



European Securities and
Markets Authority

Final Report

Draft implementing technical standards amending Commission Implementing Regulation (EU)
No 1247/2012 laying down implementing technical standards with regard to the format and
frequency of trade reports to trade repositories under Regulation (EU) No 648/2012

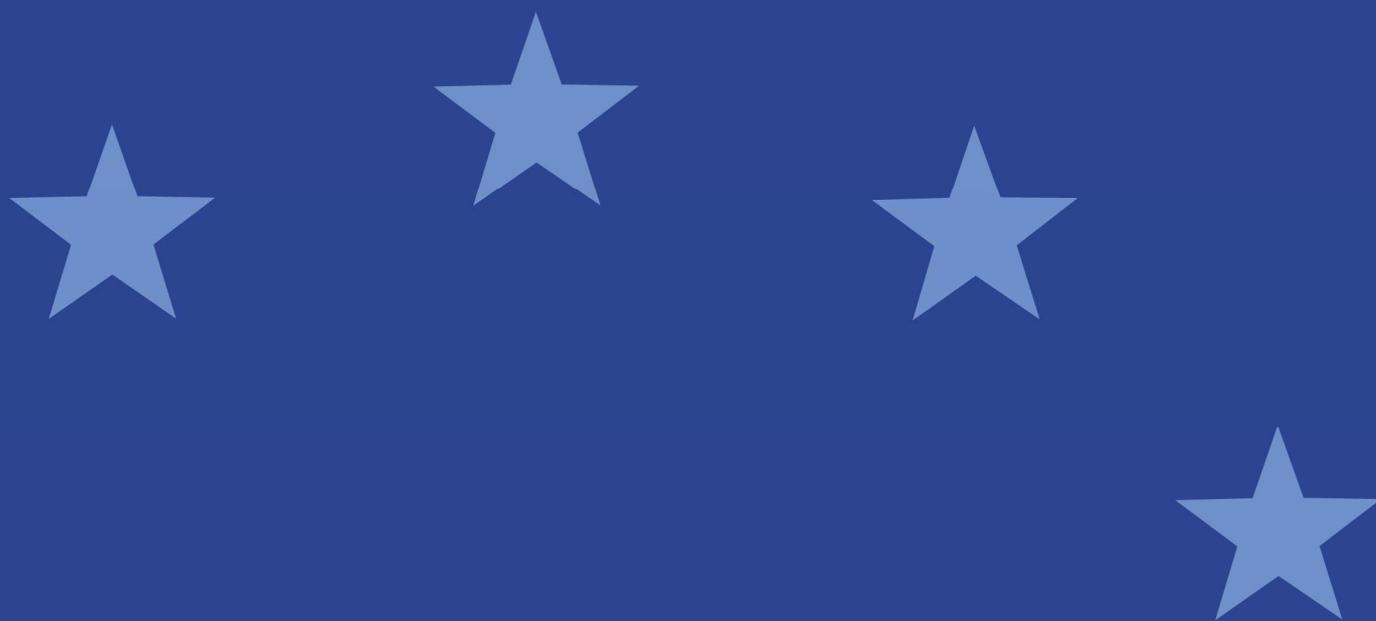


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Acronyms Used

| | |
|-------|--|
| ARM | Approved Reporting Mechanism |
| CA | Competent Authority |
| CCPs | Central Counterparties |
| CP | Consultation Paper |
| CM | Clearing Members |
| DP | Discussion Paper |
| 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 |
| EU | European Union |
| ITS | Implementing Technical Standards |
| LEI | Legal Entity Identifier |
| MiFID | Markets in Financial Instruments Directive |
| NFC | Non-financial counterparty |
| ODRF | OTC Derivatives Regulators Forum |
| OJEU | Official Journal of the European Union |



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|------|---|
| OTC | Over the Counter |
| OTCD | Over the Counter Derivative Contracts |
| RTS | Regulatory Technical Standards |
| SMSG | ESMA's Securities and Markets Stakeholder Group |
| TRs | Trade Repositories |
| UPI | Unique Product Identifier |
| UTI | Unique Trade Identifier |

I. Executive Summary

Reasons for publication

Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, CCPs and Trade Repositories (EMIR) requires ESMA to develop draft regulatory (RTS) and implementing technical standards (ITS) in relation to several provisions of EMIR.

ESMA delivered its Final Report in that regard on 27 September 2012 (ESMA document 2012/600). The standards were endorsed and published and entered into force. The RTS supplementing EMIR were published in the Official Journal of the EU (OJEU) on 23 February 2013 and entered into force on 15 March 2013. The ITS were published in the OJEU on 21 December 2012 and entered into force on 10 January, although with effect from 15 March 2013 as well, since they depend on the RTS.

At present ESMA is working on ensuring the consistent application of EMIR and its RTS and ITS. ESMA finds that for the reasons explained in this report, an amendment of the Commission Implementing Regulation (EU) No 1247/2012 (ITS on reporting¹) to postpone the reporting start date for exchange traded derivatives (ETDs) is needed.

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This Report contains ESMA's proposal for an amendment to Article 5 of the ITS on reporting, in order to postpone the reporting start date of ETDs by one year.

Article 5 regards the reporting start date of derivatives to trade repositories. The current dates do not include a specification of ETDs. This specification would be useful as there is a risk currently that reporting of ETDs is not harmonised unless further regulatory guidance is issued. Without regulatory guidance, reporting would not be consistent and not able to be efficiently used.

In accordance with Article 15 of 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), ESMA should conduct open public consultations on such draft implementing technical standards, analyse the potential related costs and benefits and request the opinion of the ESMA Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of that Regulation. Given the urgency for this Regulation to be adopted in order for the amendment to be effective before the reporting start date, ESMA has not conducted an open public consultation and has not consulted the SMSG. However, ESMA has received a significant number of requests and support from different stakeholders on the need to develop guidelines and recommendations on reporting of ETDs and on the need for counterparties, trade repositories and regulators to have the necessary time

¹ Laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories under Regulation (EU) No 648/2012.

to implement them. Therefore ESMA has already gathered evidence on the need to reschedule the reporting of ETDs and properly analysed the costs and benefits of this delay. In addition, ESMA intends to consult on the actual reporting scenarios and guidance to be issued, which will be included in guidelines and recommendations to be developed.

Next steps

This Final Report is being submitted to the European Commission. The Commission has three months to decide whether to endorse ESMA's draft implementing technical standards.

II. Introduction

1. Under Article 9 of EMIR, ESMA has a mandate to draft implementing technical standards (ITS) defining among others the reporting starting date to TRs. In its draft ITS published on 27 September 2012, ESMA considered reporting start dates according to different asset classes and included different phase-in periods for the different asset classes, as suggested by a number of respondents to its consultation on these draft ITS (Commission Implementing Regulation (EU) No 1247/2012, hereinafter "ITS on reporting").
2. When finalising its draft ITS, ESMA did not consider differences between trading methods, notably derivatives traded in venues (ETDs) vis-à-vis OTC derivatives. This was also due to the absence of evidence for a need of different treatment at the time of consultation on the draft ITS.
3. Following the implementation phase of EMIR and the evidence provided to ESMA on the complexity of reporting of ETDs, ESMA considers that guidelines and recommendations should be developed in this respect.
4. Given the need to develop guidelines on reporting of ETDs, the reporting start date for these derivatives transactions should be postponed. This Report contains a proposal in that respect, via an amendment of the ITS on reporting laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories under EMIR.

III. Background

5. According to Article 9 of EMIR financial and non-financial counterparties shall ensure that the details of any derivative contract (both OTC and exchange traded derivatives (ETD)) they have concluded and of any modification or termination are reported to a registered or recognised trade repository.
6. According to Article 5 of the ITS on reporting, derivatives contracts shall be reported by financial and non-financial counterparties 90 days following the registration of a trade repository for the relevant asset class.

7. According to Article 25 of Directive 2004/39/EC (MiFID), investment firms which execute transactions in any financial instruments admitted to trading on a regulated market shall report details of such transactions to the competent authority.
8. Therefore, transactions on derivatives admitted to trading to a regulated market will be subject to both reporting under MiFID (direct reporting to competent authorities) and under EMIR (reporting to trade repositories for the purpose of making the data available to the relevant authorities in accordance with their regulatory needs).
9. As explained in Recital 41 of EMIR, the objective of having both OTC derivatives and ETDs reported to trade repositories is for information on the risks inherent in derivatives markets to be centrally stored in an easily accessible manner. Furthermore, in accordance with Recital 43, in order to allow for a comprehensive overview of the market and for assessing systemic risk, both CCP-cleared and non-CCP-cleared derivative contracts should be reported to trade repositories. Where CCP-cleared trades are also ETDs, for the objectives described in these recitals to be fulfilled, it is essential to ensure consistency in reporting to TRs and in other regulatory reporting, in order to allow the relevant authorities to have access to the information at their disposal in an easily accessible manner and to properly assess systemic risk.

IV. Identification of the problems caused by the reporting of ETD under EMIR and MiFID

10. Under MiFID all investment firms executing a transaction in a regulated market are subject to the reporting obligation. Therefore, for the same transaction there could be different reports from the different firms under the MiFID transaction reporting obligation. Under EMIR for one transaction there could be only two counterparties. Depending on the different scenarios in which the transaction may be executed on the exchange, it is not always evident to identify who the counterparty of the transaction is for the purpose of reporting. If the same transaction is considered from the perspective of the regulated market, the market participant (i.e. the executing broker) could be considered the counterparty of a transaction executed in the market, if it is considered from the perspective of the CCP, the clearing member can be considered the counterparty, if it is considered from the perspective of the moment of execution, it will be the firm transmitting the order to the executing broker to be considered the counterparty. From the identification of the counterparty of a transaction derives the obligation to report under EMIR, so this matter affects compliance with the Regulation.
11. In absence of a clear guidance on the identification of the counterparties of an ETD transaction under different transaction scenarios, reporting under EMIR cannot take place in a consistent manner within the EU.
12. In absence of a clear identification of the counterparties of ETD transactions under EMIR, financial and non-financial counterparties would be exposed to uncertainty on their obligations and to legal risk.
13. In absence of consistency of reporting under EMIR and MiFID, counterparties, trade repositories and regulators will be subject to significant costs and low quality data on which to rely. Market

participants might be exposed to two different and duplicative reporting regimes. Regulators might be exposed to the risk of not being able to reconcile data received under the two regimes.

14. The reporting obligations under the two regimes might expose market participants to significant investments on reporting systems that might not be compliant once the necessary guidance will be provided. This would imply another investment to adapt the reporting systems once a solution will be found for the different reporting regimes to be consistent.
15. The absence of a consistent approach at European level would lead to differences in the application of EMIR and would impede the use by competent authorities of data collected under different standards for the exercise of their duties, which is the main objective for the collection of data through trade repositories under EMIR.
16. Therefore, until counterparties of ETDs are clearly identified, there will be a certain degree of ambiguity on which party the obligation to report to trade repositories would lie and until clear rules for reporting of ETDs under EMIR and MiFID are established, the information collected by trade repositories on these instruments could not be used fully by competent authorities for the exercise of their duties.
17. The problems identified above are solely related to ETD, given that in OTC derivatives transactions it is clear in all the possible scenarios to identify who the counterparty of a transaction is and who has a reporting obligation under EMIR.

V. Need to develop guidelines and recommendations on reporting of ETDs

18. Following the adoption of the ITS on reporting, ESMA undertook work on ensuring a consistent application of EMIR, analysing practical cases and issuing where possible Q&As on EMIR implementation to clarify how the different provisions in EMIR and technical standards should be applied.
19. For the reasons explained in the previous section, when faced with the reporting scenarios for ETDs, ESMA realised that more guidance was needed given the complexity of the issue. This guidance cannot take the form of Q&As, because it is not a simple clarification on how certain provisions should be implemented, but it will require a significant development of the different scenarios according to which ETDs can be executed, cleared and reported. In considering those scenarios, the impacts on existing reporting obligations should be considered to ensure to the extent possible consistency among those.
20. As envisaged under Recital 37 of EMIR, it is important that a uniform derivatives data reporting requirement is established at Union level. Therefore, ESMA considers it essential to develop Guidelines and Recommendations under Article 16 of ESMA Regulation to ensure common, uniform and consistent application of Article 9 of EMIR and in particular of the following aspects:
 - a. A clear identification of the counterparties of ETDs;
 - b. A consistent application of reporting requirements under EMIR and MiFID, to the extent possible;

- c. The compatibility of the models, logic and formats used to identify all the details to be reported under the two regimes.

21. ESMA considers that reporting of ETD transactions should not occur before clear guidance is provided in this respect. This will not hamper the supervision or the transparency towards regulators since national competent authorities are already in possession of all this information daily through MiFID.

22. The need for ESMA to develop detailed guidelines and recommendations requires a rescheduling of the reporting start date for ETDs under EMIR. ESMA therefore considers that Article 5 of the Commission Implementing Regulation (EU) No 1247/2012 should be amended to introduce a delay of 12 months for reporting of ETDs.

23. Twelve months will be necessary, considering the need for ESMA to develop the guidelines and recommendations after having publicly consulted and the need for reporting parties, trade repositories and regulators to adapt to these guidelines and recommendations.

24. In summary, the need to develop guidelines and recommendations and the related delay of the reporting obligation for ETDs is justified by the following reasons:

- a. The need for market participants to establish the relevant technical arrangements for reporting in a correct manner;
- b. The importance of ensuring consistency between EMIR and the current and future MiFID reporting obligations, to the extent possible;
- c. The need to implement stable and reliable systems that both reporting counterparties, trade repositories and the regulators can trust;
- d. The avoidance of multiplying the costs for both counterparties, trade repositories and regulators due to multiple implementations of reporting requirements or subsequent changes shortly after, when the guidelines are adopted;
- e. The need to ensure that the reports serve their regulatory purposes.

25. This rescheduling does not reflect a new policy or even technical choice, but the fact that ETD reporting proved more complex than OTC, both to counterparties, trade repositories and regulators.

26. An inconsistent or uneven reporting system for ETDs, in the absence of clear guidelines and an appropriate timeline, would be contrary to the policy objective of the reporting obligation.

VI. Amendment to ITS on reporting

27. For the reasons expressed in the previous section, ESMA considers that Article 5 of the ITS on reporting should be amended. ESMA is proposing this amendment on the basis of its mandate

under Article 9 of EMIR to develop draft ITS defining, *inter alia*, the reporting start date to trade repositories.

28. The proposed amendment included in Annex II extends by one year the period to start reporting ETDs.

29. ETDs are not defined under European legislation. EMIR defines OTC derivatives as contracts the execution of which does not take place on a regulated market or on a third country regulated market. ESMA's Q&As on EMIR Implementation OTC Q.1 (d) clarifies the following:

“Derivatives transactions, such as block trades, which are executed outside the trading platform of the regulated market, but are subject to the rules of the regulated market and are executed in compliance with those rules, including the immediate processing by the regulated market after execution and the clearing by a CCP, should not be regarded as OTC derivatives transactions. Therefore, these transactions should not be considered for the purpose of the clearing obligation and the calculation of the clearing threshold by NFC that only relates to OTC derivatives.

Derivatives transactions that do not meet the conditions listed in the first paragraph of this sub-answer (d) should be considered OTC. For example, derivatives contracts that are not executed on a regulated market and are not governed by the rules of an exchange at the point of execution should be considered OTC even if after execution they are exchanged for contracts traded in a regulated market. However, the replacement contract itself may be considered exchange traded if it meets the relevant conditions.”

30. Consistently with the above, ETDs should be considered derivative contracts which are subject to the rules of a trading venue and are executed in compliance with those rules, including the processing by the trading venue after execution and the clearing by a CCP. Indeed, regulated markets and multilateral trading facilities face the same issues and reporting scenarios to the extent that they are cleared by CCPs. Therefore it is not appropriate to treat them differently if the conditions reported above are met. In addition, if the conditions above are respected all the information on transactions executed on these trading venues will be available to the relevant competent authorities under existing reporting mechanisms.

ANNEX I - Legislative mandate to develop draft technical standards

Article 9

ESMA shall develop draft implementing technical standards determining:

- a) the format and frequency of the reports for the different classes of derivatives;
- b) the date by which derivatives contracts shall be reported, including any phase in for contracts entered into before the reporting obligation applies.

ANNEX II - Draft implementing technical standards on trade repositories

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

of []

amending Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

(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 4 July 2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories ⁽²⁾ and in particular Article 9(6) thereof,

Whereas:

- (1) Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 ⁽³⁾ laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 does not distinguish the date of application of the reporting obligation to trade repositories between derivative contracts executed in a trading venue ('ETDs') and OTC derivatives.
- (2) The characteristics and execution methods of ETDs differ from the ones of OTC derivatives, significantly impacting the reporting mechanism to trade repositories.

² OJ L 201, 27.7.2012.

³ OJ L 352/20, 21.12.2012.

- (3) Reporting of derivative contracts admitted to trading on regulated markets, representing the vast majority of ETDs, are already subject to regulatory reporting under Article 25 of Directive 2004/39/EC of 21 April 2004 of the European Parliament and of the Council on Markets in Financial Instruments ⁽⁴⁾, and additional regulatory reporting requirements on the same transactions should be consistent for the information received by competent authority to serve the intended purpose.
- (4) Implementing reporting systems represent significant costs for market participants, trade repositories and national competent authorities and these systems should be stable and consistent over time.
- (5) Reporting derivatives traded on a venue, including regulated markets and multilateral trading facilities, and cleared through a CCP, has proved a complex matter from a technical point of view, with different scenarios and actors, that requires the development of technical guidance in order to ensure legal certainty, notably on the obligations to report and how to perform them.
- (6) This Regulation is based on draft implementing technical standards submitted by the European Securities and Markets Authority (hereinafter ESMA) to the Commission.
- (7) In accordance with Article 15 of 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)⁽⁵⁾ ESMA should conduct open public consultations on such draft implementing technical standards, analyse the potential related costs and benefits and request the opinion of the ESMA Securities and Markets Stakeholder Group established in accordance with Article 37 of that Regulation. However, given the urgency for this Regulation to be adopted in view of the upcoming entry into force of the reporting obligation to trade repositories, ESMA has not conducted an open public consultation and has not consulted the ESMA Securities and Markets Stakeholder Group. However, ESMA has considered significant requests and support received from different stakeholders on the need to develop guidelines and recommendations on reporting of ETDs and on the need for all parties involved to have the necessary time to implement the reporting obligation. ESMA has already gathered evidence on the need to postpone the reporting of ETDs and intends to consult on the actual reporting scenarios which need to be included in the guidelines and recommendations to be developed.
- (8) It is necessary to establish an early date of entry into force of this Regulation to give certainty to the parties obliged to report and given that it is modifying an upcoming reporting start date already established in EU legislation.

⁴ OJ L 145 of 30.4.2004.

⁵ OJ L 331, 15.12.2010, p.84.



HAS ADOPTED THIS REGULATION:

Article 1

Amendments to Commission Implementing Regulation (EU) No 1247/2012

Commission Implementing Regulation (EU) No 1247/2012 is amended as follows:

(1) In Article 5, the following paragraph is added:

‘6. Derivative contracts in any of the classes referred to in paragraph 1 or 2 which are subject to the rules of a trading venue and are executed in compliance with those rules, including the processing by the trading venue after execution and the clearing by a CCP within one working day of execution, shall be reported to a trade repository by 1 January 2015.’

Article 2

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]

[On behalf of the President]

ANNEX III – COST-BENEFIT ANALYSIS

Introduction

In carrying out a cost benefit analysis on the amending draft implementing technical standards on Article 9 of EMIR, it should be noted that:

- the main policy decisions have already been taken under the primary legislation (EMIR) and the impact of such policy decisions have already been analysed and published by the European Commission, and taken into account when drafting the technical standards, including the one now being amended;
- ESMA does not have the ability to deviate from its specific mandate set out in the primary legislation;
- ESMA policy choices should be of a pure technical nature and not contain issues of a political nature;
- in most circumstances, ESMA's options are limited to the approach it took to drafting this particular implementing technical standard (ITS) and the need to ensure proper clarity and implementation timing.

Cost-benefit analysis

In 2013 ESMA became aware of:

- (i) the need for further specifications on the reporting rules regarding ETDs; and
- (ii) the timing required to implement ETD reporting.

ESMA considered these concerns and assessed whether:

- (i) ESMA guidance was appropriate in the current timing, on the issues raised, and which form it could take; and
- (ii) the possible rescheduling of the ETD reporting obligation *vis-à-vis* the OTC derivatives reporting starting date, and in case of rescheduling, the most appropriate lag.

For the purpose of the cost-benefit analysis on the draft ITS included in this report and amending the existing ITS on reporting by delaying the reporting start date, the elements included in the table below should be considered.

Rescheduling the reporting start date for ETD

| <i>Specific objective</i> | <i>Ensuring appropriateness of the reporting start date as regards ETDs</i> |
|--|--|
| Option 1 | Postpone the reporting start date |
| How would achieving the objective alleviate/eliminate the problem? | Given the problems connected with reporting of ETDs, this option would: <ul style="list-style-type: none"> - Enable the development of guidance and allow harmonised reporting; - Enable reporting parties to adapt their systems for ETDs; - Reduce unnecessary reporting as some entities may consider itself as counterparties with a duty to report and the guidance to be issued might conclude otherwise. - Avoid reporting and collection of potentially incompatible data, that could impede any robust use of it by regulators. |
| Option 2 | Not postponing the reporting start date |
| How would achieving the objective alleviate/eliminate the problem? | This option would maintain the status quo and it would not alleviate or eliminate the problems linked to ETD reporting. |
| What are the cost and benefits associated with the two options? | Option 1 would significantly reduce the cost for all reporting parties that would: <ul style="list-style-type: none"> - Avoid the risk of developing reporting systems that can soon be obsolete in view of future guidelines or future regulations; - Avoid costs of developing and maintaining different reporting systems for the different reporting obligations in different Member States. <p>Option 1 would limit the costs for regulators in developing different systems for different reporting mechanisms that would otherwise be needed, given the different approaches to ETD reporting that are prevalent or possible in the absence of guidance</p> |

| | |
|---|---|
| | <p>Option 1 would benefit the quality of data held by TRs, which would not be obliged to establish a transitory system that would subsequently be changed when a harmonised solution is reached through guidelines.</p> <p>However, option 1 might have a negative effect on the business plans of certain trade repositories (not yet registered) that expected some income from the reporting obligation of ETDs.</p> <p>Given the number of reporting entities and the cost saving that option 1 would imply and the additional benefits that option 1 would bring, it is evident that these benefits significantly outweigh the cost of a lower income for some trade repositories during 2014.</p> |
| <p>Which option is the preferred one? Explain briefly.</p> | <p>In view of the cost and benefits associated with both options, option 1 it is clearly preferred.</p> |
| <p>Is the policy chosen within the sole responsibility of ESMA? If not, what other body is concerned / needs to be informed or consulted?</p> | <p>The option is the sole responsibility of ESMA. However, for the effects of the option to be exploited, the European Commission would need to adopt the amended Commission Implementing Regulation proposed by ESMA.</p> |