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Commission Delegated Regulation (EU) No 149/2013 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 indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 149/2013

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 indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP

(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 Articles 4(4), 5(1), 6(4), 8(5), 10(4) and 11(14) thereof,

Whereas:

(1) A framework should be provided to encompass rules applicable to the clearing obligation, its application, possible exemptions and risk mitigation techniques to be established when clearing with a central counterparty (CCP) cannot take place. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and efficient access for stakeholders and in particular those subject to the obligations, it is desirable to include most of the regulatory technical standards required under Title II of Regulation (EU) No 648/2012 in a single Regulation.

(2) In view of the global nature of the over the counter (OTC) derivatives market, this Regulation should take into account the relevant internationally agreed guidelines and recommendations on OTC derivatives market reforms and mandatory clearing as well as the related rules developed in other jurisdictions. In particular the framework for the determination of a clearing obligation takes into account the Mandatory Clearing requirements published by the International Organization of Securities Commissions. This will support, as much as possible, convergence with the approach in other jurisdictions.

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

(4) An indirect clearing arrangement should not expose a CCP, clearing member, client or indirect client to additional counterparty risk and the assets and positions of the indirect client should benefit from an appropriate level of protection. It is therefore essential that any type of indirect clearing arrangements comply with minimum conditions for ensuring their safety. To that end, the parties involved in indirect clearing arrangements shall be subject to specific obligations. Such arrangements extend beyond the contractual relationship between indirect clients and the client of a clearing member that provides indirect clearing services.

(5) Regulation (EU) No 648/2012 requires a CCP to be a designated system under Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems[(3)]. This implies that clearing members of CCPs should qualify as participants within the meaning of that Directive. Therefore to ensure an equivalent level of protection to indirect clients as granted to clients under Regulation (EU) No 648/2012, it is necessary to ensure that clients providing indirect clearing services are credit institutions, investment firms, or equivalent third country credit institutions or investment firms.

(6) Indirect clearing arrangements should be established so as to ensure that indirect clients can obtain an equivalent level of protection as direct clients in a default scenario. Following the failure of a clearing member that facilitates an indirect clearing arrangement, indirect clients should be included in the transfer of client positions to an alternative clearing member under the portability requirements established by Articles 39 and 48 of Regulation (EU) No 648/2012. Appropriate safeguards against client failure should also exist within indirect clearing arrangements and should support transferring indirect client positions to an alternative provider of clearing services.

(7) As indirect clearing arrangements may give rise to specific risks, all the parties included in an indirect clearing arrangement, including clearing members and CCPs, should routinely identify, monitor and manage any material risks arising from the arrangement. Appropriate sharing of information between clients that provide indirect clearing services and clearing members that facilitate those services is especially important in this context. Clearing members should use information provided by clients for risk management purposes only and should prevent the misuse of commercially sensitive information, including through the use of effective barriers between different divisions of a financial institution to avoid conflicts of interest.

(8) When it authorises a CCP to clear a class of OTC derivatives, the competent authority is required to notify the European Securities and Markets Authority (ESMA). This notification should include detailed information which is necessary for ESMA to carry out its assessment process, including information on liquidity and volume of the relevant class of OTC derivatives. Although the information flows from the competent authority to ESMA, it is the CCP having requested the authorisation that should

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initially provide the required information to the competent authorities which may then complement it.

(9) Although all information to be included in the notification from the competent authority to ESMA for the purpose of the clearing obligation may not always be available, especially for new products, estimates that are available should be provided, including a clear indication of the assumptions made. The notification should also contain information pertaining to the counterparties, such as the type and number of counterparties, the steps required to start clearing with a CCP, their legal and operational capacity or their risk management framework in order to allow ESMA to assess the ability of the active counterparties to comply with the clearing obligation without disruption to the market.

(10) The notification from the competent authority to ESMA should contain information on the degree of standardisation, liquidity and price availability, in order for ESMA to assess whether a class of OTC derivatives should be subject to the clearing obligation. The criteria related to the standardisation of the contractual terms and operational processes of a relevant class of OTC are an indicator of the standardisation of the economic terms of a class of OTC derivatives as it is only when such economic terms are standardised that the contractual terms and operational processes can be standardised. The criteria related to liquidity and price availability are assessed by ESMA with different considerations than the assessment made by the competent authority while authorising the CCP. Liquidity in this context is assessed on a wider perspective and differs from the liquidity after the clearing obligation would apply. In particular, the fact that a contract is sufficiently liquid to be cleared by one CCP does not necessarily imply that it should be subject to the clearing obligation. ESMA's assessment should not replicate or duplicate the review already performed by the competent authority.

(11) The information to be provided by the competent authority for the purpose of the clearing obligation should enable ESMA to assess the availability of pricing information. In this respect, the access of a CCP to pricing information at one point in time does not mean that market participants could access pricing information in the future. As a result, the fact that a CCP has access to the necessary price information to manage the risks of clearing derivative contracts within a certain class of OTC derivatives does not automatically imply that this class of OTC derivatives should be subject to the clearing obligation.

(12) The level of details available in the register of classes of OTC derivative contracts subject to the clearing obligation depends on the relevance of these details to identify each class of OTC derivative contracts. As a result the level of details in the register may differ for different classes of OTC derivative contracts.

(13) Allowing access by multiple CCPs to a trading venue could broaden participant access to that venue and therefore enhance overall liquidity. It is nonetheless necessary in such circumstances to specify the notion of liquidity fragmentation within a venue in the case that it may threaten the smooth and orderly functioning of markets for the class of financial instruments for which the request is made.

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(14) The assessment of the competent authority of the trading venue to which a CCP has requested access and of the competent authority of the CCP should be based on the mechanisms available to prevent liquidity fragmentation within a trading venue.

(15) To prevent liquidity fragmentation all participants in a trading venue should be able to clear all transactions executed between them. However, it would not be proportionate to require all clearing members of an existing CCP to become also clearing members of any new CCP serving such trading venue. Where there are entities which are clearing members of both CCPs, they may facilitate the transfer and clearing of transactions executed by market participants separately served by the two CCPs, to limit the risk of liquidity fragmentation. Nevertheless, it is important that a request to access a trading venue by a CCP does not fragment liquidity in a manner that would increase the risks to which the existing CCP is exposed.

(16) According to Article 8(4) of Regulation (EU) No 648/2012, a request to access a trading venue by a CCP should not require interoperability, and, consequently, this Regulation should not prescribe interoperability as the only way to resolve liquidity fragmentation. However, this Regulation should not preclude CCPs from entering into such an arrangement on a voluntary basis if the necessary conditions for its establishment are fulfilled.

(17) In order to establish which OTC derivative contracts are objectively measurable as reducing risks directly relating to commercial activity or treasury financing activity, non-financial counterparties should apply one of the criteria provided for in this Regulation including the accounting definition based on International Financial Reporting Standards (IFRS) rules. The accounting definition can be used by counterparties even though they do not apply IFRS rules. For those non-financial counterparties that may use local accounting rules, it is expected that most of the contracts classified as hedging under such local accounting rules would fall within the general definition of contracts reducing risks directly related to commercial activity or treasury financing activity provided for in this Regulation.

(18) In some circumstances, it may not be possible to hedge a risk by using a directly related derivative contract, a contract with exactly the same underlying and settlement date as the risk being covered. In such case, the non-financial counterparty may use proxy hedging through a closely correlated instrument to cover its exposure such as an instrument with a different but very close underlying in terms of economic behaviour. Additionally, certain groups of non-financial counterparties which enter into OTC derivative contracts, via a single entity, to hedge their risk in relation to the overall risks of the group may use macro or portfolio hedging. Those macro, portfolio or proxy hedging OTC derivative contracts may constitute hedging for the purpose of this Regulation and should be considered against the criteria for establishing which OTC derivative contracts are objectively reducing risks.

(19) A risk may evolve over time and in order to adapt to the evolution of the risk, OTC derivative contracts initially executed for reducing risk related to commercial or treasury financing activity may have to be offset through the use of additional OTC derivative contracts. As a result, hedging of a risk may be achieved by a combination

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of OTC derivative contracts including offsetting OTC derivative contracts that close out those OTC derivative contracts that have become unrelated to the commercial or treasury financing risk.

(20) The range of risks directly related to commercial and treasury financing activities is very wide and varies across different economic sectors. Risks related to commercial activities are typically attached to inputs to the production function of a company as well as products and services that it sells or provides. Treasury financing activities typically relate to the management of the short- and long-term funding of an entity, including its debt, and the ways it invests the financial resources it generates or holds, including cash management. Treasury financing and commercial activities can be affected by common sources of risks, such as foreign exchange, commodity prices, inflation or credit risk. Given that OTC derivatives are concluded to hedge a particular risk, when analysing the risks directly related to commercial or treasury financing activities, those risks should be defined in a consistent manner covering both activities. In addition, separating the two concepts might have unintended consequences, given that depending on the sector in which non-financial counterparties operate, a particular risk would be hedged under treasury financing or commercial activity.

(21) While the clearing thresholds should be set taking into account the systemic relevance of the related risks, it is important to consider that the OTC derivatives that reduce risks are excluded from the computation of the clearing thresholds and that the clearing thresholds allow an exception to the principle of the clearing obligation for those OTC derivative contracts which may be considered as not concluded for hedging purposes. More specifically, the value of the clearing thresholds should be reviewed periodically and should be determined by class of OTC derivative contracts. The classes of OTC derivatives determined for the purpose of the clearing thresholds may be different from the classes of OTC derivatives for the purpose of the clearing obligation. In setting the value of the clearing thresholds, due consideration should be given to the need to define a single indicator reflecting the systemic relevance of the sum of net positions and exposures per counterparty and per asset class of OTC derivatives. Furthermore, the clearing thresholds being used by non-financial counterparties should be simple to implement.

(22) The determination of the value of the clearing thresholds should take into account the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives in accordance with Regulation (EU) No 648/2012. However, it should be considered that these net positions and exposures are different from a net exposure across counterparties and across asset class. Furthermore, in accordance with Regulation (EU) No 648/2012 these net positions should be added up in order to determine the data to be considered for the setting of the clearing thresholds. It is the total gross sum resulting from the addition of these net positions that should be considered when setting the clearing thresholds. The gross notional value resulting from that addition should be used as a reference for setting the clearing thresholds.

(23) In addition, the structure of the OTC derivatives activity of non-financial counterparties usually leads to a low level of netting as OTC derivative contracts are concluded in