

Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (Text with EEA relevance)

Article 1

Regulation (EU) No 648/2012 is amended as follows:

- (1) in Article 2, point (8) is replaced by the following:
 - (8) “financial counterparty” means:
 - (a) an investment firm authorised in accordance with Directive 2014/65/EU of the European Parliament and of the Council⁽¹⁾;
 - (b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council⁽²⁾;
 - (c) an insurance undertaking or reinsurance undertaking authorised in accordance with Directive 2009/138/EC of the European Parliament and of the Council⁽³⁾;
 - (d) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC, unless that UCITS is set up exclusively for the purpose of serving one or more employee share purchase plans;
 - (e) an institution for occupational retirement provision (IORP), as defined in point (1) of Article 6 of Directive (EU) 2016/2341 of the European Parliament and of the Council⁽⁴⁾;
 - (f) an alternative investment fund (AIF), as defined in point (a) of Article 4(1) of Directive 2011/61/EU, which is either established in the Union or managed by an alternative investment fund manager (AIFM) authorised or registered in accordance with that Directive, unless that AIF is set up exclusively for the purpose of serving one or more employee share purchase plans, or unless that AIF is a securitisation special purpose entity as referred to in point (g) of Article 2(3) of Directive 2011/61/EU, and, where relevant, its AIFM established in the Union;
 - (g) a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council⁽⁵⁾;
- (2) Article 4 is amended as follows:
 - (a) paragraph 1 is amended as follows:
 - (i) points (a)(i) to (a)(iv) are replaced by the following:

- (i) between two financial counterparties that meet the conditions set out in the second subparagraph of Article 4a(1);
 - (ii) between a financial counterparty that meets the conditions set out in the second subparagraph of Article 4a(1) and a non-financial counterparty that meets the conditions set out in the second subparagraph of Article 10(1);
 - (iii) between two non-financial counterparties that meet the conditions set out in the second subparagraph of Article 10(1);
 - (iv) between, on the one side, a financial counterparty that meets the conditions set out in the second subparagraph of Article 4a(1) or a non-financial counterparty that meets the conditions set out in the second subparagraph of Article 10(1), and, on the other side, an entity established in a third country that would be subject to the clearing obligation if it were established in the Union;;
- (ii) point (b) is replaced by the following:
- (b) they are entered into or novated on or after the date on which the clearing obligation takes effect, provided that, on the date they are entered into or novated, both counterparties meet the conditions set out in point (a);;
- (b) the following paragraph is inserted:

3a. Without being obliged to contract, clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable, non-discriminatory and transparent commercial terms. Such clearing members and clients shall take all reasonable measures to identify, prevent, manage and monitor conflicts of interest, in particular between the trading unit and the clearing unit, that may adversely affect the fair, reasonable, non-discriminatory and transparent provision of clearing services. Such measures shall also be taken where trading and clearing services are provided by different legal entities belonging to the same group.

Clearing members and clients shall be permitted to control the risks related to the clearing services offered.

The Commission is empowered to adopt delegated acts in accordance with Article 82 to supplement this Regulation by specifying the conditions under which the commercial terms referred to in the first subparagraph of this paragraph are to be considered to be fair, reasonable, non-discriminatory and transparent, based on the following:

- a fairness and transparency requirements with respect to fees, prices, discount policies and other general contractual terms and conditions regarding the price list, without prejudice to the confidentiality of contractual arrangements with individual counterparties;

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- b factors that constitute reasonable commercial terms to ensure unbiased and rational contractual arrangements;
 - c requirements that facilitate clearing services on a fair and non-discriminatory basis, having regard to related costs and risks, so that any differences in prices charged are proportionate to costs, risks and benefits; and
 - d risk control criteria for the clearing member or client related to the clearing services offered.;
- (3) the following article is inserted:

Article 4a

Financial counterparties that are subject to the clearing obligation

- 1 Every 12 months, a financial counterparty taking positions in OTC derivative contracts may calculate its aggregate month-end average position for the previous 12 months in accordance with paragraph 3.

Where a financial counterparty does not calculate its positions, or where the result of that calculation exceeds any of the clearing thresholds specified pursuant to point (b) of Article 10(4), the financial counterparty shall:

- a immediately notify ESMA and the relevant competent authority thereof, and, where relevant, indicate the period used for the calculation;
 - b establish clearing arrangements within four months after the notification referred to in point (a) of this subparagraph; and
 - c become subject to the clearing obligation referred to in Article 4 for all OTC derivative contracts pertaining to any class of OTC derivatives which is subject to the clearing obligation entered into or novated more than four months following the notification referred to in point (a) of this subparagraph.
- 2 A financial counterparty that is subject to the clearing obligation referred to in Article 4 on 17 June 2019 or that becomes subject to the clearing obligation in accordance with the second subparagraph of paragraph 1, shall remain subject to that obligation and shall continue clearing until that financial counterparty demonstrates to the relevant competent authority that its aggregate month-end average position for the previous 12 months does not exceed the clearing threshold specified pursuant to point (b) of Article 10(4).

The financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of that position.

- 3 In calculating the positions referred to in paragraph 1, the financial counterparty shall include all OTC derivative contracts entered into by that financial counterparty or entered into by other entities within the group to which that financial counterparty belongs.

Notwithstanding the first subparagraph, for UCITS and AIFs, the positions referred to in paragraph 1 shall be calculated at the level of the fund.

UCITS management companies which manage more than one UCITSs and AIFMs which manage more than one AIF shall be able to demonstrate to the relevant competent authority that the calculation of positions at the fund level does not lead to:

- a a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; and
- b a circumvention of the clearing obligation.

The relevant competent authorities of the financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.;

(4) Article 5 is amended as follows:

(a) paragraph 1 is replaced by the following:

1. Where a competent authority authorises a CCP to clear a class of OTC derivatives under Article 14 or 15, or where a class of OTC derivatives which a CCP intends to start clearing is covered by an existing authorisation granted in accordance with Article 14 or 15, the competent authority shall immediately notify ESMA of that authorisation or of the class of OTC derivatives which the CCP intends to start clearing.;

(b) in paragraph 2, point (c) is deleted;

(5) Article 6 is amended as follows:

(a) in paragraph 2, point (e) is deleted;

(b) paragraph 3 is replaced by the following:

3. Where a CCP is no longer authorised or recognised in accordance with this Regulation to clear a specific class of OTC derivatives, ESMA shall immediately remove that CCP from the public register in relation to that class of OTC derivatives.;

(6) the following article is inserted:

Article 6a

Suspension of clearing obligation

1 ESMA may request that the Commission suspend the clearing obligation referred to in Article 4(1) for specific classes of OTC derivatives or for a specific type of counterparty, where one of the following conditions is met:

- a the specific classes of OTC derivatives are no longer suitable for central clearing in accordance with the criteria referred to in the first subparagraph of Article 5(4) and in Article 5(5);
- b a CCP is likely to cease clearing those specific classes of OTC derivatives and no other CCP is able to clear those specific classes of OTC derivatives without interruption;
- c the suspension of the clearing obligation for those specific classes of OTC derivatives or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability or to the orderly functioning of financial markets in the Union and that suspension is proportionate to those aims.

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For the purposes of point (c) of the first subparagraph, prior to the request referred to in the first subparagraph, ESMA shall consult the ESRB and the competent authorities designated in accordance with Article 22.

The request referred to in the first subparagraph shall be accompanied by evidence that at least one of the conditions set out therein is met.

Where the suspension of the clearing obligation is considered by ESMA to be a material change in the criteria for the trading obligation to take effect referred to in Article 32(5) of Regulation (EU) No 600/2014, the request referred to in the first subparagraph of this paragraph may also include a request to suspend the trading obligation laid down in Article 28(1) and (2) of that Regulation for the same specific classes of OTC derivatives that are subject to the request to suspend the clearing obligation.

- 2 Under the conditions set out in paragraph 1 of this Article, the competent authorities responsible for the supervision of clearing members and the competent authorities designated in accordance with Article 22 may request that ESMA submit a request for a suspension of the clearing obligation to the Commission. The request by the competent authority shall provide reasons and submit evidence showing that at least one of the conditions set out in the first subparagraph of paragraph 1 of this Article is met.

ESMA shall, within 48 hours of receipt of the request from the competent authority referred to in the first subparagraph of this paragraph, on the basis of the reasons and evidence provided by the competent authority, either request that the Commission suspend the clearing obligation referred to in Article 4(1) or reject the request referred to in the first subparagraph of this paragraph. ESMA shall inform the competent authority concerned of its decision. Where ESMA rejects the request by the competent authority, it shall provide reasons therefor in writing.

- 3 The requests referred to in paragraphs 1 and 2 shall not be made public.

- 4 The Commission shall, without undue delay after receipt of the request referred to in paragraph 1, on the basis of the reasons and evidence provided by ESMA, either suspend the clearing obligation for the specific classes of OTC derivatives or for the specific type of counterparty referred to in paragraph 1 by way of an implementing act, or reject the requested suspension. Where the Commission rejects the requested suspension, it shall provide reasons therefor in writing to ESMA. The Commission shall immediately inform the European Parliament and the Council thereof and forward them the reasons provided to ESMA. Such information shall not be made public.

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the procedure referred to in Article 86(3).

- 5 Where requested by ESMA in accordance with the fourth subparagraph of paragraph 1 of this Article, the implementing act suspending the clearing obligation for specific classes of OTC derivatives may also suspend the trading obligation laid down in Article 28(1) and (2) of Regulation (EU) No 600/2014 for the same specific classes of OTC derivatives that are subject to the suspension of the clearing obligation.

- 6 The suspension of the clearing obligation and, where applicable, the trading obligation shall be communicated to ESMA and shall be published in the *Official*

Journal of the European Union, on the Commission's website and in the public register referred to in Article 6.

- 7 The suspension of the clearing obligation referred to in paragraph 4 shall be valid for an initial period of no more than three months from the date of application of that suspension.

The suspension of the trading obligation referred to in paragraph 5 shall be valid for the same initial period.

- 8 Where the grounds for the suspension continue to apply, the Commission may, by way of an implementing act, extend the suspension referred to in paragraph 4 for additional periods of no more than three months, with the total period of the suspension of no more than 12 months. Any extensions of the suspension shall be published in accordance with paragraph 6.

The implementing act referred to in the first subparagraph of this paragraph shall be adopted in accordance with the procedure referred to in Article 86(3).

ESMA shall, in sufficient time before the end of the suspension period referred to in paragraph 7 of this Article or of the extension period referred to in the first subparagraph of this paragraph, issue an opinion to the Commission on whether the grounds for the suspension continue to apply. For the purposes of point (c) of the first subparagraph of paragraph 1 of this Article, ESMA shall consult the ESRB and the competent authorities designated in accordance with Article 22. ESMA shall send a copy of that opinion to the European Parliament and to the Council. That opinion shall not be made public.

The implementing act extending the suspension of the clearing obligation may also extend the period of the suspension of the trading obligation referred to in paragraph 7.

The extension of the suspension of the trading obligation shall be valid for the same period as the extension of the suspension of the clearing obligation.;

- (7) Article 9 is amended as follows:

- (a) paragraph 1 is replaced by the following:

1. Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported in accordance with paragraphs 1a to 1f of this Article to a trade repository registered in accordance with Article 55 or recognised in accordance with Article 77. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

The reporting obligation shall apply to derivative contracts which:

- a were entered into before 12 February 2014 and remain outstanding on that date;
- b were entered into on or after 12 February 2014.

Notwithstanding Article 3, the reporting obligation shall not apply to derivative contracts within the same group where at least one of the counterparties is a non-financial counterparty or would be qualified as a non-financial counterparty if it were established in the Union, provided that:

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- a both counterparties are included in the same consolidation on a full basis;
- b both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures; and
- c the parent undertaking is not a financial counterparty.

Counterparties shall notify their competent authorities of their intention to apply the exemption referred to in the third subparagraph. The exemption shall be valid unless the notified competent authorities do not agree upon fulfilment of the conditions referred to in the third subparagraph within three months of the date of notification.;

(b) the following paragraphs are inserted:

1a. Financial counterparties shall be solely responsible, and legally liable, for reporting on behalf of both counterparties, the details of OTC derivative contracts concluded with a non-financial counterparty that does not meet the conditions referred to in the second subparagraph of Article 10(1), as well as for ensuring the correctness of the details reported.

To ensure that the financial counterparty has all the data it needs to fulfil the reporting obligation, the non-financial counterparty shall provide the financial counterparty with the details of the OTC derivative contracts concluded between them, which the financial counterparty cannot be reasonably expected to possess. The non-financial counterparty shall be responsible for ensuring that those details are correct.

Notwithstanding the first subparagraph, non-financial counterparties who have already invested in a reporting system may decide to report the details of their OTC derivative contracts with financial counterparties to a trade repository. In that case, the non-financial counterparties shall inform the financial counterparties with which they have concluded OTC derivative contracts of their decision prior to reporting those details. In that situation, the non-financial counterparties shall be responsible, and legally liable, for reporting those details and for ensuring their correctness.

A non-financial counterparty that does not meet the conditions referred to in the second subparagraph of Article 10(1) and that concludes an OTC derivative contract with an entity established in a third country shall not be required to report pursuant to this Article and shall not be legally liable for reporting or ensuring the correctness of the details of such OTC derivative contracts, provided that:

- a that third-country entity would be qualified as a financial counterparty if it were established in the Union;
- b the legal regime for reporting to which that third-country entity is subject has been declared equivalent pursuant to Article 13; and
- c the third-country financial counterparty has reported such information pursuant to that third-country legal regime for reporting to a trade repository that is subject to a legally binding and enforceable obligation to grant the entities referred to in Article 81(3) direct and immediate access to the data.

1b The management company of a UCITS shall be responsible, and legally liable, for reporting the details of OTC derivative contracts to which

that UCITS is a counterparty, as well as for ensuring the correctness of the details reported.

1c The AIFM shall be responsible, and legally liable, for reporting the details of OTC derivative contracts to which the relevant AIF is a counterparty, as well as for ensuring the correctness of the details reported.

1d The authorised entity that is responsible for managing and acting on behalf of an IORP that, in accordance with national law, does not have legal personality shall be responsible, and legally liable, for reporting the details of OTC derivative contracts to which that IORP is a counterparty, as well as for ensuring the correctness of the details reported.

1e Counterparties and CCPs that are required to report the details of derivative contracts shall ensure that such details are reported correctly and without duplication.

1f Counterparties and CCPs that are subject to the reporting obligation referred to in paragraph 1 may delegate that reporting obligation.;

(c) paragraph 6 is replaced by the following:

6. To ensure uniform conditions of application of paragraphs 1 and 3, ESMA shall, in close cooperation with the ESCB, develop draft implementing technical standards specifying:

- a the data standards and formats for the information to be reported, which shall include at least the following:
 - (i) global legal entity identifiers (LEIs);
 - (ii) international securities identification numbers (ISINs);
 - (iii) unique trade identifiers (UTIs);
- b the methods and arrangements for reporting;
- c the frequency of the reports;
- d the date by which derivative contracts are to be reported.

In developing those draft implementing technical standards, ESMA shall take into account international developments and standards agreed upon at Union or global level, and their consistency with the reporting requirements laid down in Article 4 of Regulation (EU) 2015/2365⁽⁶⁾ and Article 26 of Regulation (EU) No 600/2014.

ESMA shall submit those draft implementing technical standards to the Commission by 18 June 2020.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.;

(8) Article 10 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

1. Every 12 months, a non-financial counterparty taking positions in OTC derivative contracts may calculate its aggregate month-end average position for the previous 12 months in accordance with paragraph 3.

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Where a non-financial counterparty does not calculate its positions, or where the result of that calculation in respect of one or more classes of OTC derivatives exceeds the clearing thresholds specified pursuant to point (b) of the first subparagraph of paragraph 4, that non-financial counterparty shall:

- a immediately notify ESMA and the relevant competent authority thereof, and, where relevant, indicate the period used for the calculation;
- b establish clearing arrangements within four months of the notification referred to in point (a) of this subparagraph;
- c become subject to the clearing obligation referred to in Article 4 for the OTC derivative contracts entered into or novated more than four months following the notification referred to in point (a) of this subparagraph that pertain to those asset classes in respect of which the result of the calculation exceeds the clearing thresholds or, where the non-financial counterparty has not calculated its position, that pertain to any class of OTC derivatives which is subject to the clearing obligation.

2 A non-financial counterparty that is subject to the clearing obligation referred to in Article 4 on 17 June 2019 or that becomes subject to the clearing obligation in accordance with the second subparagraph of paragraph 1 of this Article, shall remain subject to that obligation and shall continue clearing until that non-financial counterparty demonstrates to the relevant competent authority that its aggregate month-end average position for the previous 12 months does not exceed the clearing threshold specified pursuant to point (b) of paragraph 4 of this Article.

The non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end average position for the previous 12 months does not lead to a systematic underestimation of the position.;

(b) the following paragraph is inserted:

2a. The relevant competent authorities of the non-financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.;

(c) in paragraph 4, the fourth subparagraph is replaced by the following:

After consulting the ESRB and other relevant authorities, ESMA shall periodically review the clearing thresholds referred to in point (b) of the first subparagraph and, where necessary taking into account, in particular, the interconnectedness of financial counterparties, propose to amend the regulatory technical standards in accordance with this paragraph.

That periodic review shall be accompanied by a report by ESMA on the subject.;

(9) in Article 11, paragraph 15 is amended as follows:

(a) the first subparagraph is amended as follows:

(i) point (a) is replaced by the following:

- (a) the risk-management procedures, including the levels and type of collateral and segregation arrangements referred to in paragraph 3;;
 - (ii) the following point is inserted:
 - (aa) the supervisory procedures to ensure initial and ongoing validation of those risk-management procedures;;
 - (b) the third subparagraph is replaced by the following:

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.;
- (10) in Article 38, the following paragraphs are added:
 - 6. A CCP shall provide its clearing members with a simulation tool allowing them to determine the amount of additional initial margin, on a gross basis, that the CCP may require upon the clearing of a new transaction. That tool shall only be accessible on a secured access basis, and the results of the simulation shall not be binding.
 - 7. A CCP shall provide its clearing members with information on the initial margin models it uses. That information shall:
 - a clearly explain the design of the initial margin model and how it operates;
 - b clearly describe the key assumptions and limitations of the initial margin model and the circumstances under which those assumptions are no longer valid;
 - c be documented.;
- (11) in Article 39, the following paragraph is added:
 - 11. Member States' national insolvency laws shall not prevent a CCP from acting in accordance with Article 48(5), (6) and (7) with regard to the assets and positions recorded in accounts as referred to in paragraphs 2 to 5 of this Article.;
- (12) Article 56 is amended as follows:
 - (a) paragraph 1 is replaced by the following:
 - 1. For the purposes of Article 55(1), a trade repository shall submit either of the following to ESMA:
 - a an application for registration;
 - b an application for an extension of the registration where the trade repository is already registered under Chapter III of Regulation (EU) 2015/2365.;
 - (b) paragraph 3 is replaced by the following:
 - 3. To ensure the consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the following:

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- a the details of the application for the registration referred to in point (a) of paragraph 1;
- b the details of the simplified application for the extension of the registration referred to in point (b) of paragraph 1.

ESMA shall submit those draft regulatory technical standards to the Commission by 18 June 2020.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.;

- (c) paragraph 4 is replaced by the following:

4. To ensure uniform conditions of application of paragraph 1, ESMA shall develop draft implementing technical standards specifying the following:

- a the format of the application for registration referred to in point (a) of paragraph 1;
- b the format of the application for an extension of the registration referred to in point (b) of paragraph 1.

With regard to point (b) of the first subparagraph, ESMA shall develop a simplified format.

ESMA shall submit those draft implementing technical standards to the Commission by 18 June 2020.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.;

- (13) in Article 62, paragraph 5 is replaced by the following:

5. If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires a national competent authority to be authorised by a judicial authority in accordance with national rules, ESMA shall also apply for such authorisation. ESMA may also apply for such authorisation as a precautionary measure.;

- (14) Article 63 is amended as follows:

- (a) paragraphs 1 and 2 are replaced by the following:

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections on any business premises, land or property of the legal persons referred to in Article 61(1). Where the proper conduct and efficiency of the inspection so require, ESMA may conduct the on-site inspection without prior announcement.

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises, land or property of the legal persons who are subject to an investigation decision adopted by ESMA and shall have all the powers referred to in Article 62(1). They shall also

have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.;

(b) paragraph 8 is replaced by the following:

8. If the on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7 requires a national competent authority to be authorised by a judicial authority in accordance with national rules, ESMA shall also apply for such authorisation. ESMA may also apply for such authorisation as a precautionary measure.;

(15) Article 64 is amended as follows:

(a) paragraph 4 is replaced by the following:

4. When submitting the file with the findings referred to in paragraph 3 to ESMA, the investigation officer shall notify the persons who are subject to the investigations. Such persons shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or to ESMA's internal preparatory documents.;

(b) paragraph 8 is replaced by the following:

8. ESMA shall refer matters to the relevant authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts that it knows to be liable to constitute a criminal offence under the applicable law. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where it is aware that a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of *res judicata* as the result of criminal proceedings under national law.;

(16) in Article 65, paragraph 2 is amended as follows:

(a) in point (a), 'EUR 20 000' is replaced by 'EUR 200 000';

(b) point (b) is replaced by the following.;

(b) for the infringements referred to in points (a), (b) and (d) to (k) of Section I of Annex I, and in points (a), (b) and (h) of Section II of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed EUR 100 000.;

(c) the following point is added:

(c) for the infringements referred to in Section IV of Annex I, the amounts of the fines shall be at least EUR 5 000 and shall not exceed EUR 10 000.;

(17) in Article 67, paragraph 1 is replaced by the following:

1. Before taking any decision under Article 73(1) and on a periodic penalty payment under Article 66, ESMA shall give the persons who are subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons who are subject to the proceedings have had an opportunity to comment.

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The first subparagraph of this paragraph shall not apply to the decisions referred to in points (a), (c) and (d) of Article 73(1) if urgent action is needed in order to prevent significant and imminent damage to the financial system or to prevent significant and imminent damage to the integrity, transparency, efficiency and orderly functioning of financial markets, including to the stability or the correctness of data reported to a trade repository. In such a case, ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.;

(18) in Article 72, paragraph 2 is replaced by the following:

2. The amount of any fee charged to a trade repository shall cover all reasonable administrative costs incurred by ESMA in relation to its registration and ESMA's supervisory activities and shall be proportionate to the turnover of the trade repository concerned and the type of registration and supervision exercised by ESMA.;

(19) the following article is inserted:

Article 76a

Mutual direct access to data

1 Where necessary for the exercise of their duties, relevant authorities of third countries in which one or more trade repositories are established shall have direct access to information in trade repositories established in the Union, provided that the Commission has adopted an implementing act in accordance with paragraph 2 to that effect.

2 Upon the submission of a request by the authorities referred to in paragraph 1 of this Article, the Commission may adopt implementing acts, in accordance with the examination procedure referred to in Article 86(2), determining whether the legal framework of the third country of the requesting authority fulfils all of the following conditions:

- a trade repositories established in that third country are duly authorised;
- b effective supervision and enforcement of trade repositories takes place in that third country on an ongoing basis;
- c guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and they are at least equivalent to those set out in this Regulation;
- d trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to grant the entities referred to in Article 81(3) direct and immediate access to the data.;

(20) in Article 78, the following paragraphs are added:

9. A trade repository shall establish the following procedures and policies:
- a procedures for the effective reconciliation of data between trade repositories;
 - b procedures to verify the completeness and correctness of the data reported;
 - c policies for the orderly transfer of data to other trade repositories where requested by the counterparties or CCPs referred to in Article 9 or where otherwise necessary.

10 To ensure the consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying:

- a the procedures for the reconciliation of data between trade repositories;
- b the procedures to be applied by the trade repository to verify the compliance by the reporting counterparty or submitting entity with the reporting requirements and to verify the completeness and correctness of the data reported under Article 9.

ESMA shall submit those draft regulatory technical standards to the Commission by 18 June 2020.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.;

(21) in Article 80, the following paragraph is inserted:

5a. Upon request, a trade repository shall provide counterparties that are not required to report the details of their OTC derivative contracts pursuant to Article 9(1a) to (1d) and counterparties and CCPs which have delegated their reporting obligation pursuant to Article 9(1f) with access to the information reported on their behalf.;

(22) Article 81 is amended as follows:

- (a) in paragraph 3, the following point is added:
 - (q) the relevant authorities of a third country in respect of which an implementing act pursuant to Article 76a has been adopted.;

(b) paragraph 5 is replaced by the following:

5. In order to ensure the consistent application of this Article, ESMA shall, after consulting the members of the ESCB, develop draft regulatory technical standards specifying the following:

- a the information to be published or made available in accordance with paragraphs 1 and 3;
- b the frequency of publication of the information referred to in paragraph 1;
- c the operational standards required to aggregate and compare data across trade repositories and for the entities referred to in paragraph 3 to access that information;
- d the terms and conditions, the arrangements and the required documentation under which trade repositories grant access to the entities referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 18 June 2020.

In developing those draft regulatory technical standards, ESMA shall ensure that the publication of the information referred to paragraph 1 does not reveal the identity of any party to any contract.

Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first

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subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.;

- (23) in Article 82, paragraphs 2 to 6 are replaced by the following:
2. The delegation of power referred to in Articles 1(6), 4(3a), 64(7), Article 70, Articles 72(3), and 85(2) shall be conferred to the Commission for an indeterminate period of time.
 3. The delegation of power referred to in Articles 1(6), 4(3a), 64(7), Article 70, Articles 72(3) and 85(2) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
 4. Before adopting a delegated act, the Commission shall endeavour to consult ESMA and shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
 5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
 6. A delegated act adopted pursuant to Articles 1(6), 4(3a), 64(7), Article 70, Articles 72(3) and 85(2) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.;
- (24) Article 85 is amended as follows:
- (a) paragraph 1 is replaced by the following:
 1. By 18 June 2024 the Commission shall assess the application of this Regulation and prepare a general report. The Commission shall submit that report to the European Parliament and to the Council, together with any appropriate proposals.;
 - (b) the following paragraph is inserted:
 - 1a. By 17 June 2023 ESMA shall submit a report to the Commission on the following:
 - a the impact of Regulation (EU) 2019/834 of the European Parliament and of the Council⁽⁷⁾ on the level of clearing by financial and non-financial counterparties and on the distribution of clearing within each type of counterparty, in particular with regard to financial counterparties that have a limited volume of activity in OTC derivatives and with regard to the appropriateness of the clearing thresholds referred to in Article 10(4);
 - b the impact of Regulation (EU) 2019/834 on the quality and accessibility of the data reported to trade repositories, as well as the quality of the information made available by trade repositories;

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- c the changes to the reporting framework, including the take-up and implementation of delegated reporting as laid down in Article 9(1a) and in particular its impact on the reporting burden for non-financial counterparties that are not subject to the clearing obligation;
 - d the accessibility of clearing services, in particular whether the requirement to provide clearing services, directly or indirectly, under fair, reasonable, non-discriminatory and transparent commercial terms referred to in Article 4(3a) has been effective in facilitating access to clearing.;
- (c) paragraphs 2 and 3 are replaced by the following:

2. By 18 June 2020, and every 12 months thereafter until the final extension referred to in the third subparagraph, the Commission shall prepare a report assessing whether viable technical solutions have been developed for the transfer by pension scheme arrangements of cash and non-cash collateral as variation margins and the need for any measures to facilitate those viable technical solutions.

ESMA shall, by 18 December 2019, and every 12 months thereafter until the final extension referred to in the third subparagraph, in cooperation with EIOPA, EBA and the ESRB, submit a report to the Commission, assessing the following:

- a whether CCPs, clearing members and pension scheme arrangements have undertaken an appropriate effort and have developed viable technical solutions facilitating the participation of such arrangements in central clearing by posting cash and non-cash collateral as variation margins, including the implications of those solutions on market liquidity and procyclicality and their potential legal or other implications;
- b the volume and the nature of the activity of pension scheme arrangements in cleared and non-cleared OTC derivatives markets, within each asset class, and any related systemic risk to the financial system;
- c the consequences of pension scheme arrangements fulfilling the clearing requirement on their investment strategies, including any shift in their cash and non-cash asset allocation;
- d the implications of the clearing thresholds specified pursuant to point (b) of Article 10(4) for pension scheme arrangements;
- e the impact of other legal requirements on the cost differentials between cleared and non-cleared OTC derivative contracts, including margin requirements for non-cleared derivatives and the calculation of the leverage ratio in accordance with Regulation (EU) No 575/2013;
- f whether any further measures are necessary to facilitate a clearing solution for pension scheme arrangements.

The Commission may adopt a delegated act in accordance with Article 82 to extend the two-year period referred to in Article 89(1) twice, each time by one year, where it concludes that no viable technical solution has been developed and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remains unchanged.

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CCPs, clearing members and pension scheme arrangements shall make their best efforts to contribute to the development of viable technical solutions that facilitate the clearing of OTC derivative contracts by such arrangements.

The Commission shall set up an expert group composed of representatives of CCPs, clearing members, pension scheme arrangements and other relevant parties to such viable technical solutions to monitor their efforts and assess the progress made in the development of viable technical solutions that facilitate the clearing of OTC derivative contracts by pension scheme arrangements, including the transfer by such arrangements of cash and non-cash collateral as variation margins. That expert group shall meet at least every six months. The Commission shall consider the efforts made by CCPs, clearing members and pension scheme arrangements when drafting its report pursuant to the first subparagraph.

3 By 18 December 2020 the Commission shall prepare a report assessing:

- a whether the obligations to report transactions under Article 26 of Regulation (EU) No 600/2014 and under this Regulation create a duplicative transaction reporting obligation for non-OTC derivatives and whether reporting of non-OTC transactions could be reduced or simplified for all counterparties without undue loss of information;
- b the necessity and appropriateness of aligning the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/834 to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation;
- c whether any trades that directly result from post-trade risk reduction services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1), taking into account the extent to which those services mitigate risk, in particular counterparty credit risk and operational risk, the potential for circumvention of the clearing obligation and the potential disincentive to central clearing.

The Commission shall submit the report referred to in the first subparagraph to the European Parliament and to the Council, together with any appropriate proposals.;

(d) the following paragraph is inserted:

3a. By 18 May 2020, ESMA shall submit a report to the Commission. That report shall assess:

- a the consistency of the reporting requirements for non-OTC derivatives under Regulation (EU) No 600/2014 and under Article 9 of this Regulation, both in terms of the details of the derivative contracts that are to be reported and access to data by the relevant entities and whether those requirements should be aligned;
- b the feasibility of further simplifying the reporting chains for all counterparties, including for all indirect clients, taking into account the need for timely reporting and taking into account the measures

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- adopted pursuant to Article 4(4) of this Regulation and Article 30(2) of Regulation (EU) No 600/2014;
- c the alignment of the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/834 to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation;
 - d in cooperation with the ESRB, whether any trades that directly result from post-trade risk reduction services, including portfolio compression, should be exempted from the clearing obligation referred to in Article 4(1); that report shall:
 - (i) investigate portfolio compression and other available non-price forming post-trade risk reduction services which reduce non-market risks in derivatives portfolios without changing the market risk of the portfolios, such as rebalancing transactions;
 - (ii) explain the purposes and functioning of such post-trade risk reduction services, the extent to which they mitigate risk, in particular counterparty credit risk and operational risk, and assess the need to clear such trades or to exempt them from clearing, in order to manage systemic risk; and
 - (iii) assess to what extent any exemption from the clearing obligation for such services discourages central clearing and may lead to counterparties circumventing the clearing obligation;
 - e whether the list of financial instruments that are considered highly liquid with minimal market and credit risk, in accordance with Article 47, could be extended and whether that list could include one or more money market funds authorised in accordance with Regulation (EU) 2017/1131 of the European Parliament and of the Council⁽⁸⁾;
- (25) in Article 86, the following paragraph is added:
3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.;
- (26) in Article 89(1), the first subparagraph is replaced by the following:
1. Until 18 June 2021, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks that directly relate to the financial solvency of pension scheme arrangements, and to entities established to provide compensation to members of such arrangements in case of default.
- The clearing obligation set out in Article 4 shall not apply to OTC derivative contracts as referred to in the first subparagraph of this paragraph entered into by pension scheme arrangements from 17 August 2018 until 16 June 2019.;
- (27) Annex I is amended in accordance with the Annex to this Regulation.

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- (1) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ([OJ L 173, 12.6.2014, p. 349](#)).
- (2) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ([OJ L 176, 27.6.2013, p. 338](#)).
- (3) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) ([OJ L 335, 17.12.2009, p. 1](#)).
- (4) Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) ([OJ L 354, 23.12.2016, p. 37](#)).
- (5) Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 ([OJ L 257, 28.8.2014, p. 1](#)).’;
- (6) Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 ([OJ L 337, 23.12.2015, p. 1](#)).’;
- (7) Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories ([OJ L 141, 28.5.2019, p. 42](#)).’;
- (8) Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds ([OJ L 169, 30.6.2017, p. 8](#)).’;

Changes to legislation:

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