European Securities and Markets Authority

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COMMUNICATION

Clearing obligation for pension scheme arrangements

The European Securities and Markets Authority (ESMA) is aware of challenges that certain pension scheme arrangements (PSA) would face to start clearing their OTC derivative contracts on 17 August 2018, when the current exemption from the clearing obligation under EMIR expires.

EMIR introduced a temporary exemption for PSAs from the clearing obligation to allow time for a suitable technical solution for the transfer of non-cash collateral as variation margins to be developed by CCPs, and provided for two possible extensions of this temporary extension. Following the two possible extensions there is no possibility to further extend this temporary exemption under EMIR.

This situation is reflected in the European Commission's proposal to amend EMIR that was published on 4 May 2017 (Refit). In particular, the Refit proposal includes amongst other measures a further extension of the temporary exemption for PSAs from the clearing obligation, in view of the fact that there is not yet a suitable technical solution for the transfer of non-cash collateral as variation margins.

The two positions adopted respectively by the European Parliament and the Council on the Refit proposal also recognise the absence of a suitable technical solution for the transfer of non-cash collateral as variation margins and thus also appear to support the view of a further extension of the temporary exemption for PSAs from the clearing obligation, although with different lengths of the exemption between the two positions.

Given that the Refit negotiations have not finalised and the resulting text is not expected to start applying by the time the temporary exemption expires, there would be a timing gap during which PSAs would need to have clearing arrangements in place and start clearing their derivative contracts before they are once again no longer required to do so.

From a legal perspective, neither ESMA nor competent authorities possess any formal power to dis-apply a directly applicable EU legal text or even delay the start of some of its obligations. Therefore, any changes to the application of the EU rules would formally need to be implemented through EU legislation, and in this case through the amendments to EMIR resulting from the Refit negotiations.

ESMA nonetheless acknowledges the difficulties that certain PSAs would face to start clearing their OTC derivative contracts on 17 August 2018 in the eventuality the Refit proposal is not applicable by then, and during this expectedly limited period of time until the day when the exemption will be effective again. In this respect, ESMA expects competent authorities to not prioritise their supervisory actions towards entities that are expected to be exempted again in a relatively short period of time and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportionate manner.