Commission Delegated Regulation (EU) 2019/396 of 19 December 2018 amending Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date at which the clearing obligation takes effect for certain types of contracts (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2019/396

of 19 December 2018

amending Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date at which the clearing obligation takes effect for certain types of contracts

(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 5(2) thereof,

Whereas:

(1) On 29 March 2017, the United Kingdom submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. The Treaties will cease to apply to the United Kingdom from the date of entry into force of a withdrawal agreement, or failing that, two years after that notification, i.e. from 30 March 2019, unless the European Council, in agreement with the United Kingdom, unanimously decides to extend that period.

(2) The clearing obligation laid down in Regulation (EU) No 648/2012 does not take into account the eventuality of a Member State withdrawing from the Union. The challenges faced by those parties to an OTC derivative contract whose counterparties are established in the United Kingdom are a direct consequence of an event that is beyond their control and may put them at a disadvantage compared to other counterparties in the Union.

(3) Commission Delegated Regulations (EU) 2015/2205[(2)], (EU) 2016/592[(3)] and (EU) 2016/1178[(4)] specify the dates from which the clearing obligation is to take effect for contracts pertaining to certain classes of OTC derivatives. In addition, those Regulations provide for different dates depending on the category of counterparty to those contracts.

(4) Counterparties cannot foresee what the status of a counterparty established in the United Kingdom might become or to what extent that counterparty would be able to continue providing certain services to counterparties established in the Union. To address that

Changes to legislation: *There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2019/396. (See end of Document for details)*

situation, counterparties may want to novate the contract by replacing the counterparty established in the United Kingdom with a counterparty in a Member State.

(5) If, due to the withdrawal of the United Kingdom from the Union, the parties decide to replace a counterparty established in the United Kingdom with a new counterparty established in the Union, the novation of the contracts will trigger the clearing obligation if such novation occurs on or after the date from which the clearing obligation takes effect for that type of contract. As a result, the parties will have to clear that contract in an authorised or recognised CCP.

(6) Centrally cleared contracts are subject to a different collateral regime than non-centrally cleared contracts. The triggering of the clearing obligation may thus force certain counterparties to discontinue their transactions, leaveing certain risks unhedged.

(7) In order to ensure the smooth functioning of the market and a level playing field between counterparties established in the Union, counterparties should be able to replace counterparties established in the United Kingdom with counterparties established in a Member State without triggering the clearing obligation. In order to allow for sufficient time to replace such counterparties, the date from which the clearing obligation takes effect for the novation of those contracts should be 12 months after the date of application of this Regulation.

(8) Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 should therefore be amended accordingly.

(9) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.

(10) It is necessary to facilitate the implementation of efficient solutions by market participants as quickly as possible. Therefore, the European Securities and Markets Authority has analysed the potential related costs and benefits but has not conducted any open public consultation in accordance with the second subparagraph of Article 10(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(5)].

(11) This Regulation should enter into force as a matter of urgency and should only apply from the day following that on which the Treaties cease to apply to and in the United Kingdom unless a withdrawal agreement concluded with the United Kingdom has entered into force by that date or the two-year period referred to in Article 50(3) of the Treaty on European Union has been extended,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2015/2205

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

(1) in Article 3, the following paragraph is added:

3. By way of derogation from paragraphs 1 and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect 12 months from the date of application of this Regulation where the following conditions are fulfilled:

a the clearing obligation has not been triggered by 14 March 2019;

b the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.;

(2) in Article 4, paragraph 3 is replaced by the following:

3. For financial counterparties in Category 3 and for transactions referred to in paragraphs 2 and 3 of Article 3 of this Regulation concluded between financial counterparties, the minimum remaining maturity referred to in point (ii) of Article 4(1)(b) of Regulation (EU) No 648/2012, at the date the clearing obligation takes effect, shall be:

a 50 years for contracts that belong to the classes of Table 1 or Table 2 of the Annex;

b 3 years for contracts that belong to the classes of Table 3 or Table 4 of the Annex..

Article 2

Amendment to Delegated Regulation (EU) 2016/592

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

(1) in Article 3, the following paragraph is added:

3. By way of derogation from paragraphs 1 and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect 12 months from the date of application of this Regulation where the following conditions are fulfilled:

a the clearing obligation has not been triggered by 14 March 2019;

b the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.;

(2) in Article 4, paragraph 3 is replaced by the following:

3. For financial counterparties in Category 3 and for transactions referred to in paragraphs 2 and 3 of Article 3 of this Regulation concluded between financial counterparties, the minimum remaining maturity referred to in point (ii) of Article 4(1)(b) of Regulation (EU) No 648/2012, at the date the clearing obligation takes effect, shall be 5 years and 3 months..

Article 3

Amendment to Delegated Regulation (EU) 2016/1178

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