COMMISSION DELEGATED REGULATION (EU) 2022/750

of 8 February 2022

amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ([1]), and in particular Article 5(2) thereof,

Whereas:

(1) Commission Delegated Regulation (EU) 2015/2205 ([2]) specifies, among others, the classes of over-the-counter (OTC) interest rate derivatives denominated in Euro (EUR), Pound Sterling (GBP), Japanese Yen (JPY) and US Dollar (USD) that are subject to the clearing obligation. Those classes include one class denominated in EUR that references the Euro Overnight Index Average (EONIA) rate as well as several classes denominated in GBP, JPY or USD that reference the London Inter-Bank Offered Rate (LIBOR), whereas EONIA and LIBOR are two benchmarks that are due to cease.

(2) The European Money Markets Institute, the administrator for EONIA, communicated that the cessation of EONIA will take place at the end of 2021. Similarly, the ICE Benchmark Administrator, the administrator for LIBOR, communicated that the cessation of GBP LIBOR, JPY LIBOR and certain fixings of USD LIBOR will also take place at the end of 2021, whereas the publication of all remaining settings of USD LIBOR will cease in June 2023. On 5 March 2021, the Financial Conduct Authority from the United Kingdom confirmed that all LIBOR settings will indeed either cease to be provided by any administrator or no longer be representative. In addition, the Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued a joint statement to strongly encourage counterparties to stop using any of the LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021.

(3) After 31 December 2021, counterparties will hence no longer be able to enter into OTC interest rate derivatives referencing EONIA, GBP LIBOR or JPY LIBOR as those benchmarks will have ceased or are expected to no longer enter into OTC interest rate derivatives referencing USD LIBOR. On that date, there will thus be no volume nor liquidity in derivatives referencing EONIA, GBP LIBOR or JPY LIBOR and that those trades will also not be cleared by central counterparties (CCPs). On that same date, there should also not be any material liquidity in derivatives referencing USD LIBOR. Therefore, the classes of derivatives currently in scope of the clearing obligation and that are referencing EONIA, GBP LIBOR or JPY LIBOR will no longer meet two of the conditions to be subject to the clearing obligation set out in Regulation (EU) No 648/2012, i.e. to have a sufficient level of liquidity and to be cleared by an authorised or recognised CCP, while the classes of derivatives currently in scope of the clearing obligation and that are referencing USD LIBOR will no longer meet one of the conditions to be subject to the clearing obligation set out in Regulation (EU) No 648/2012, i.e. to have a sufficient level of liquidity. It follows that those classes should be removed from the scope of the clearing obligation.

(4) Regulators and market participants have been working on replacement rates for those currencies, and in particular on the development of new risk-free rates, which are now being used as benchmarks in financial instruments and financial contracts. In particular, the euro short-term rate (€STR), the Secured Overnight Financing Rate (SOFR), the Sterling Over Night Index Average (SONIA) and the Tokyo Overnight Average Rate (TONA) risk-free rates are

([1]) OJ L 201, 27.7.2012, p. 1.
([2]) Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

produced for EUR, USD, GBP and JPY respectively. More specifically with respect to the OTC derivative market, it now means that OTC interest rate derivative contracts referencing €STR, SOFR, SONIA and TONA are being traded by counterparties and are being cleared at certain CCPs.

(5) ESMA has been notified of the classes of OTC interest rate derivatives referencing €STR, SOFR, SONIA or TONA that certain CCPs have been authorised to clear. For each of those classes ESMA has assessed the criteria that are essential for subjecting them to the clearing obligation, including the level of standardisation, the volume and liquidity, and the availability of pricing information. With the overarching objective of reducing systemic risk, ESMA has determined the classes of OTC interest rate derivatives referencing some of those risk-free rates that should be subject to the clearing obligation in accordance with the procedure set out in Regulation (EU) No 648/2012. Those classes should be therefore included in the scope of the clearing obligation.

(6) In general, different counterparties need different periods of time for putting in place the necessary arrangements to start clearing their OTC interest rate derivatives subject to the clearing obligation. However, in this case, counterparties have had time to prepare for the benchmark transition and for the planned cessation of EONIA, EUR LIBOR, GBP LIBOR or JPY LIBOR taking place at the end of 2021, including with respect to their clearing arrangements. For counterparties already subject to the clearing obligation and clearing OTC interest rate derivatives denominated in EUR or GBP, clearing the classes referencing the new risk-free rates in those currencies does not require significant changes, if any at all, to their clearing contracts or processes. Indeed, when counterparties have clearing arrangements in place to clear OTC interest rate derivatives denominated in EUR or GBP, then clearing OTC interest rate derivatives referencing the risk-free rates in those currencies does not require establishing and implementing brand new clearing arrangements as was the case when they first started clearing OTC interest rate derivatives denominated in those currencies. Because clearing derivatives referencing the new risk-free rates is part of a bigger implementation preparation to transition away from EONIA and LIBOR and on to new benchmarks, there is no need to introduce an additional phase-in in order to ensure an orderly and timely implementation of that obligation. The changes made to introduce the new classes of OTC interest rate derivatives referencing the risk-free rates and denominated in EUR and GBP should start to apply on the date of entry into force of this Regulation.

(7) Following the joint statement from the Commission, ESMA, ECB Banking Supervision and EBA to strongly encourage counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, counterparties have had to plan for the end of when they could reference USD LIBOR, including with respect to their clearing arrangements. The same considerations with regards to the ability of counterparties having clearing arrangements in place to clear OTC interest rate derivatives denominated in a certain currency to adapt them rather with a rather short turnaround time in order to clear OTC interest rate derivatives referencing the risk-free rates in that same currency also apply to USD, but some additional elements mean that their preparations are less advanced for USD. In particular, CCPs have not yet communicated when they will convert the currently cleared OTC interest rate derivatives referencing USD LIBOR into OTC interest rate derivatives referencing SOFR and it is not yet clear either how mandatory clearing will be adapted in the domestic market for these derivatives. This additional complexity means that counterparties need more time to prepare for the clearing obligation of OTC interest rate derivatives referencing the USD risk-free rate and thus that there is a need to introduce an additional phase-in in order to ensure an orderly and timely implementation of that obligation. The changes made to introduce the new class of OTC interest rate derivatives referencing the risk-free rate denominated in USD should start to apply three months after the date of entry into force of this Regulation.

(8) The planned cessation of EONIA, GBP LIBOR and JPY LIBOR is scheduled for the end of 2021 such that it will not be possible to trade or clear OTC interest rate derivatives referencing those benchmarks as of 3 January 2022 onwards. Similarly, following the joint statement from the Commission, ESMA, ECB Banking Supervision and EBA to strongly encourage counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, counterparties will be expected to not trade or clear OTC interest rate derivatives referencing USD LIBOR as of 3 January 2022 onwards. Instead, from 3 January 2022, counterparties will trade or clear other OTC interest rate derivatives, in particular OTC interest rate derivatives referencing the risk-free rates. This Regulation should thus enter into force without delay after its publication.

(9) Delegated Regulation (EU) 2015/2205 should therefore be amended accordingly.

(10) This Regulation is based on the draft regulatory technical standards submitted to the Commission by ESMA.

(11) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, requested the advice of the Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ([3]), and consulted the European Systemic Risk Board,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2015/2205

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

(1) Article 3 is amended as follows:

(a) the following paragraphs 1a and 1b are inserted:

'1a. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows D.4.1, D.4.2 of Table 4, the clearing obligation for such contracts shall take effect on 18 May 2022.

1b. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows D.4.3 of Table 4, the clearing obligation for such contracts shall take effect on 18 August 2022.';

(b) in paragraph 2, the first subparagraph is replaced by the following:

'By way of derogation from paragraphs 1, 1a and 1b, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union, the clearing obligation shall take effect on:

(a) 30 June 2022 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country;

(b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:

(i) 60 days after the date of entry into force of the equivalence decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country;

(ii) the date when the clearing obligation takes effect pursuant to paragraph 1.';

([3]) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(c) paragraph 3 is replaced by the following:

‘3. By way of derogation from paragraphs 1, 1a, 1b and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect from 18 February 2022 where the following conditions are fulfilled:

(a) the clearing obligation has not been triggered by 18 February 2021;

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

(2) the Annex is replaced by the text in the Annex to this Regulation.

Article 2

Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 8 February 2022.

For the Commission

The President

Ursula VON DER LEYEN

ANNEX

‘ANNEX

Interest rate OTC derivatives classes subject to the clearing obligation

Table 1

Basis swaps classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.1.1	Basis	Euribor	EUR	28D-50Y	Single currency	No	Constant or variable

Table 2

Fixed-to-float interest rate swaps classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.2.1	Fixed-to-float	Euribor	EUR	28D-50Y	Single currency	No	Constant or variable

Table 3

Forward rate agreement classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.3.1	FRA	Euribor	EUR	3D-3Y	Single currency	No	Constant or variable

Table 4

Overnight index swaps classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.4.2	OIS	FedFunds	USD	7D-3Y	Single currency	No	Constant or variable
D.4.1	OIS	€STR	EUR	7D-3Y	Single currency	No	Constant or variable
D.4.2	OIS	SONIA	GBP	7D-50Y	Single currency	No	Constant or variable
D.4.3	OIS	SOFR	USD	7D-3Y	Single currency	No	Constant or variable’