

PUBLIC STATEMENT

Clearing and trading obligations 21 December 2018 deadline

The European Securities and Markets Authority (ESMA) is aware of challenges that certain groups as well as certain non-financial counterparties above the clearing threshold (NFC+) would face on 21 December 2018 to start CCP clearing and trading on trading venues some of their OTC derivative contracts. Under Regulation (EU) No 648/2012 (EMIR), both a) the current derogation from the clearing obligation for certain intragroup transactions concluded with a third country group entity, and b) the phase-in for counterparties in Category 4, broadly speaking NFCs+, expire on 21 December 2018, for the interest rate derivative classes denominated in the G4 currencies subject to the clearing obligation.

With regard to a), EMIR provides for an exemption regime for OTC derivative contracts concluded between a counterparty established in a third country and another counterparty established in the Union belonging to the same group when certain conditions are met. One condition is an equivalence decision pursuant to Article 13(2) regarding the jurisdiction where the third country counterparty is established. The Commission Delegated Regulations on the clearing obligation provide for derogations for these intragroup transactions, with the nearest expiration date for these derogations being 21 December 2018. The derogation aims at ensuring that those contracts are not subject to the clearing obligation for a limited period of time in the absence of the relevant equivalence decision. Competent authorities should be able to verify that the counterparties concluding those contracts belong to the same group and fulfil the other conditions of intragroup transactions pursuant to EMIR.

Given the absence of equivalence decisions, ESMA undertook a review of the Commission Delegated Regulations on the clearing obligation and developed draft amendments to extend the derogation expiration to 21 December 2020. The final report with the amending draft Regulatory Technical Standards (RTS) has been submitted to the European Commission on 27 September 2018 for review and endorsement. In the eventuality that the amendments extending the derogation expiration date for certain intragroup transactions concluded with a third country group entity have not entered into force by the current expiration date¹, groups would need to have clearing arrangements in place and start clearing these intragroup transactions.

With regard to b), ESMA is mandated under EMIR to define the dates from which the clearing obligation takes effect. Four categories of counterparties have been defined to achieve a

¹ And that no relevant equivalence decision has been adopted.

phased implementation. For NFCs+ in the fourth category, the clearing obligation start date for the interest rate derivative classes denominated in the G4 currencies is on 21 December 2018. Under EMIR, when an NFC+ is above the clearing threshold in one or more asset classes, it triggers the clearing obligation for all its activity, regardless of the asset class or classes in which the NFC+ is above the threshold.

The European Commission's proposal to amend EMIR that was published on 4 May 2017 (Refit) changed this requirement, such that NFCs+ would only be subject to the clearing obligation in the asset class or asset classes where their level of activity is above the clearing threshold. The two positions adopted respectively by the European Parliament and the Council on the Refit proposal also support such a change.

Given that the Refit negotiations have not been finalised and that the resulting text is not expected to start applying by the time the phase-in for Category 4 counterparties expires, there would be a timing gap during which NFCs+ which exceed one of the clearing thresholds but do not exceed the clearing threshold in the interest rate derivative asset class would need to have clearing arrangements in place and start clearing their interest rate derivative contracts, before they are once again no longer required to do so once Refit comes into force.

Furthermore, MiFIR exempts financial and non-financial counterparties, temporarily exempted under EMIR from the clearing obligation, from the trading obligation for derivatives. With respect to a), i.e. with the expiration of the current derogation from the clearing obligation under EMIR and pending the adoption and entry into force of the proposed amending draft RTS, and with respect to b), i.e. with the expiration of the current Category 4 clearing obligation phase-in under EMIR and pending the adoption and entry into force of the proposed amendments for NFCs+ under Refit², the relevant counterparties would hence also be subject to the trading obligation under MiFIR for those OTC derivative contracts.

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 change to the application of the EU rules would need to be implemented through EU legislation.

ESMA nonetheless acknowledges the difficulties that certain groups as well as certain NFCs+ would face on 21 December 2018 to start clearing with CCPs and trading on trading venues some of their OTC derivative contracts in the eventuality that the amendments in the draft RTS or in Refit are not applicable by then. In this respect, ESMA expects competent authorities to not prioritise their supervisory actions towards group entities that benefit from the derogation for intragroup transactions meeting certain conditions on and after 21 December 2018, and towards NFCs+ that are not above the clearing threshold (as prescribed under the current EMIR legislation) in the interest rate derivative asset class on or after 21 December 2018, and

² It should be noted that, under the current version of Refit, it is unclear that the modifications of the obligations applicable to NFC+ for the clearing obligation under EMIR are automatically applicable to the trading obligation under MiFIR.

to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.