity to manage the related risks.

14. Regarding the Commission's specific request on *"reviewing the framework applicable to bank and central bank guarantees to allow for an easier and greater issuance and usage of this type of collateral",* ESMA outlined its concerns about the potential impact that extending eligible collateral to uncollateralised commercial bank guarantees may have unless specific conditions regarding the scope, time and use of uncollateralised commercial bank guarantees are also implemented.

15. In its response, ESMA also proposed to provide further clarity, via amendments to Delegated Regulation 153/2013, regarding the eligibility of bank guarantees which are issued or backed by qualifying public entities (public guarantees), other than central banks.

16. This Report further assesses the specific conditions for a temporary expansion of eligible collateral to uncollateralised commercial bank guarantees and public guarantees and submits a revised draft RTS to that effect.

17. ESMA has not conducted open public consultations on the draft regulatory technical standards, nor did it analyse the potential costs and benefits, given the urgent nature of the proposed changes. ESMA nonetheless consulted the EBA, the ESRB and the ESCB as required under EMIR and took into account publicly available information from a diverse set of industry sources.

4 Expanding the list of eligible collateral

4.1 EMIR requirements for CCP eligible collateral

18. CCPs require margins from their members to ensure that they can guarantee the performance of any given contract to which they are a counterparty in case of default of one or more of their members.

19. Article 46(1) of EMIR requires that a CCP only accepts highly liquid collateral with minimal credit and market risks to cover its exposures to its clearing members, in order to avoid that the value of the margin declines or that the ability to rapidly liquidate margin collateral is impaired (see Annex 5.1).

20. Article 46(1) of EMIR also specifies that for non-financial counterparties, a CCP may accept bank guarantees. Recital 66 of EMIR further clarifies that a CCP may accept commercial bank guarantees only from NFCs acting as clearing members.

21. EMIR also requires that the CCP uses a number of tools to manage the remaining risks linked to (even highly liquid) collateral, such as concentration limits and haircuts. Article 46(2) of EMIR adds that a CCP may also accept as collateral the underlying of the derivative contract or the financial instrument that defines the CCP exposure.

22. Finally, EMIR mandates ESMA – after consulting the EBA, the ESRB and the ESCB – to specify, via regulatory technical standards, "(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; and (c) the conditions under which commercial bank guarantees may be accepted as collateral". The regulatory technical standards are contained in Delegated Regulation 153/2013.

23. Delegated Regulation 153/2013 does not provide a detailed and closed list of types of eligible collateral but outlines a number of criteria for financial instruments, gold and bank guarantees to be accepted in principle by CCPs (see Annex 5.2).

24. For commercial bank guarantees, point 1 of Section 2 of Annex I stipulates that a commercial bank guarantee, subject to limits agreed with the competent authority, has to be issued to guarantee a non-financial clearing member's positions; is irrevocable, unconditional and the issuer cannot rely on any legal or contractual exemption or defence to oppose the payment of the guarantee; it has to be honoured, on first demand, within the period of liquidation of the portfolio of the defaulting clearing member providing it without any regulatory, legal or operational constraint; it is not issued by an entity that is part of the same group as or by a critical service provider of the CCP; and it is fully backed by collateral that meets certain conditions (not subject to wrong way risk, the CCP has prompt access to it and it is bankruptcy remote). In addition, the suitability of the guarantor has to be 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. Finally, as per point 1 of Section 2, the CCP needs to demonstrate to its NCA that it is able to manage the credit risk of these instruments based on an adequate internal assessment, as well as the underlying currency risk.

25. Point 2 of Section 2 of Annex I also adds some specific provisions for guarantees issued by central banks to be accepted as collateral, including the irrevocable and unconditional nature of the guarantee, as well as its ability to be honoured within the period of liquidation of the portfolio of the defaulting clearing member.

26. In practice, it appears that EU-CCPs mainly accept cash denominated in the local currency and sovereign bonds as collateral. Commercial bank guarantees are accepted by a limited number of EU-CCPs to cover margin requirements on spot markets.

4.2 Uncollateralised Commercial Bank Guarantees

27. Uncollateralised commercial bank guarantees are not currently accepted as eligible collateral as Delegated Regulation 153/2013 requires that commercial bank

guarantees be fully backed by collateral, which is itself not subject to wrong way risk, is accessible by the CCP and is bankruptcy remote. These requirements are in line with the international standards (i.e. Principles for Financial Market Infrastructures, PFMI) where guarantees are not acceptable collateral – unless they are fully backed by collateral or issued by a central bank[6].

28. ESMA is however aware that in the US, CME[7] accepts uncollateralised commercial bank guarantees ('letters of credit' in the US) under certain strict conditions for NFCs. These are capped at the lesser of 25 per cent of core collateral requirements or US$500 million per clearing participant. In addition, clearing participants may only post letters of credit from a CME approved bank up to 40 per cent of that bank's established limit. ESMA understands that currently only a limited number of clearing members benefit from this derogation and that banks issuing such uncollateralised commercial bank guarantees may not face the same capital charges in the US as in Europe.

29. ESMA also notes that uncollateralised commercial bank guarantees were accepted in certain Member States before EMIR was introduced and subsequently grandfathered in EMIR until March 2016. It is also noted that such guarantees are still accepted today as eligible collateral for the cleared energy spot market.

30. While an NFC acting as a clearing member is able to use certain commercial bank guarantees under EMIR as collateral, ESMA notes that the requirement that they be fully collateralised has limited their use, as the NFC would likely prefer to post the collateral directly at the CCP (if they had this collateral in the first place), rather than go through a bank with the added intermediation costs.

31. Enabling NFCs acting as clearing members to meet initial margin requirements via uncollateralised commercial bank guarantees would ease the burden of maintaining an appropriate liquidity buffer for stressed market situations and promote hedging activities on transparent and functioning regulated markets, in Member States where shifts to the uncleared bilateral space have been observed. As opposed to initial margin, which constitutes the majority of margin posted at the CCP for energy derivatives, variation margin calls are expected to continue to be paid in cash in line with market practice.

32. However, such an extension would entail additional default, liquidity, legal and operational risks as the commercial bank guarantees would no longer be backed by collateral to which the CCP would have prompt access in case the issuing bank is not honouring the guarantee in a timely manner.

33. Given the above outlined risks and the significant uncertainties linked to their use, ESMA believes that uncollateralised commercial bank guarantees should only be made eligible as collateral to specifically help NFCs acting as clearing members and facing

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[6] Principle 5, Footnote 63

[7] https://www.rba.gov.au/payments-and-infrastructure/financial-market-infrastructure/clearing-and-settlement-facilities/assessments/chicago-mercantile-exchange/2017/pdf/cme-assessment-2017-03.pdf

liquidity strains in energy derivatives markets. These should be subject to strict conditions to ensure that the associated risks are appropriately managed.

34. First, the application of the draft RTS is limited to a period of 12 months designed to provide sufficient time for a CCP to change its risk management framework to accept a broader set of collateral and receive the agreement of its risk committee, its board, and the relevant supervisory authority, whilst limiting the build-up of risks over time.

35. Second, as outlined in the level 1 text of EMIR, commercial bank guarantees are only eligible for non-financial counterparties acting as clearing members. The draft RTS further limits the use of uncollateralised commercial bank guarantees to energy derivatives as defined in REMIT, as was the case during the transition period for uncollateralised commercial bank guarantees until March 2016, to ensure that the temporary eligibility of uncollateralised commercial bank guarantees addresses the specific situation on regulated gas and electricity markets cleared in EU-based CCP.

36. In addition, it should be noted that all other requirements in Section 2 of Annex I of Delegated Regulation 153/2013 for commercial bank guarantees remain applicable to avoid unintended effects, in particular with regard to the unconditionality and irrevocability of the guarantee and the requirement that the CCP's board ratifies the suitability of the guarantor.

37. Finally, other safeguards in relation to the risk management of the CCP already in Delegated Regulation 153/2013 continue applying. As the provision of credit to NFCs is typically concentrated in a few commercial banks, such provision would be subject to the concentration limits in the Delegated Regulation to help diversify risks of the issuer defaulting or being downgraded and ensure that it can be promptly liquidated without significant market risk affecting its value. Article 42(4) specifies that commercial bank guarantees accepted by a CCP from a single credit institution cannot exceed 25 % of its collateral, in cases where commercial bank guarantees represent more than 50 % of the total collateral (otherwise 10% per single institution). Similarly, CCPs should set limits for these uncollateralised commercial bank guarantees to only represent a limited share of the total amount of the initial margin requirement of the non-financial clearing member in view of the intrinsic risk profile. These should be done with the agreement of the NCA as outlined in Section 2 of Annex I.

38. ESMA will also work with the CCPs and respective NCAs, through the relevant EMIR procedures and convergence tools, to ensure consistent application as well as put in place appropriate monitoring on the provision of such uncollateralised bank guarantees.

4.3 Public Guarantees

39. While public guarantees where not specifically raised by the European Commission, ESMA has noted that Delegated Regulation 153/2013 is not clear regarding the

eligibility of commercial bank guarantees which are backed by public entities or guarantees which are directly issued by public entities, other than central banks.

40. The draft RTS enables guarantees which are issued or backed by public entities (public guarantees) to qualify as eligible collateral by CCPs under a number of cumulative conditions.

41. First, the list of eligible public entities providing the guarantees is closed and limited in scope to ensure that the guarantees remain of sufficiently high quality with low credit and market risks.

42. The draft RTS limits the eligible public entities to:

    a. a central government in the EEA;

    b. 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;

    c. the European Financial Stability Facility, the European Stability Mechanism, or the European Union where applicable;

    d. a multilateral development bank as listed under Article 117 of Regulation (EU) No 575/2013;

43. In addition, the draft RTS requires that the CCP can demonstrate to its NCA that the public guarantee has low credit risk based upon its own internal assessment and a defined and objective methodology to avoid overreliance on external opinions.

44. ESMA considers that public guarantees should at least follow the same conditions as those outlined for central bank guarantees, given the similar risk profile.

45. The draft RTS therefore specifies that the CCP should be able to manage the related currency risk and that the guarantee should be *“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”* to ensure that no unforeseen conditions are attached to its use.

46. Finally, the draft RTS also requires that the guarantee *“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”* to avoid any delays in realising the guarantee.

47. Public guarantees would not be limited to NFCs, as the EMIR level 1 text only restricts commercial bank guarantees to NFCs given their different risk profile, and therefore

could be used, if necessary, by all types of clearing members including banks and investment firms.

48. Given the risk profile of public guarantees, ESMA does not find it is necessary to limit their use to specific instruments, in order to ensure that these be available as collateral should the current crisis observed in energy markets spread to other markets.

49. On the other hand, as is the case for the uncollateralised commercial bank guarantees, the draft RTS envisages that the extension of eligible collateral to public guarantees be also time-limited.

5 Annexes

5.1 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.

5.2 Annex II – Current provisions on eligible collateral in Delegated Regulation 153/2013

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.

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) t 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.

5.3 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 temporary emergency measures on 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[8], and in particular Article 46(3) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) No 153/2013[9] lays down regulatory technical standards on requirements for central counterparties (CCPs) to accept highly liquid collateral with minimal credit and market risk.

(2) Recent political and market developments have led to significant price and volatility increases on energy markets, which have triggered substantial margin increases by CCPs to cover the related exposures. Those margin increases have created liquidity strains on non-financial counterparties, which typically have fewer and less liquid assets to meet margin requirements. As a consequence, those non-financial counterparties have been forced to either reduce their positions or leave them not properly hedged, which exposes them to further price variations.

(3) In order to ensure the smooth functioning of the Union financial and energy markets under the current circumstances and to alleviate the liquidity pressure on non-financial counterparties active on gas and electricity regulated markets cleared in CCPs established in the Union, the pool of eligible collateral available to non-financial clearing members should temporarily be expanded to include uncollateralised bank guarantees.

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

[9] 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).

(4) In order to contain the liquidity strains observed on energy derivative markets, guarantees issued or backed by public entities should also be considered as eligible collateral for financial and non-financial counterparties by the CCP, given that those guarantees have low counterparty credit risk and are irrevocable, unconditional and can be honoured within the period of liquidation of the portfolio of the defaulting clearing member, therefore carrying limited liquidity risk.

(5) The risks related to an expansion of eligible collateral to uncollateralised bank guarantees and public guarantees are expected to remain limited, as the expansion would be subject to the risk management safeguards of the CCP and all other applicable requirements, as laid down in Delegated Regulation (EU) No 153/2013, would continue to apply.

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

(7) In order to further limit the risks associated to the acceptance of uncollateralised bank guarantees for non-financial clearing members and public guarantees for financial and non-financial clearing members as collateral, those measures should be of temporary nature and granted for a period of 12 months, providing relief to market participants and incentivising them to return to the markets.

(8) In the light of the recent market developments, it is necessary to expand the pool of eligible collateral available to non-financial clearing members as quickly as possible. This Regulation should therefore enter into force as a matter of urgency.

(9) 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.

(10) 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 Council10. The Securities and Markets Stakeholder Group will be informed thereof pursuant to that provision,

HAS ADOPTED THIS REGULATION:

[10] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 1

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

(1) In Article 39, the following second paragraph is added:

'Until [*12 month after the date of entry into force of this amending Regulation*], 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, second paragraph, the following sentence is added:

'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 [*the date of entry into force of this amending Regulation* to *12 month after the date of entry into force of this amending Regulation*].';

(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

In Annex I to Delegated Regulation (EU) No 153/2013, the following Section 2a is inserted:

'*SECTION 2a*

Public guarantees

1. Until [*12 month after the date of entry into force of this amending Regulation*], 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), CCP shall employ, in performing the assessment referred to in that point, defined and objective methodology that shall not fully rely on external opinions.

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[*] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).'