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EUROPEAN
COMMISSION

Brussels, XXX
[…](2021) XXX draft

COMMISSION DELEGATED REGULATION (EU) No …/..

of XXX

extending the transitional period referred to in Article 89(1), first subparagraph, of Regulation (EU) No 648/2012 of the European Parliament and of the Council

(Text with EEA relevance)

This draft has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) provides for a temporary exemption from the clearing obligation for Pension Scheme Arrangements (PSAs) meeting certain criteria. This transitional period is set out under Article 89(1) of EMIR and provides further time for central counterparties (CCPs), PSAs and clearing members to develop viable technical solutions which would allow PSAs to meet the cash variation margin calls of CCPs.

The temporary exemption has been extended over the years, since no viable technical solution has emerged. The recent review of EMIR (Regulation (EU) No. 834/2019, “EMIR Refit”) prolongued the exemption until 18 June 2021. In accordance with Article 85(2) it is possible to further extend it by two years maximum through two Commission delegated acts, while the ultimate aim of the Regulation remains central clearing for PSAs.

The Commission is proposing to prolong the existing exemption by an additional year, by means of this Delegated Act.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

“EMIR Refit” provides for a comprehensive framework to assess the progress made in finding viable solutions. According to Article 85(2), the Commission has to prepare yearly reports assessing whether viable technical solutions have been developed for the transfer by PSAs of cash and non-cash collateral as variation margins and the need for any measures to facilitate those viable technical solutions. ESMA, in cooperation with EIOPA, EBA and the ESRB, has to submit yearly reports to the Commission on the topic, to contribute to the Commission’s assessment. Moreover, the Commission is required to set up an expert group composed of representatives of CCPs, clearing members, PSAs and other relevant parties 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 PSAs.

The Commission received the reports by ESMA in April and December 2020; ESMA also held a public consultation between 2 April and 15 June 2020 to gather a broad range of views and data, which fed into its December report.

The Commission organised meetings of the expert group in October 2019 and in April and November 2020 and published its first report to the co-legislators in September 2020 (COM(2020) 574 final of 23.9.2020). In the report the Commission concluded that over the years progress has been made by the relevant stakeholders towards finding solutions: in particular, some CCPs have developed or are in the course of developing types of “facilitated access” to the cleared repo markets, where PSAs could exchange collateral with cash[1]; some PSAs are already clearing voluntarily a portion of their derivatives, as clients of clearing members. That report also highlighted that the remaining issue for PSAs is the need to post variation margin in cash in stressed market conditions, when cash margin requests from CCPs can become significant and PSAs’ capacity to resort to the repo market may not always be ensured.

[1] A repurchase agreement (“repo”) is an agreement to sell securities at a given price combined with an agreement to repurchase those securities at an agreed price at a later date. The repo market brings together firms which provide collateral in exchange for cash and firms which provide cash in exchange for collateral.

The public consultation held by ESMA broadly confirmed the findings highlighted above. Moreover, a number of proposals were put forward in that public consultation to try and address the remaining issues: on the one hand, the need for the access models put in place by some CCPs to be further refined operationally; on the other hand, the possibility to consider some targeted regulatory changes which could contribute to facilitating central clearing for PSAs. In light of this, in its December report ESMA, in cooperation with EIOPA, EBA and ESRB, suggests that the temporary exemption should be extended by one year further, until June 2022, in order to allow sufficient time to make some further improvements.

The Commission services have consulted the Expert Group of the European Securities Committee on the proposal for a delegated act to extend the PSA central clearing exemption by one year. This consultation process led to a broad consensus on the proposal. Some Member States stressed the need to work together with the industry and the ESAs in order to avoid further extensions.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt a delegated act is provided for under Article 85(2) of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

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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[2], and in particular Article 85(2), third subparagraph thereof,

Whereas:

(1) Article 89(1) of Regulation (EU) No 648/2012 provides that, for a transitional period until 18 June 2021, the clearing obligation set out in Article 4 of that Regulation shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements and to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of default. That transitional period was introduced to avoid the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners, and to provide time for developing viable technical solutions for the transfer by pension scheme arrangements of cash and non-cash collateral as variation margins.

(2) Article 85(2), third subparagraph, of Regulation (EU) No 648/2012 empowers the Commission to extend that transitional period twice, each time by one year, where the Commission concludes that no such viable technical solutions have yet been developed and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners have remained unchanged. Article 85(2), first subparagraph, of that Regulation requires the Commission to prepare yearly reports until the final extension of the transitional period, assessing whether such viable technical solutions have been developed and whether any measures to facilitate those viable technical solutions need to be adopted.

(3) The Commission adopted its first report[3] on 23 September 2020. That report highlighted that market participants have made efforts over the years to develop such

[2] OJ L 201, 27.7.2012, p. 1.

[3] Report from the Commission to the European Parliament and the Council under Article 85(2) of 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, as amended by Regulation (EU) No 834/2019, 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 (COM(2020) 574 final of 23 September 2020).

viable technical solutions and that some pension scheme arrangements have started clearing centrally a portion of their derivatives on a voluntary basis. The report concluded that the key remaining challenge for pension scheme arrangements is the need to post variation margin in cash in case of market stress, when they may be required by CCPs to post significant amounts of variation margin.

(4) Article 85(2), second subparagraph, of Regulation (EU) No 648/2012 also requires the European Securities and Markets Authority (ESMA), in cooperation with the European Insurance and Occupational Pensions Authority, the European Banking Authority and the European Systemic Risk Board, to submit to the Commission yearly reports, assessing, *inter alia*, 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. ESMA concluded in its report of 17 December 2020 that some solutions to mitigate the challenges faced by pension scheme arrangements have been explored over the years by the stakeholders concerned, which together might be able to support pension scheme arrangements in both normal and stressed times. ESMA also concluded, however, that those solutions need to be further developed, or might need to be accompanied by some regulatory changes in certain cases. ESMA therefore expressed the view that an extension of the transitional period by one year is needed.

(5) The Commission, taking into account the report of ESMA, is of the opinion that it is indeed necessary to extend the transitional period by one year to allow the envisaged solutions to mature and be further refined.

(6) The transitional period referred to in Article 89(1) of Regulation (EU) No 648/2012 should therefore be extended.

(7) This Regulation should enter into force as a matter of urgency so that the existing transitional period is extended prior to its expiry or as soon as possible after its expiry. A later entry into force would lead to legal uncertainty for pension scheme arrangements as to whether they need to begin preparing for upcoming clearing obligations,

HAS ADOPTED THIS REGULATION:

Article 1

The transitional period laid down in Article 89(1), first subparagraph, of Regulation (EU) No 648/2012 is extended until 18 June 2022.

Article 2

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,

For the Commission
The President
Ursula VON DER LEYEN