

Public statement

on the eligibility of uncollateralised public guarantees, public bank guarantees and commercial bank guarantees for Non-Financial Counterparties (NFCs) acting as clearing members in light of the agreement on the EMIR review

The European Commission published a proposal to amend Regulation (EU) No 648/2012 (**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), which was then published on 14 February 2024¹ and subsequently adopted by the European Parliament on 24 April 2024². 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 agreed EMIR 3 text includes, among others, a provision in relation to the eligibility of public guarantees, public bank guarantees or commercial bank guarantees as collateral by CCPs. This measure enables the acceptance of fully uncollateralised bank guarantees by the CCPs to cover their initial and ongoing exposures to Non-Financial Counterparties (NFCs) acting as clearing members and clients, under certain conditions. These provisions would effectively make permanent the main features of the temporary amendments to Delegated Regulation (EU) No 153/2013³ regarding CCP requirements adopted during the energy crisis which expanded the eligible pool of collateral to alleviate certain liquidity concerns, in particular for NFCs. These temporary measures are due to expire on 7 September 2024.

Stakeholders have expressed concerns regarding the risks of letting the emergency measures elapse, thereby temporarily reducing the pool of eligible collateral for NFCs as clearing members, before the new provisions apply and the expansion of CCP eligible collateral for NFCs is made permanent with the entry into force of EMIR 3.

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 specific suspension powers, would need to be implemented through EU legislation.

However, in view of the challenges that stakeholders would face if they have to comply with the CCP collateral requirements between the expiry of the emergency measures and the entry into force of EMIR 3, ESMA would expect national competent authorities not to prioritise their supervisory actions in relation

¹ <https://data.consilium.europa.eu/doc/document/ST-6344-2024-INIT/en/pdf>

² https://www.europarl.europa.eu/doceo/document/TA-9-2024-0348_EN.html

³ Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on requirements for central counterparties Text with EEA relevance, OJ L 52, 23.2.2013, p. 41–74

to the eligibility of uncollateralised public guarantees, public bank guarantees and commercial bank guarantees for NFCs acting as clearing members in light of the agreement on the EMIR review 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.