COMMISSION DELEGATED REGULATION (EU) 2022/1671

of 9 June 2022

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)

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

Whereas:

(1) Article 89(1) of Regulation (EU) No 648/2012 provides that until 18 June 2021, the clearing obligation set out in Article 4 of that Regulation is not to 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 allow for the development of viable technical solutions for the transfer by pension scheme arrangements of cash and non-cash collateral as variation margin, and thus to avoid any adverse effects on the retirement benefits of future pensioners that would be caused by an immediate application of the clearing obligation to such OTC derivative contracts.

(2) Article 85(2), third subparagraph, of Regulation (EU) No 648/2012 empowers the Commission to extend the transitional period laid down in Article 89(1) of that Regulation twice, each time by one year, were the Commission to conclude that no viable technical solutions for the transfer by pension scheme arrangements of cash and non-cash collateral as variation margins have been developed and that the adverse effects on the retirement benefits of future pensioners due to centrally clearing derivative contracts have remained unchanged. For that purpose, Article 85(2), first subparagraph, of Regulation (EU) No 648/2012 requires the Commission to prepare yearly reports, until the final extension of the transitional period, to assess 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 has adopted two annual reports on 23 September 2020 ([2]) and 6 May 2021 ([3]) respectively. In those reports, the Commission observed that market participants have made efforts over the years to develop appropriate technical solutions which include collateral transformation either by clearing members or through cleared repo markets. The Commission also noted that some pension scheme arrangements have started to centrally clear a portion of their derivatives portfolios voluntarily. The report concluded that the key remaining challenge for pension scheme arrangements was access, in stressed market conditions, to liquidity to be able to post variation margin, because that requirement would rapidly and significantly increase the risk of exhausting the cash allocations of pension scheme arrangements.

(4) Article 85(2), second subparagraph, point (a), of Regulation (EU) No 648/2012 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 whether CCPs, clearing members and pension scheme arrangements have undertaken an appropriate

([1]) OJ L 201, 27.7.2012, p. 1.
([2]) COM(2020) 574 final.
([3]) COM(2021) 224 final.

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.

(5) In Commission Delegated Regulation (EU) 2021/962 [4], the Commission has extended the transitional period laid down in Article 89(1) of Regulation (EU) No 648/2012 once, until 18 June 2022.

(6) On 25 January 2022, ESMA submitted its latest report on 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. While largely confirming its earlier findings detailed in previous reports to the Commission, ESMA in that report focussed on the operational readiness of pension scheme arrangements to clear OTC derivative contracts. Although a steadily growing number of pension scheme arrangements voluntarily clears OTC derivative contracts and liquidity conditions continue to evolve favourably, ESMA's report also concluded that pension scheme arrangements and relevant market participants need sufficient time to finalise their clearing and collateral management arrangements. ESMA therefore expressed the view that an additional extension with one year of the transitional period laid down in Article 89(1) of Regulation (EU) No 648/2012 is needed.

(7) In its latest assessment of the state of readiness of pension scheme arrangements to centrally clear their derivatives portfolios [5], the Commission came to a conclusion that is similar to ESMA's. According to the Commission's analysis, liquidity conditions for pension scheme arrangements remained robust, even during recent periods of market stress, and is expected to continue to evolve favourably as the funds take up alternative access models to the repo market. A positive outlook for liquidity access has led to a situation where a growing number of pension scheme arrangements started to clear voluntarily at least a part of their derivative portfolios. The alternative models to access liquidity through the repo market must be given time to mature, however, while pension scheme arrangements must improve their internal liquidity and collateral management practices.

(8) The Commission, taking into account the report of ESMA, therefore concluded that it is indeed necessary to extend the transitional period laid down in Article 89(1) of Regulation (EU) No 648/2012 by one more year.

(9) The transitional period laid down in Article 89(1) of Regulation (EU) No 648/2012 should therefore be extended.

(10) This Regulation should enter into force as a matter of urgency to ensure that the transitional period is extended before it expires,

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 2023.

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

(4) Commission Delegated Regulation (EU) 2021/962 of 6 May 2021 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 (OJ L 213, 16.6.2021, p. 1).

(5) COM(2022) 254.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 9 June 2022.

For the Commission
The President
Ursula VON DER LEYEN