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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 (Text with EEA relevance)

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

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to the opinion of the European Central Bank[(1)],

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[(2)], and in particular Article 25(8), Article 26(9), Article 29(4), Article 34(3), Article 41(5), Article 42(5), Article 44(2), Article 45(5), Article 46(3), Article 47(8) and Article 49(4) thereof,

Whereas:

(1) The provisions in this Regulation are closely linked, since they deal with organisational requirements, including record keeping and business continuity, and prudential requirements, including in relation to margins, the default fund, liquidity risk controls, the default waterfall, collateral, investment policy, review of models, stress testing and back testing. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations it is desirable to include all the regulatory technical standards required under Title III and Title IV of Regulation (EU) No 648/2012 in a single Regulation.

(2) In view of the global nature of financial markets, this Regulation should take into account the Principles for Financial Market Infrastructures issued by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions (CPSS-IOSCO Principles) which serve as a global benchmark for regulatory requirements for central counterparties (CCPs).

(3) To ensure that they are safe and sound in all market conditions, it is important that CCPs adopt prudent risk management procedures which duly cover all the risks they are or may be exposed to. In this respect, the risk management standards actually implemented by CCPs should be more stringent than those set forth in this Regulation if for risk management purposes it is deemed appropriate.

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(4) In order to clearly identify a limited number of concepts stemming from Regulation (EU) No 648/2012, as well as to specify the technical terms necessary for developing this technical standard, a number of terms should be defined.

(5) It is important to ensure that recognised third country CCPs do not disrupt the orderly functioning of Union markets. For this reason, it is essential to ensure that recognised CCPs are not in a position to lower their risk management requirements below Union standards, which could lead to regulatory arbitrage. The information to be provided to ESMA concerning the recognition of a third country CCP should enable ESMA to assess whether that CCP is in full compliance with the prudential requirements applicable in that third country. In addition, the equivalence determination by the Commission should ensure that the laws and regulations of the third country are equivalent to every provision under Title IV of Regulation (EU) No 648/2012 and of this Regulation.

(6) To ensure an adequate level of investor protection, in the recognition of third country CCPs the European Securities and Markets Authority (ESMA) may require additional information to the one strictly necessary to assess that conditions established in Regulation (EU) No 648/2012 are fulfilled.

(7) The ongoing assessment of the full compliance of a third country CCP with the prudential requirements of such third country is the duty of the third country competent authority. The information to be provided to ESMA by the applicant third country CCP should not have the objective of replicating the assessment of the third country competent authority, but ensuring that the CCP is subject to effective supervision and enforcement in that third country, thus guaranteeing a high degree of investor protection.

(8) To allow ESMA to perform a complete assessment, the information provided by the applicant third country CCP should be complemented by that information necessary to assess the effectiveness of the ongoing supervision, enforcement powers and actions taken by the third country competent authority. Such information should be provided under the cooperation arrangement established in accordance with Regulation (EU) No 648/2012. Such a cooperation arrangement should ensure that ESMA is informed in a timely manner of any supervisory or enforcement action against the CCP applying for recognition and any change of the conditions under which authorisation was granted to the relevant CCP and on any relevant update of the information originally provided by the CCP under the recognition process.

(9) The requirements of Regulation (EU) No 648/2012 relating to internal risk reporting lines need further specification to implement a risk-management framework, which includes the structure, rights and responsibilities of the internal risk management process. Governance arrangements should take into account different regimes on corporate law in the Union, in order to ensure that CCPs operate within a sound legal framework.

(10) To ensure that a CCP implements the appropriate procedures to comply with this Regulation, Regulation (EU) No 648/2012 and Commission Implementing Regulation

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(EU) No 1249/2012[(3)], the role and responsibilities of a compliance function of a CCP should be specified.

(11) It is necessary to clearly define the responsibilities of the board and the senior management as well as to specify minimum requirements for the functioning of the board in order to ensure that the organisational structure of a CCP enables it to perform its services and activities in a continuous and orderly manner. It is also necessary to set up clear and direct reporting lines to ensure accountability.

(12) In order to ensure the sound and prudent management of a CCP, it is important that its remuneration policy discourages excessive risk taking. For the remuneration policy to produce the intended effects, it should be adequately monitored and reviewed by the board that should set-up a specific committee to appropriately oversee the fulfilment of remuneration policy.

(13) To ensure that CCPs operate with the necessary level of human resources to meet all of their obligations, they are accountable for the performance of their activities and competent authorities have the relevant contact points within the CCPs they supervise, CCPs should have at least a chief risk officer, a chief compliance officer and chief technology officer.

(14) CCPs should adequately assess and monitor the extent to which board members that sit on the boards of different entities have conflicts of interest, whether within or outside the group of the CCP. Board members should not be prevented from sitting on different boards unless this gives rise to conflicts of interest.

(15) In order to have an effective audit function, a CCP should define the responsibilities and reporting lines of its internal auditors, to ensure that relevant matters are brought before the board of the CCP and the competent authorities in a timely manner. When establishing and maintaining an internal audit function, its mission, independence and objectivity, scope and responsibility, authority, accountability and standards of operation should be clearly defined.

(16) To carry out its duties effectively, the relevant competent authority should be provided with access to all necessary information to determine whether the CCP is in compliance with its conditions of authorisation. Such information should be made available by the CCP without undue delay.

(17) Records kept by CCPs should facilitate a thorough knowledge of CCPs' credit exposure towards clearing members and allow monitoring of the implied systemic risk. They should also enable competent authorities, ESMA and the relevant members of the European System of Central Banks (ESCB) to adequately re-construct the clearing process, in order to assess compliance with regulatory requirements including reporting requirements. Once recorded, that data is also useful for CCPs in meeting regulatory requirements and obligations towards clearing members and in disputes.

(18) Data reported by CCPs to trade repositories should be recorded so as to empower competent authorities to verify the compliance of CCPs with the reporting obligation set out in Regulation (EU) No 648/2012 and to easily access information in cases where this cannot be found in trade repositories.

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(19) The record-keeping requirements in relation to trades should make use of the same concepts used in the reporting obligation set out in Article 9 of Regulation (EU) No 648/2012, in order to ensure appropriate reporting by CCPs.

(20) To ensure business continuity in times of disruption, the secondary processing site of the CCP should be located sufficiently distant and in a sufficiently geographically distinct location from the primary site so that it would not be subject to the same disaster which may cause the unavailability of the primary site. Scenarios should be created to analyse the impact of crisis events on critical services, including scenarios which envisage the unavailability of systems caused by a natural disaster. Those analyses should be reviewed periodically.

(21) CCPs are systemically relevant financial market infrastructures and they should recover critical functions within two hours, with backup systems ideally starting processing immediately after an incident. CCPs should also ensure with very high probability that no data will be lost.

(22) It is important that the default of a clearing member does not cause significant losses to other market participants. Therefore, CCPs are required to cover through margins posted by the defaulter, at least, a relevant proportion of the possible loss that during the close out process the CCP might have. Rules should determine the minimum percentage the margins should cover for different classes of financial instruments. Furthermore, CCPs should follow principles to adequately tailor their margin levels to the characteristics of each financial instrument or portfolio they clear.

(23) CCPs should not reduce their margins to a level that compromises their safety as a result of the existence of a highly competitive environment. For this reason, margin calculations should follow specific requirements in their basic components. In this sense, margins should take into account a full range of market conditions including periods of stress.

(24) Rules should be established to specify the appropriate percentage and time horizons for the liquidation period and the calculation of historical volatility. However, in order to ensure that CCPs duly manage the risk they face, it is desirable not to specify the approach which the CCP should take to calculating margin requirements from these parameters. For the same reasons, CCPs should not be prevented to rely on various reliable methodological approaches for the development of portfolio margining, they should be allowed to rely on methods based on correlations between price risk of the financial instrument or set of financial instruments they clear, as well as any appropriate methods based on equivalent statistical parameters of dependence.

(25) To determine the period of time during which a CCP is exposed to market risk related to the management of a defaulter's position, the CCP should consider the relevant characteristics of the financial instruments or portfolio cleared, such as their level of liquidity and the size of the position or its concentration. CCPs should prudently evaluate the time required for the complete closure of a defaulter's position since the latest collection of margins, the size of the position and its concentration.

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(26) In order to avoid causing or exacerbating financial instability, CCPs should, to the maximum extent practical, adopt forward-looking margin methodologies that limit the likelihood of procyclical changes in margin requirements, without undermining the resilience of the CCP.

(27) A higher confidence interval for OTC derivatives is typically justified because those products can suffer from less reliable pricing and shorter runs of historical data on which to base exposure estimations. CCPs might clear OTC derivatives that do not suffer from such phenomena and have the same risk characteristics as listed derivatives and they should be able to clear those products consistently irrespective of the execution method.

(28) A suitable definition of extreme but plausible market conditions is a core component of CCP risk management. For the purposes of keeping the CCP risk management framework up to date, extreme but plausible market conditions should not be considered as a static concept, but rather as conditions that evolve over time and vary across markets. One market scenario can be extreme but plausible for one CCP while not having great importance for another. A CCP should establish a robust internal policy framework for identifying the markets to which it is exposed and employ a common minimum set of standards for defining extreme but plausible conditions in each identified market. It should also consider objectively the potential for simultaneous pressures in multiple markets.

(29) To ensure appropriate and robust governance arrangements are in place, the framework used by a CCP to identify extreme but plausible market conditions should be discussed by the risk committee and approved by the board. It should be reviewed at least annually, with results discussed by the risk committee and then shared with the board. The review should ensure that changes to the scale and concentration of the CCP's exposures as well as developments in the markets in which it operates are reflected in the definition of extreme but plausible market conditions. That review should not, however, be a substitute for continuous judgment by the CCP on the adequacy of its default fund in light of evolving market conditions.

(30) To ensure efficient management of their liquidity risk, CCPs should be required to establish a liquidity risk management framework. That framework should depend on the nature of its obligations and address the tools a CCP has available for assessing the liquidity risk it is facing, determining the liquidity pressures likely to occur and ensuring the adequacy of its liquid resources.

(31) In assessing the adequacy of its liquid resources, a CCP should be required to consider the size and liquidity of the resources it holds, as well as the possible concentration risk of those assets. It is important that CCPs are able to identify all major kinds of liquidity risk concentrations within their resources so that the CCP's liquidity resources are immediately available when necessary. CCPs should also consider additional risks stemming from multiple relationships, interdependencies and concentrations.

(32) As liquidity has to be readily available for same day transactions or even intraday transactions, a CCP might employ cash at the central bank, of issue, cash at creditworthy commercial banks, committed lines of credit, committed repos, highly marketable