

Public statement

Deprioritisation of supervisory actions on the EMIR clearing obligation for third-country pension scheme arrangements in light of the agreement on the EMIR review

The European Commission published a proposal to amend EMIR on 7 December 2022, a.k.a. EMIR 3. Following a series of negotiations on the EMIR 3 text proposal, the Council and the European Parliament reached a provisional agreement on 7 February 2024. The political agreement on the EMIR 3 text was confirmed by the Committee of Permanent Representatives of the Governments of the Member States of the European Union (COREPER), subject to further legal linguistic revision, which was then published¹ on 14 February 2024. Taking into account the standard process that legislative proposals follow until finalisation and adoption, it is reasonable to expect that the final EMIR 3 text could be adopted and published in the Official Journal before the end of 2024 and enter into force 20 days thereafter.

The published EMIR 3 text includes, among others, a provision in relation to pension scheme arrangements established in a third-country (TC PSA). This measure provides for an exemption regime from the EMIR clearing obligation when the TC PSA is exempted from the clearing obligation under that third country's national law. This would also mean that under EMIR 3, counterparties entering into OTC derivatives with such TC PSAs would not be required to clear these OTC derivative transactions.

Stakeholders have expressed concerns that having to clear such OTC derivative transactions now while this requirement would no longer apply in a few months, where the relevant conditions are met when EMIR 3 enters into force, would expose them to operational and execution challenges.

From a legal perspective, neither ESMA nor the national competent authorities possess any formal power to dis-apply a directly applicable EU legal text in exceptional circumstances. ESMA also does not currently possess any appropriate tools or powers to grant forbearance to deal with such exceptional circumstances that warrant a temporary dis-application of requirements under EU Law. Therefore, any change to the application of the EU rules, such as the creation of an exemption or granting specific suspension powers, would need to be implemented through EU legislation.

¹ [Capital markets Union: Council and Parliament agree on improvements to EU clearing services - Consilium \(europa.eu\)](https://consilium.europa.eu/en/press/press-releases/2024/02/14/)

However, in view of the challenges that stakeholders would face if they have to comply with the requirement until EMIR 3 enters into force, ESMA would expect national competent authorities not to prioritise their supervisory actions in relation to the clearing obligation for transactions conducted with TC PSAs exempted from the clearing obligation under their third country's national law, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.