

Regulation of OTC derivatives in the EU

The European Market Infrastructure Regulation (EMIR – Regulation (EU) No 648/2012) addressed the problems observed in the functioning of the 'over-the-counter' (OTC) derivatives market during the 2007-2008 financial crisis. In May 2017, following an extensive assessment, the European Commission proposed to amend and simplify EMIR, to address disproportionate compliance costs, transparency issues and insufficient access to clearing for certain counterparties. Parliament is due to vote on the proposal during the June plenary session.

European Commission proposal

Among other things, the Commission [proposal](#) would require adherence by clearing members and their clients to the principle of providing clearing services under fair, reasonable and non-discriminatory ('FRAND') commercial terms; sets out a new method of calculating positions to determine whether a financial counterparty (FC) is subject to the clearing obligation; would give the Commission the power, in exceptional circumstances, to temporarily suspend the clearing obligation for a specific class of OTC derivatives or type of counterparty; exempt intra-group transactions involving non-financial counterparties (NFCs) from the reporting obligation; oblige central counterparties (CCPs) to provide their clearing members with tools to simulate their initial margin requirements; add requirements to ensure the quality of reported data for trade repositories (TD); increase the upper limit of fines for infringements of EMIR by TDs; and provide for a three-year exemption from central clearing for pension funds.

European Parliament position

On 16 May 2018, the Parliament's Committee on Economic and Monetary Affairs (ECON) adopted its [report](#). Among other things, it would oblige clearing members and clients to take all steps to identify, prevent, manage and monitor conflicts of interest within a group of affiliated entities, that may adversely affect 'FRAND' and transparent provision of clearing services, and would entrust the European Securities and Market Authority (ESMA) with developing regulatory technical standards (RTS), specifying the conditions under which commercial terms are 'FRAND'. It specifies that in the case of OTC derivative contracts concluded between a NFC established within the EU and a third-country entity that would be considered a FC if it were established in the EU, the NFC does not have to abide by the Article 9 reporting obligation, under specific conditions; and sets out that NFCs exceeding the clearing threshold ('NFCs+') should not be subject to segregation and exchange of collateral for asset classes for which the clearing threshold has not been exceeded. The ECON committee specifies that the right of access of persons under investigation to the file of the investigating officer does not extend to ESMA's internal preparatory documents; provides that the right of the persons to be heard will not apply in cases where urgent action is needed to prevent significant and imminent damage to the financial system; tasks the Commission with imposing a 'best effort obligation' on stakeholders that can contribute to finding a solution to the exemption for pension scheme arrangements (PSAs) from the clearing obligation, so that PSAs clear their derivatives trades as soon as possible; and tasks the Commission with setting up a stakeholders' expert group to assess progress in developing technical solutions to facilitate the clearing of OTC contracts by PSAs. The plenary is due to vote on the committee's amendments during the June plenary session, with a view to the opening of trilogue negotiations with the Council, which agreed its [mandate](#) for negotiations on 11 December 2017.

First-reading report: [2017/0090\(COD\)](#); Committee responsible: ECON; Rapporteur: Werner Langen (EPP, Germany). For further information see our 'EU Legislation in progress' [briefing](#).

