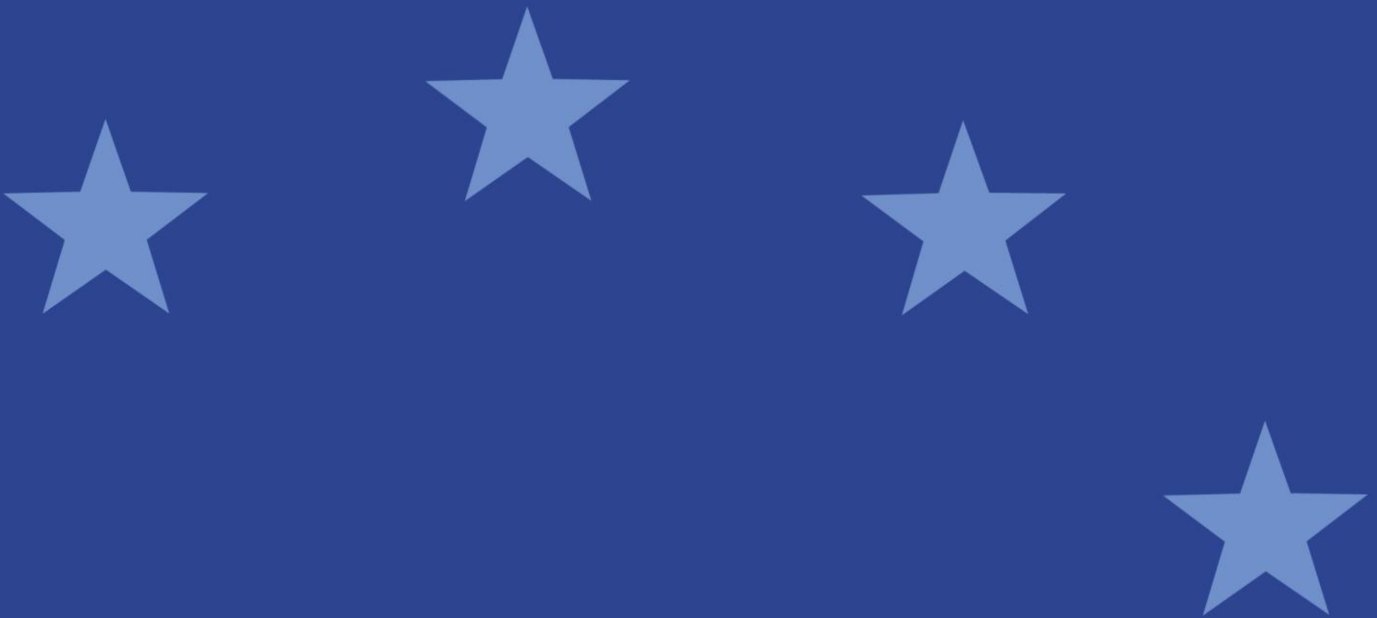
# Final Report

**EMIR RTS on various amendments to the bilateral margin requirements in view of the international framework**



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# Acronyms used

| | |
|---|---|
| Bilateral margining RTS | Commission Delegated Regulation (EU) No 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9) |
| CCP | Central Counterparty |
| 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” |
| EBA | European Banking Authority |
| EBA Regulation | Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12) |
| EIOPA | European Insurance and Occupational Pensions Authority |
| EIOPA Regulation | Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48) |
| ESAs | European Supervisory Authorities, namely the EBA, EIOPA and ESMA |
| ESMA | European Securities and Markets Authority |
| 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) |
| ESRB | European Systemic Risk Board |
| NCA | National Competent Authority |
| OTC | Over-the-counter |
| RTS | Regulatory Technical Standards |
| TEU | Treaty on the European Union |

# 1 Executive Summary

## Reasons for publication

This final report presents new draft regulatory technical standards (RTS) on the risk mitigation techniques for OTC derivative contracts not cleared by a CCP (bilateral margining) that the European Supervisory Authorities (ESAs) have developed under Article 11(15) of Regulation (EU) No 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories (EMIR). The draft RTS propose to introduce a number of amendments to the Commission Delegated Regulation on bilateral margining that take into account the international framework agreed by the Basel Committee on Banking Supervision (BCBS) and the International Organisation of Securities Commissions (IOSCO).

In view of the progress made globally towards the implementation of the international framework, stakeholders have asked for a number of adjustments in the EU legislative rulebook in order to better facilitate international consistency. These relate to the treatment of physically settled FX forward and swap contracts, intragroup contracts, equity option contracts and the implementation of the initial margin requirements.

The ESAs' proposal includes amendments of the Commission Delegated Regulation on bilateral margining in order to facilitate further international consistency towards the implementation of the international framework.

The proposed amendments are an adaptation of the timelines and rules to facilitate the current implementation of the Commission Delegated Regulation, and more broadly of the international framework. Moreover, each of the proposed amendments are limited in scope. Therefore, with a view to facilitate as soon as possible a consistent implementation of the bilateral margin requirements, in accordance with Article 10(1) of the EBA, EIOPA and ESMA Regulations respectively, the ESAs have not conducted any open public consultation. However, the stakeholder groups of each of the ESAs have been consulted.

## Contents

This Report provides explanations on the draft RTS amending the current Commission Delegated Regulation on bilateral margining with respect to the treatment of physically settled FX forward and swap contracts, intragroup contracts, equity option contracts and the implementation of the initial margin requirements. Section I explains the background to our proposals, Section II details the rationales for the RTS amendments and Section III outlines the ESAs' proposal.

## Next Steps

This Final Report is sent to the European Commission, and the ESAs are submitting the draft technical standards presented in the Annex for endorsement in the form of a Commission Delegated Regulation, i.e. a legally binding instrument applicable in all Member States of the European Union. Following the endorsement, they are then subject to non-objection by the European Parliament and the Council.

The ESAs cannot disapply EU law. However, in view of the remaining steps mentioned above that the draft RTS need to go through before being finalised and entering into force, and in light of some of the soon approaching deadlines, with regards to the bilateral margin requirements and the treatment of physically settled FX forward and swap contracts, intragroup contracts, equity option contracts and the implementation of the last phase of the initial margin requirements as proposed in the draft RTS, the ESAs expect competent authorities to apply the EU framework in a risk-based and proportionate manner until the amended RTS enter into force.

# 2 Final report

## 2.1 Background

1. The BCBS and IOSCO designed and agreed international standards for the exchange of bilateral margin along with a calendar to facilitate a consistent implementation across jurisdictions. In particular, this international framework contains a phase-in for the implementation of the initial margin requirements which has been spread over several years and this implementation is still ongoing.

2. These international standards have been implemented in the EU regulatory framework through Commission Delegated Regulation (EU) No 2016/2251 on bilateral margining. Indeed, the ESAs, who have a joint mandate under Article 11(15) of EMIR, have developed RTS taking into account the international framework, and the Commission Delegated Regulation on bilateral margining is based on these RTS.

3. Following the agreed calendar of the international framework, the Commission Delegated Regulation on bilateral margining contains a phase-in for a range of requirements, including various deferred dates of application for certain contracts or counterparties, in order to facilitate international consistency in the implementation of these standards. This reflects the strong belief of the ESAs that, in the area of the margining of non-centrally cleared OTC derivatives, a global level playing field is necessary, such that regulatory competition and a ‘race to the bottom’ are avoided.

4. The Commission Delegated Regulation on bilateral margin requirements was adopted by the European Commission on 4 October 2016, and then following a period of non-objection by the European Parliament and Council it was published in the Official Journal on 15 December 2016, which triggered the start of the implementation of the requirements in the EU.

5. Since then, in parallel to similar efforts in other jurisdictions, the ESAs have monitored the implementation of these requirements in the EU, and by the regulatory community at the global level, including the BCBS and IOSCO as well as the FSB. This monitoring has confirmed overall progress towards the implementation of the standards but has also highlighted certain areas where further consistency could be facilitated, or areas where the requirements could be clarified or slightly amended in order to facilitate their implementation.

6. Some of these areas have led the BCBS and IOSCO to clarify or slightly amend the international framework, others concern adjustments needed to ensure a level playing field. The next section describes these different areas in detail.

## 2.2 Proposed amendments and clarifications

### 2.2.1 Clarification of the requirements when below the 50 million initial margin threshold

7. In September 2018, several trade associations sent a letter to the BCBS and IOSCO, about the implementation issues relating to the last phases of implementation of the initial margin requirements, arguing in particular that there is a bottleneck issue due to the large number of counterparties caught in the last phase whereas many of them would not pose a material systemic risk, and thus raising the need to review the requirements and the ongoing implementation.

8. Following an analysis of the issue, the BCBS and IOSCO issued a first clarification in March 2019 that did provide a significant level of relief to a very large number of counterparties expected to be in scope in the last phase, while not affecting the requirements contained in the international standards. Hence, it was a clarification on the existing rule and it did not require a change in the international framework:

> "In the remaining phases of the framework's implementation in 2019 and 2020, initial margin requirements will apply to a large number of entities for the first time, potentially involving documentation, custodial and operational arrangements. The Basel Committee and IOSCO note that the framework does not specify documentation, custodial or operational requirements if the bilateral initial margin amount does not exceed the framework's €50 million initial margin threshold. It is expected, however, that covered entities will act diligently when their exposures approach the threshold to ensure that the relevant arrangements needed are in place if the threshold is exceeded."

9. The ESAs have reviewed the application of the relevant requirements of Commission Delegated Regulation on bilateral margining and are of the view that that clarification can already be taken into account when applying them. Thus, the ESAs consider that there is no need to amend the Delegated Regulation on bilateral margin requirements in order for counterparties below the 50 million initial margin exchange threshold not to be required to have all the relevant operational and legal arrangements in place. No amendment related to this point is thus included in the draft RTS in Annex.

### 2.2.2 Extension of the last phase of the implementation of the initial margin requirements

10. Still, in relation to the implementation challenges raised by several trade associations mentioned in the previous point, the BCBS and IOSCO have analysed in more detail the issues around the last phase-in of the requirements and have indicated in July 2019 to having agreed to an extension of this phase-in:

"The Basel Committee and IOSCO have agreed to extend by one year the final implementation of the margin requirements. With this extension, the final implementation phase will take place on 1 September 2021, at which point covered entities with an aggregate average notional amount (AANA) of noncentrally cleared derivatives greater than €8 billion will be subject to the requirements. To facilitate this extension, the Basel Committee and IOSCO also will introduce an additional implementation phase whereby as of 1 September 2020 covered entities with an AANA of non-centrally cleared derivatives greater than €50 billion will be subject to the requirements.

The Basel Committee and IOSCO have agreed to this extended timeline in the interest of supporting the smooth and orderly implementation of the margin requirements which is consistent and harmonised across their member jurisdictions and helps avoid market fragmentation that could otherwise ensue. The Basel Committee and IOSCO expect that covered entities will act diligently to comply with the requirements by this revised timeline and strongly encourage market participants to make all relevant arrangements on a timely basis."

11. Following from this, the ESAs have reviewed the Commission Delegated Regulation on bilateral margining and have identified the amendments necessary to the EU framework in order to extend the implementation deadline by one year for those counterparties above the 8 billion threshold but below the new 50 billion threshold.

12. It can also be noted that no further extension of the phase-in and no change of the thresholds, in particular the 8 billion threshold, are envisaged. As a result, it is important that the counterparties who have been facing some challenges in their preparation for complying with the initial margin requirements and that under the proposed draft RTS would have one more year to complete them, continue their preparation efforts in order to be able to comply by the deadline.

13. In addition, these draft RTS are still subject to endorsement by the European Commission and a non-objection period by the European Parliament and Council, and thus legal certainty on the one-year extension proposal from the ESAs would only be confirmed after these steps and the publication in the Official Journal.

### 2.2.3 Physically settled FX Forwards and Swaps

14. The international framework gives explicit guidance on physically settled FX forwards and swaps:

"BCBS and IOSCO agree that standards apply for variation margin to be exchanged on physically settled FX forwards and swaps in a manner consistent with the final policy framework set out in this document and that those variation

margin standards are implemented either by way of supervisory guidance or national regulation."

15. The international standards state that variation margining of physically settled FX forwards and swaps is both an established practice among significant market participants and a prudent risk management tool that limits the build-up of systemic risk, and thus that variation margining should apply to these contracts.

16. The international standards recommend implementing this requirement by way of national regulation or supervisory guidance. The EU initially implemented these international standards by way of regulation. Specifically, this was done through Article 27(a) of Commission Delegated Regulation on bilateral margining, which exempts these contracts from the exchange of initial margin, in line with the international framework, and through Article 37(2) thereof for the variation margin requirements, including a deferred date of application for physically settled FX forwards until 3 January 2018, which is the date of application of the revised Markets in Financial Instruments Directive (MiFID II) and thus when the definition of physically settled FX forwards was further harmonised.

17. Although the bilateral margin requirements for physically settled FX forwards were meant to apply from the entry into force of MiFID II at the start of January 2018, market participants raised some concerns which the ESAs analysed.

18. Based on the material presented to the ESAs, it became apparent that the adoption of the international standards in other jurisdictions via supervisory guidance had led to an international scope of application that is more limited than the scope the ESAs had proposed in the RTS (and which was finally embedded in the EU rules). Whereas the requirement remains relevant for transactions between institutions, the implementation appeared to pose a challenge regarding transactions between institutions and end-users.

19. Following from this, the ESAs developed and submitted in December 2017 a joint RTS on bilateral margining with respect to physically settled FX forward contracts, that proposed a permanent exemption for certain contracts when entered into between institutions and end-users. It can be noted though that the process for the proposed amending RTS from December 2017 has not been completed and thus that it has not become law. However, the ESAs are of the view that the rationale for the proposed amendment is still valid.

20. More recently, following the EMIR Review, the co-legislators have agreed on a range of amendments to EMIR in Regulation (EU) 2019/834, also referred to as the EMIR Refit text. The EMIR Refit text was published on 28 May 2019 and entered into force on 17 June 2019. It is important to note in this context that the co-legislators have reiterated through the EMIR Refit text the importance of international consistency in the

implementation of the international standards on bilateral margining, and in particular with regards to the treatment of physically settled FX forwards and swaps. Recital 21 of the EMIR Refit text makes clear that:

> "The need for international regulatory convergence and the need for non-financial counterparties and small financial counterparties to reduce the risks associated with their currency risk exposures make it necessary to set out special risk-management procedures for physically settled foreign exchange forwards and physically settled foreign exchange swaps. In view of their specific risk profile, it is appropriate to restrict the mandatory exchange of variation margins on physically settled foreign exchange forwards and physically settled foreign exchange swaps to transactions between the most systemic counterparties in order to limit the build-up of systemic risk and to avoid international regulatory divergence."

21. Following from this, the ESAs have discussed with the European Commission the need to replace the amendment submitted by the ESAs in December 2017 by a new amendment covering a broader scope, i.e. not only covering physically settled FX forwards, but covering both physically settled FX forwards and swaps, with the same exemption for both. The draft RTS included in Annex contains this broader scope.

### 2.2.4 Temporary exemption for single-stock equity options and index options

22. As described above, the Commission Delegated Regulation on bilateral margining contains a range of implementation timelines, including a phase-in for the initial margin requirements as well as deferred dates of application for certain contracts and counterparties. In particular, the requirements for single-stock equity options or index options transactions are deferred until 4 January 2020.

23. Recital 43 of the Commission Delegated Regulation on bilateral margining provides the rationale behind the initial three-year temporary exemption, it states that:

"In order to avoid market fragmentation and ensure a level playing field for Union counterparties established in the Union on a global level, and acknowledging the fact that in some jurisdictions the exchange of variation and initial margin for single-stock options and equity index options is not subject to equivalent margin requirements, the treatment of those products should be phased-in. This phase-in period will provide time for monitoring regulatory developments in other jurisdictions and ensuring that appropriate requirements are in place in the Union to mitigate counterparty credit risk in respect of such contracts whilst avoiding scope for regulatory arbitrage."

24. Three years later, the situation has not materially changed. Certain jurisdictions have not implemented these requirements for these contracts or have also introduced temporary exemptions in the meantime.

25. The ESAs reiterate the view that, from a prudential point of view, the international framework agreed on by all the participant authorities in the BCBS and IOSCO discussions is a crucial pillar in ensuring safer derivatives markets, limiting the counterparty risk between counterparties trading derivatives, and thus that its coordinated implementation is key in reaching this objective.

26. Furthermore, the same Recital 21 of the EMIR Refit text that mentioned in the section on physically settled FX forwards and swaps also comes in support of this objective of an implementation of the international framework across the range of derivatives. Recital 21 states that:

    > "International regulatory convergence should also be ensured with regard to risk-management procedures for other classes of derivatives."

27. With the view to continue monitoring regulatory developments in other jurisdictions and ensuring that appropriate requirements are in place in the Union to mitigate counterparty credit risk in respect of such contracts whilst avoiding scope for regulatory arbitrage, it would thus appear proportionate to extend by one year the current deferred application of the margin requirements for single-stock equity options or index options transactions in the EU framework. The draft RTS included in Annex contains this proposed amendment.

### 2.2.5 Temporary exemption for intragroup transactions

28. Another deferred date of application of the bilateral margin requirements relates to intragroup transactions with a third country entity in the absence of an equivalence decision adopted by the European Commission pursuant to Article 13(2) of EMIR. The requirements for these intragroup transactions are currently deferred until 4 January 2020.

29. ESMA already looked at this question from the perspective of the clearing obligation. After running a consultation, ESMA finalised and submitted a draft RTS to the European Commission on 27 September 2018 proposing to extend the temporary regime by two years until 21 December 2020. The draft RTS have since been endorsed, then published in the Official Journal and have entered into force.

30. The rationale for the exemption from the clearing obligation is the same as for the exemption from the bilateral margin requirements, i.e. broadly speaking that those deferred dates were necessary to ensure that such intragroup OTC derivate contracts

were not subject to the EMIR clearing or bilateral margin requirements before the adoption of the relevant equivalence decisions.

31. The ESAs are thus of the view that in light of this common rationale for a temporary exemption, it is proportionate to also extend the temporary exemption for bilateral margin and to align it with the exemption for the clearing obligation, i.e. until 21 December 2020. The draft RTS included in the Annex contains this proposed amendment.

## 2.3 Way forward

32. From a process point of view, it is important to note that the adjustments introduced in the proposed draft RTS are of a proportionate nature. They are also in line with the international framework and take into account the status of the implementation of this framework at the international level which has also been documented and analysed. In addition, some of the current deadlines are soon approaching, in particular the deferred date of application for intragroup transactions as well as for equity options, which is 4 January 2020, and market participants would benefit in knowing as early as possible on how to prepare for these requirements. Finally, many of these requirements have also been called for by a large range of market participants.

33. As a result, the ESAs are of the view that it would be disproportionate to conduct open public consultations and analyses of the potential related costs and benefits, taking into account the scope and impact of the changes concerned in the draft RTS and the urgency of the matter for some of the requirements.

34. These amendments are thus submitted directly to the European Commission for review and endorsement. The process that follows the adoption of draft RTS by the European Commission without significant amendments is a review period by the European Parliament and Council before they can then be published in the Official Journal and subsequently enter into force.

35. The ESAs cannot disapply EU law. However, in view of the remaining steps that the draft RTS need to go through before being finalised and entering into force, and in light of some of the soon approaching deadlines, with regards to the bilateral margin requirements and the treatment of physically settled FX forward and swap contracts, intragroup contracts, equity option contracts and the implementation of the last phase of the initial margin requirements as proposed in the draft RTS, the ESAs expect competent authorities to apply the EU framework in a risk-based and proportionate manner until the amended RTS enter into force.

# 3 Annexes

## 3.1 Annex I - ESAs mandate to develop draft technical standards

*Article 11(15) of Regulation (EU) No 648/2012*

**Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP**

15. In order to ensure consistent application of this Article, the ESAs shall develop common draft regulatory technical standards specifying:

(a) the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in paragraph 3;

(aa) the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures;

(b) the procedures for the counterparties and the relevant competent authorities to be followed when applying exemptions under paragraphs 6 to 10;

(c) the applicable criteria referred to in paragraphs 5 to 10 including in particular what is to be considered as a practical or legal impediment to the prompt transfer of own funds and repayment of liabilities between the counterparties.

The level and type of collateral required with respect to OTC derivative contracts that are concluded by covered bond entities in connection with a covered bond, or by a securitisation special purpose entity in connection with a securitisation within the meaning of this Regulation and meeting the conditions of Article 4(5) of this Regulation and the requirements set out in Article 18, and in Articles 19 to 22 or 23 to 26 of Regulation (EU) 2017/2402 (the Securitisation Regulation) shall be determined taking into account any impediments faced in exchanging collateral with respect to existing collateral arrangements under the covered bond or securitisation.

The ESAs shall submit those draft regulatory technical standards, except for those referred to in point (aa) of the first subparagraph, to the Commission by 18 July 2018.

EBA, in cooperation with ESMA and EIOPA, shall submit the draft regulatory technical standards referred to in point (aa) of the first subparagraph to the Commission by 18 June 2020.

Depending on the legal nature of the counterparty, power is delegated to the Commission to adopt the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 or (EU) No 1095/2010.

## 3.2 Annex II - Draft technical standards

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

**amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral**

**of [ ]**

**(text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories[1], and in particular Article 11(15) thereof,

Whereas:

1. Delegated Regulation (EU) 2016/2251 [2] specifies, among others, the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in paragraph 3 of Article 11 of Regulation (EU) 648/2012, that financial counterparties are required to have for the purpose of the exchange of collateral, with respect to their OTC derivative contracts not cleared by a central counterparty. Commission Delegated Regulation (EU) 2016/2251 implements the international framework for the exchange of collateral that has been agreed at the global level by the Basel Committee on Banking Supervision (BCBS) and the International Organisation of Securities Commissions (IOSCO).

2. The implementation of the BCBS and IOSCO framework, has been phased in over a number of years. This phased implementation has had the objective to ensure international consistency, and thus minimise possibilities of regulatory arbitrage with the view to avoiding market disruption, as well as to facilitate a proportionate and effective implementation of the requirements, by providing counterparties more or less time to adapt their internal systems and

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

[2] Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (OJ L 340, 15.12.2016, p. 9).

processes to comply with the requirements depending on the category of counterparty to those contracts, the type of contract and when the contract was entered into or novated. The phase-in defined in Delegated Regulation (EU) 2016/2251 takes into account the schedule agreed in the BCBS and IOSCO framework.

3. Furthermore, the phase-in defined in Delegated Regulation (EU) 2016/2251 also takes into account the scope and level of implementation of the global standards in other jurisdictions in order to avoid market fragmentation and ensure a level playing field for Union counterparties established in the Union on a global level. In particular, Delegated Regulation (EU) 2016/2251 has provided more time for certain products not subject to equivalent margin requirements in other jursidictions while regulatory developments in these jurisdictions has been monitored.

4. However, the international schedule has now been amended by the BCBS and IOSCO and takes into account the number and type of counterparties remaining to implement the requirements in order to ensure an orderly implementation of the requirements. In addition, there are still certain products not subject to equivalent margin requirements in other jursidictions. In order to better reflect the progress made to date across jurisdictions and the changes in the international schedule, an amendment of the phase-in defined in Delegated Regulation (EU) 2016/2251 is necessary to ensure a level playing field and market stability, by limiting the risk of regulatory arbitrage and facilitating a smooth implementation.

5. Many financial and non-financial counterparties enter into physically settled foreign exchange forward and physically settled foreign exchange swap contracts to hedge their risks associated with their currency risk exposures. In view of the specific risk profile of these contracts, the need for international regulatory convergence and in line with Recital 21 of Regulation (EU) 2019/834, it is appropriate to restrict the mandatory exchange of variation margin for these contracts between the most systemic counterparties, a permanent exemption should be introduced for these contracts when entered into with non-institutions.

6. The European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (the ESAs) have monitored the progress that has been made by counterparties to implement the initial margin requirements for non-centrally cleared derivatives and are aware that in the final phase of implementation, the initial margin requirements are scheduled to apply to a large number of entities for the first time. In the interest of supporting the smooth and orderly implementation of the margin requirements which is also consistent and harmonised across the member jurisdictions of the BCBS-IOSCO framework and helps avoid market fragmentation that could otherwise ensue, the deadline for the implementation of the initial margin requirements should be extended, with the introduction of an additional implementation phase whereby from 1 September 2020 covered counterparties with an aggregate average notional amount of non-centrally cleared derivatives above €50 billion would be subject to the requirements.

7. Delegated Regulation (EU) 2016/2251 laid down a deferred date of application of the bilateral margin requirements for non-centrally cleared OTC derivative contracts concluded between

counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union. As stated in the relevant recital of that Regulation, the deferred date was necessary to ensure that such OTC derivative contracts were not subject to the bilateral margin requirements before the adoption of an implementing act pursuant to Article 13(2) of Regulation (EU) No 648/2012. To date, only two implementing acts pursuant to Article 13(2) of Regulation (EU) No 648/2012 have been adopted in relation to the bilateral margin requirements. This situation is similar to the one addressed with respect to the clearing obligation in Commission Delegated Regulation (EU) 2019/667. Therefore, the application of the bilateral margin requirements for non-centrally cleared OTC derivative intragroup contracts should be further deferred for a defined period of time, aligned with the defined period of time applicable in the context of the clearing obligation, or until the adoption of those implementing acts.

8. International regulatory convergence should also be ensured with regard to risk-management procedures for other classes of derivatives. In particular, in order to avoid market fragmentation and ensure a level playing field for Union counterparties established in the Union on a global level, and acknowledging the fact that in some jurisdictions single-stock option and equity index option contracts are not subject to equivalent margin requirements, the treatment of those products should be further phased-in for a period of one year. This further phase-in period will provide time for monitoring regulatory developments in other jurisdictions and ensuring that appropriate requirements are in place in the Union to mitigate counterparty credit risk in respect of such contracts whilst avoiding scope for regulatory arbitrage.

9. Delegated Regulation (EU) 2016/2251 should therefore be amended accordingly.

10. This Regulation is based on the draft regulatory technical standards submitted by the ESAs to the Commission.

11. Given that the necessary amendments to Delegated Regulation (EU) 2016/2251 are limited adjustments of the existing regulatory framework, in line with international developments, in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[3], the third subparagraph of Article 10(1) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council[4] and the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[5], the ESAs have not conducted any open public consultation nor analysis of the potential related costs and benefits. The ESAs consider that the consultation and the costs

[3] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

[4] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

[5] 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).

and benefits analysis would be disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned. The ESAs nevertheless requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010, the opinion of the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1094/2010, and the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

12. It is necessary to provide legal certainty to market participants as quickly as possible, for them to adapt adequately their preparation for complying with the requirements of this Delegated Regulation (EU) 2016/2251, in particular with respect to the requirements for which the currently applicable deadline is rapidly approaching, this Regulation should enter into force, as a matter of urgency, on the day following that of its publication.

HAS ADOPTED THIS REGULATION:

*Article 1*
*Amendment to Delegated Regulation (EU) 2016/2251*

Delegated Regulation (EU) 2016/2251 is amended as follows:

1. After Article 31, the following Article is inserted:

*‘Article 31a*
*Treatment of physically settled foreign exchange forwards and physically settled foreign exchange swaps*

By way of derogation from Article 2(2), counterparties may provide in their risk management procedures that variation margins are not required to be posted or collected for physically settled foreign exchange forward contracts and physically settled foreign exchange swap contracts in any of the following cases:

(a) where one of the counterparties is a counterparty other than an institution as defined in point (3) of Article 4(1) of Regulation (EU) No 575/2013;

(b) where one of the counterparties is a counterparty established in a third country, which would not qualify as an institution as defined in point (3) of Article 4(1) of that Regulation if it were established in the Union.’.

2. In Article 36(1), point (e) is replaced by the following:

(e) ‘from 1 September 2020, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 50 billion;’.

3. In Article 36(1), the following point is added:

(f) ‘from 1 September 2021, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 8 billion.’.

4. In Article 36(2), point (a) is replaced by the following:

(a) ‘from 21 December 2020 where no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 11(3) of that Regulation in respect of the relevant third country;’.

5. In Article 38, paragraph 1 is replaced by the following:

1. ‘By way of derogation from Articles 36(1) and 37, in respect of all non-centrally cleared OTC derivatives which are single-stock equity options or index options, the Articles referred to in Articles 36(1) and 37 shall apply from 4 January 2021.’.

*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*

*[For the Commission*
*On behalf of the President*

*[Position]*

## 3.3 Annex III – Feedback from the consultation of the Stakeholder Groups

36. As mentioned at the start of this Report, the stakeholder groups of each of the ESAs have been consulted on the proposed amendments covered in the draft RTS.

37. While no formal position of each of the 4 relevant Stakeholder Groups of the ESAs could be established in the time provided, a few subject matter experts from these groups with respect to the topic covered, bilateral margining of uncleared OTC derivatives, answered and provided feedback on the proposed amendments.

38. The feedback was overall positive, expressing full support to introduce these amendments. One respondent explained that "it addresses the outstanding concerns in terms of alignment with developments in the international framework for margining of non-cleared derivatives: timing and implementation of the final phases for smaller users, targeted exemptions for physically-settled fx forwards and fx swaps for non-systemic entities, and targeted exemptions for intragroup transactions and certain equity options."

39. There was not a single contribution objecting against the introduction of these amendments.

40. However, the respondents also added that the proposed one-year extension of the exemption for single-stock equity options and index options was too short and advocated for a two-year extension instead, possibly with a review clause.

41. First of all, the concern raised is that a one-year extension does not provide market participants with an adequate timeframe in terms of visibility and planning. Secondly, and more fundamentally, they argue that the situation of unlevel playing field has not changed and is unlikely to change at least in the next 6 months, and as a result that this issue will need to be addressed again very shortly.

42. The ESAs take note of both the full support to introduce these amendments quickly as well as with regards to the concerns raised on the length of the extension of the exemption for single-stock equity options and index options. First of all, the overall support reinforces the need to proceed rapidly and submit the draft RTS to the Commission. Secondly, with regards to the length of the extension of the exemption, the ESAs reiterate the importance of the global framework, while the one year extension allows to consider further the level of implementation across jurisdictions. Taking all this into account, the draft RTS in Annex were kept unchanged after the consultation of the stakeholder groups.