Commission Delegated Regulation (EU) 2019/397 of 19 December 2018 amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative contracts not cleared by a CCP (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2019/397

of 19 December 2018

amending Delegated Regulation (EU) 2016/2251 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date until which counterparties may continue to apply their risk-management procedures for certain OTC derivative 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 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) 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 requirement to exchange collateral set out in Regulation (EU) No 648/2012 in respect of over-the-counter ('OTC') derivative contracts not cleared by a central counterparty ('CCP') 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 Regulation (EU) 2016/2251[(2)] specifies different dates of application of the procedures to exchange collateral for non-centrally cleared OTC derivative contracts, 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) 2019/397. (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) Before Regulation (EU) No 648/2012 and Delegated Regulation (EU) 2016/2251 applied, counterparties to non-centrally cleared OTC derivative contracts were not required to exchange collateral, and bilateral trades were therefore not collateralised or they were collateralised on a voluntary basis. If counterparties were required to exchange collateral as a result of novating their contracts to address the withdrawal of the United Kingdom from the Union, the remaining counterparty may not be able to agree to the novation.

(6) 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 in a Member State without being required to exchange collateral in respect of those novated contracts. The date from which they should be required to exchange collateral for the novation of those contracts should be 12 months after the date of application of this amending Regulation.

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

(8) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority to the Commission.

(9) It is necessary to facilitate the implementation of efficient solutions by market participants as quickly as possible. Therefore, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority have analysed the potential related costs and benefits but have not conducted any open public consultation in accordance with the second subparagraph of Article 10(1) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[(3)], the second subparagraph of Article 10(1) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council[(4)] and the second subparagraph of Article 10(1) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(5)]. For the same reason, this Regulation should enter into force on the day following that of its publication.

(10) 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:

***Changes to legislation:** There are currently no known outstanding effects for the Commission Delegated Regulation (EU) 2019/397. (See end of Document for details)*

Article 1

Amendment to Delegated Regulation (EU) 2016/2251

Article 35 of Delegated Regulation (EU) 2016/2251 is replaced by the following:

Article 35

Transitional provisions

Counterparties referred to in Article 11(3) of Regulation (EU) No 648/2012 may continue to apply the risk-management procedures that they have in place at the date of application of this Regulation in respect of non-centrally cleared OTC derivative contracts entered into or novated between 16 August 2012 and the relevant dates of application of this Regulation.

Counterparties referred to in Article 11(3) of Regulation (EU) No 648/2012 may also continue to apply the risk-management procedures that they have in place at 14 March 2019 in respect of non-centrally cleared OTC derivative contracts fulfilling all of the following conditions:

(a) the non-centrally cleared OTC derivative contracts have been entered into or novated before either the relevant dates of application of this Regulation as set out in Articles 36, 37 and 38 of this Regulation or 14 March 2019, whichever is earlier;

(b) the non-centrally cleared OTC derivative contracts are novated for the sole purpose of replacing a counterparty established in the United Kingdom with a counterparty established in a Member State;

(c) the non-centrally cleared OTC derivative contracts are novated between the date following that on which Union law ceases to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union and either of the following, whichever is later:

  (i) the relevant dates of application set out in Articles 36, 37 and 38 of this Regulation; or

  (ii) 12 months from the date following that on which Union law ceases to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union.

Article 2

Entry into force and application

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from the date following that on which the Treaties cease to apply to and in the United Kingdom pursuant to Article 50(3) of the Treaty on European Union.

However, this Regulation shall not apply in any of the following cases:

(a) a withdrawal agreement concluded with the United Kingdom in accordance with Article 50(2) of the Treaty on European Union has entered into force by that date;