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Regulation of OTC derivatives

Amending the European Market Infrastructure Regulation (EMIR)

The European Market Infrastructure Regulation (EMIR – Regulation (EU) No 648/2012), adopted in 2012, forms part of the European regulatory response to the financial crisis, and specifically addresses the problems observed in the functioning of the 'over-the-counter' (OTC) derivatives market during the 2007-2008 financial crisis. In the last three years, the Commission, with the help of reports from the European Systemic Risk Board (ESRB), the European Central Bank (ECB) and the European Securities Markets Authority (ESMA), carried out an extensive assessment of EMIR. In May 2017, it proposed a regulation amending and simplifying Regulation (EU) No 648/2012 in the context of its Regulatory Fitness and Performance (REFIT) programme, to address disproportionate compliance costs, transparency issues and insufficient access to clearing for certain counterparties. The Council published its mandate for negotiations with the EP on 11 December 2017. On 16 May 2018, the ECON committee of the EP adopted its report which is due to be debated during the June plenary.

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories

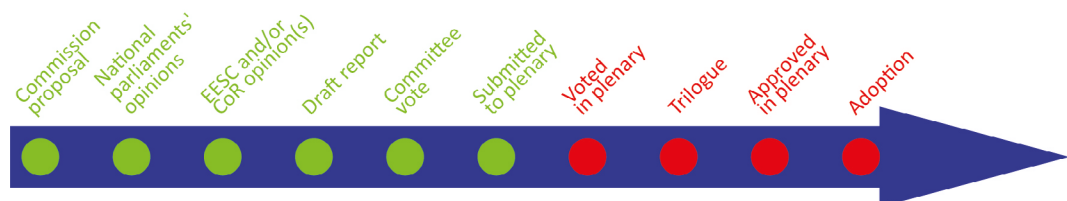
COM(2017) 208, 4.5.2017, 2017/0090(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible: Economic and Monetary Affairs (ECON)

Rapporteur: Werner Langen (EPP, Germany)

Shadow rapporteurs: Jakob von Weizsäcker (S&D, Germany); Kay Swinburne (ECR, United Kingdom); Petr Ježek (ALDE, Czech Republic); Matt Carthy (GUE/NGL, Ireland); Philippe Lamberts (Greens/EFA, Belgium); Jörg Meuthen (EFDD, Germany); Barbara Kappel (ENF, Austria)

Next steps expected: First-reading vote in plenary



7 June 2018
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Introduction

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Introduction

The European Market Infrastructure Regulation (EMIR – [Regulation \(EU\) No 648/2012](#)), adopted in 2012, forms part of the European regulatory response to the financial crisis, and specifically addresses the problems observed in the functioning of the [over-the-counter \(OTC\)](#) derivatives market during the 2007-2008 financial crisis.¹

Existing situation

Regulation (EU) No 648/2012 contains provisions for: the central clearing of standardised OTC derivative contracts; margin and operational risk mitigation requirements for OTC derivative contracts that are not centrally cleared; reporting obligations for derivative contracts; as well as specific requirements for [central counterparties \(CCPs\)](#) and [trade repositories \(TRs\)](#). The regulation is completed by several delegated acts and by equivalence decisions recognising third-country CCPs.²

Between 2015 and 2016 the Commission carried out an extensive assessment of EMIR. This included:

- > a [public consultation](#) and a [public hearing](#) on the review of EMIR – for the Commission to obtain feedback from stakeholders on their experiences in the implementation of EMIR to date;
- > an evaluation of EMIR rules as part of the [call for evidence](#) on the EU regulatory framework for financial services, for the Commission to get a clearer understanding of the interaction of the individual rules and cumulative impact of the legislation as a whole, including potential overlaps, inconsistencies and gaps;
- > the publication of a [general report on EMIR](#), submitted by the Commission to the European Parliament and the Council, in accordance with Article 85(1) of the regulation;
- > the publication of an [inception impact assessment](#) on possible amendments to EMIR within the framework of the regulatory fitness and performance program (REFIT).

Following the above, and taking into consideration the input from the European Systemic Risk Board (ESRB), the European Central Bank (ECB), the European Securities Markets Authority (ESMA) and the European System of Central Banks (ESCB),³ the Commission concluded that, while 'no fundamental change should

1 For more information on derivatives and EMIR, see [EPRS in-depth analysis, 'EMIR – The regulation of OTC derivatives in the EU'](#) and [European Commission](#) information.

2 For a detailed overview of these elements, see [EPRS in-depth analysis, 'EMIR – The regulation of OTC derivatives in the EU'](#).

3 For more information on these reports, see either [EPRS in-depth analysis, 'EMIR – The regulation of OTC derivatives in the EU'](#) or the EPRS [Implementation Appraisal](#), published in March 2017.



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be made to the nature of the core requirements of EMIR, some specific areas [could be amended](#) 'so as to eliminate disproportionate costs and burdens on certain derivatives counterparties ... and to simplify rules without compromising the objectives of the legislation'.

Parliament's starting position

The European Parliament referred its [resolution](#) of 10 December 2013 on a recovery and resolution framework for nonbank institutions, and its [resolution](#) of 12 April 2016 on the EU's role in the framework of international financial, monetary and regulatory institutions and bodies. Furthermore, Edward Czesak (ECR, Poland) and Barbara Kappel (ENF, Austria), in their individual capacity, have addressed written questions to the Commission on the subject.⁴

⁴ More details about the aforementioned EP positions and Member of Parliament's questions can be found in the EPRS [Implementation Appraisal](#).



Proposal

Preparation of the proposal

In May 2017, the European Commission accompanied its proposal for a regulation and its communication with an extensive [impact assessment \(IA\) of 155 pages](#).

The Commission's IA points to a number of issues which prevent the objectives of EMIR from being met in the most effective and efficient manner: '(i) disproportionate compliance costs that in a number of cases outweigh prudential benefits, (ii) insufficient transparency of OTC derivatives positions and exposures and (iii) insufficient access to clearing for certain counterparties'. The Commission proposes to take the following actions:

To address the first issue (i.e. **disproportionate compliance costs**), the Commission proposes to: amend EMIR to extend the transitional exemption beyond August 2018, with regular reviews assessing progress in developing clearing solutions for pension scheme arrangements (PSAs);⁵ reduce the scope of the clearing obligation for non-financial counterparties (NFCs) by introducing a higher clearing threshold;⁶ and provide a narrower definition of the category of small financial counterparties that are subject to the clearing obligation, so as to exempt from the clearing obligation those very small financial counterparties for which central clearing is not economically feasible. In addition, the Commission proposes to: eliminate the requirement to report historic trades; exempt from the reporting obligation those intragroup transactions in which one of the counterparties is a non-financial counterparty; transfer the obligation to report exchange-traded derivative transactions from the counterparties to the CCPs; and alleviate the burden of EMIR reporting for small non-financial counterparties.

To deal with the second issue (**insufficient transparency of OTC derivatives positions and exposures**), the Commission proposes to expand the scope of the technical standards to be developed by ESMA to: allow for the further harmonisation of the reporting rules and requirements;⁷ require trade repositories to grant counterparties – upon request only – access to all data reported on their behalf, to allow for verification of its correctness; and significantly increase the upper limit of the basic amounts of fines ESMA can impose on trade repositories, taking into account their current turnover.

Lastly, to remedy the third issue (**insufficient access to clearing**), the Commission proposes to provide for a clear provision that EMIR overrides national insolvency law with respect to EMIR default management tools⁸

5 According to the Commission, this option would allow more time to develop technical solutions and measures to facilitate them, and be consistent with EMIR's objective that the ultimate aim for pension scheme arrangements is central clearing, as soon as this is feasible.

6 The Commission is of the view that this option is least likely to put financial stability at risk because it does not remove the obligation to exchange variation margin for non-financial counterparties that have exceeded the clearing threshold and initial margin for those non-financial counterparties that are above the threshold of €8 billion introduced in the margins rules.

7 'Including the form of the reports, the standards to be used, and the methods and arrangements for reporting, as well as the harmonisation of the procedures to be applied by trade repositories to validate the reported data as to its completeness and correctness and the procedures for the reconciliation of data between them', p. 68 of the impact assessment.

8 The aim of the provision is to provide legal certainty to central counterparties, clearing members and clients, as well as an appropriate level of protection to clients.



Preparation of the proposal

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and to introduce a more specific 'fair, reasonable and non-discriminatory' (FRAND) principles provision for clearing members and clients that offer client and indirect client clearing.

Together, these options are expected to lead to one-off savings of €2.3 billion–€6.9 billion and €1.1 billion–€2.66 billion savings in operational costs (p. 78 of the IA).⁹

The changes the proposal would bring

The Commission [proposal](#) introduces the following amendments to Regulation (EU) No 648/2012:¹⁰

- > Article 2 point (8) is amended to include in the definition of 'financial counterparty', alternative investment funds (AIFs), [central securities depositories \(CSDs\)](#), and [securitisation special purpose entities \(SSPEs\)](#);
- > Article 4, paragraph 1 is amended so that the conditions for the OTC derivative contracts to become subject to the clearing obligation when a counterparty is a financial counterparty (FC) are specified in the second subparagraph of the new Article 4a(1). In addition, the requirement to clear OTC derivative contracts entered into or renewed before the date from which the clearing obligation takes effect, removes the necessity for those contracts to **'have a remaining maturity higher than the minimum remaining maturity'**;
- > Article 4, a new paragraph 3a is inserted, providing that clearing members and their clients who provide clearing services to other counterparties (or offer their clients the possibility to provide such services), do so under fair, reasonable and non-discriminatory commercial ([FRAND](#)) terms;
- > a new Article 4a ('Financial counterparties subject to a clearing obligation') is inserted which sets out a new method of calculating positions (aggregate month-end position for months March to May) to determine whether an FC is subject to the clearing obligation. The article notes further that, if the amount calculated thus exceeds the thresholds in Article 10(4), then the FC must immediately notify ESMA, be subject to the clearing obligation, and clear the derivative contract for which the threshold has been exceeded within four months of becoming subject to the clearing obligations. Lastly, the article sets out that, to end the clearing obligation, the FC must show to the national competent authority that its aggregate month-end position for March-May no longer exceeds Article 10(4b) thresholds;
- > Articles 5(2c) (the obligation for ESMA to develop draft RTS on the minimum remaining maturity of the OTC derivative contracts and 6(2e) (the provision that the public register maintained by ESMA must include the minimum remaining maturity of the derivative contracts) are deleted.

⁹ For more information and an evaluation, please see the EPRS Initial Appraisal of the Commission IA (forthcoming).

¹⁰ A separate proposal was adopted on 13 June, to amend EMIR to ensure more consistent and robust supervision of central counterparties in EU and non-EU countries. This will be the subject of a separate 'EU Legislation in progress' briefing.



- > a new Article 6b ('Suspension of clearing obligation in situations other than resolution') is inserted, which gives the Commission the power, under specific conditions, to temporarily suspend the clearing obligation for a specific class of OTC derivatives or a specific type of counterparty, on the basis of a request of ESMA. The article also lays down the procedure for the suspension;
- > Article 9 paragraph 1 is amended, so that the requirement to report historic transactions¹¹ is removed and so that intra-group transactions in which one of the counterparties is a non-financial counterparty (NFC) are exempted from the reporting obligation;
- > Article 9, a new paragraph 1a is inserted, laying rules on the reporting obligation in some specific cases (e.g. exchange-traded derivatives transactions, transactions between an FC and an NFC), establishing who is responsible for reporting and including for liabilities arising from this responsibility;
- > Article 9, paragraph 6 is amended, providing that ESMA will also develop draft ITS specifying the data standards and formats for the information to be reported, which include at least the global legal entity identifiers ('LEIs'), the international securities identification numbers ('ISINs') and the unique trade identifiers ('UTIs').
- > Article 10 (non-financial counterparties – NFCs) paragraph 1 is amended so that the calculation to determine whether the positions in OTC derivatives of a NFC exceed the clearing threshold are made based on the 'aggregate month-end average position for the months March, April and May';¹² similarly, Article 10 paragraph 2 is amended, so that should an NFC become subject to the clearing obligation and wishes to end the obligation, it must demonstrate to the authority that its aggregate month-end average position for the months March, April and May of a given year no longer exceeds the clearing threshold;
- > Article 11 paragraph 15 is amended so that ESAs develop draft RTS also relating to the supervisory procedures, to ensure initial and ongoing validation of the risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral, and of significant changes to the risk-management procedures;
- > in Article 38, new paragraphs 6 and 7 are inserted, so that CCPs are required to provide their clearing members with tools to simulate their initial margin requirements, as well as a detailed overview of the characteristics of the initial margin models they use;
- > in Article 39, a new paragraph 11 is inserted, to clarify that assets covering the positions recorded in an account are not part of the insolvency estate of the CCP or clearing member that keeps separate records and accounts;

11 That is, transactions that were not outstanding on the starting date of the reporting obligation on 12 February 2014.

12 Rather than if the rolling average position over 30 working days exceeds the thresholds, which is the case under the current EMIR rules.



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- > Article 56 is amended, so that trade repositories that are already registered under Regulation (EU) 2015/2365¹³ can submit a simplified application for an extension of registration;
- > Article 65 paragraph 2 is amended, to increase tenfold the maximum fines ESMA can impose on trade repositories that infringe the rules referred to in specific points of Annex I (from €20 000 to €200 000 in Section II of Annex I, and from €10 000 to €100 000 in Section I of Annex I). Furthermore, it adds a point, for infringements referred to in Section IV of Annex I, specifying they must range between €5 000 and €10 000;
- > Article 72 paragraph 2 is amended, so that the fees charged to a trade repository are proportionate not only to its turnover, but also to the type of registration and supervision exercised (so as to reflect the amendment to Article 56 with regard to the fees when a trade repository is already registered under Regulation (EU) 2015/2365;
- > Article 76a is inserted, providing that, under certain conditions,¹⁴ authorities in third countries that have trade repositories are granted direct access to the data held in EU trade depositories;
- > in Article 78, paragraphs 9 and 10 are added, so that the requirements to:
 - > have adequate procedures for the reconciliation of data between trade repositories and for ensuring the quality of the reported data; and
 - > establish adequate policies for the orderly transfer of data to other trade repositories where this is requested by an undertaking subject to the reporting obligation under Article 9; are added to the general requirements for trade repositories;
- > Article 81 is amended, providing that trade repositories must grant counterparties access to all data reported on their behalf, to allow for verification of data accuracy. In addition, the list of entities to which trade repositories have to make information available – to enable them to fulfil their respective responsibilities and mandates – is modified;
- > Article 82, paragraph 2 is amended, to add delegation of power to the Commission under Article 4 (3) (clearing obligation);

13 [Regulation \(EU\) 2015/2365](#) of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

14 The Commission must have adopted an implementing act 'declaring that in the third country the (a) trade repositories are duly authorised, (b) effective supervision and enforcement of trade repositories takes place on an ongoing basis; (c) guarantees of professional secrecy exist, including the protection of business secrets shared with third parties by the authorities, and they are at least equivalent to those set out in this Regulation; and (d) that trade repositories authorised in that third country are subject to a legally binding and enforceable obligation to give direct and immediate access to the data to the relevant Union authorities'.



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- > Article 85 is amended and under points (a–f) sets out the items that ESMA should address in the report it will prepare for the Commission (with input from, EIOPA, EBA and the ESRB) to assess whether viable technical conditions have been developed for the transfer by Pension Scheme Arrangements of cash and non-cash collateral as variation margins; it further sets out that ESMA will submit a report to the Commission on the impact of EMIR on the level of clearing by NFCs and by FCs other than those subject to Article 4a(2), as well as on the improvement of the quality of transaction data reported to trade repositories;
- > Article 89 is amended, so that the temporary exemption from the clearing obligation of pension scheme arrangements is extended by three years;

Finally, the annex to the proposal contains amendments to Annexes I and IV of the regulation, relating to trade repository infringements.

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Views

Advisory committees

The European Economic and Social Committee adopted its opinion on the Commission proposal, on 20 September 2017, in plenary. It broadly agrees with the proposal, but also adds that it is important that the measures put forward are consistent with the Capital Markets Union action plan, and, in particular, with its provisions on securitisation. In addition, it recommends standardising the types of derivative transactions and instruments, because doing so could help to significantly increase the quality of the data.

On 11 October 2017, the European Central Bank adopted its [opinion](#) on the Commission proposal. While the ECB generally supported the Commission's initiative, it noted, among other things, that central bank transactions must be fully exempted from reporting requirements, to ensure that NCBs continue to perform their statutory tasks effectively; and that it is concerned by the proposed amendment to exempt from reporting all intragroup trades involving a non-financial counterparty. Furthermore, it reiterated its position that STS SSPEs should be fully exempted both from the clearing obligation and from the legislative requirements to provide collateral. Lastly, it proposed to include, in the act itself, macroprudential intervention tools, to prevent the build-up of systemic risk and further limit the pro-cyclicality of margins and haircuts.

National parliaments

The [subsidiarity deadline](#) was set for 19 July 2017. No national parliament has submitted a reasoned opinion.

Stakeholders' views¹⁵

Various industry stakeholders ([European Association of Corporate Treasurers](#), [Assonime](#), [Association Française des Entreprises Privées](#), [International Group of Treasury Associations](#), [Deutsches Aktieninstitut](#)) welcomed the Commission's proposal in a 4 May 2017 [press release](#), praising it as 'an important step forward in relieving burdens for businesses which use derivatives to manage their commercial and financing risks'.

¹⁵ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

Legislative process

The Council agreed on its mandate for negotiations on 1 December 2017. Its [text](#) focuses, among other things, on the following main points:

- > clearing members or clients have the possibility to control the risks connected to the clearing services offered (Article 4(3a));
- > FRAND commercial terms should be transparent. The Council further details the basis on which the Commission should specify – in its delegated act – what constitutes FRAND (Article 4(3a));
- > with regard to FCs subject to the clearing obligation, if the result of the aggregate month-end average position of Article 4a exceeds the clearing thresholds, the FC should establish clearing arrangements within [four] months after notifying ESMA. The Council further proposes to delete the obligation for the FC to clear the contracts referred to in point (b) within four months of becoming subject to the clearing obligation, but adds the obligation for the FC to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position does not lead to systematic under-estimation of the overall position (Article 4a);
- > if a suspension of clearing, which is always limited in time, is not renewed, it will automatically expire (Article 6a);
- > the Commission provision, according to which CCPs are responsible for reporting on behalf of both counterparties the details of derivative contracts that are not over the counter, as well as for ensuring the accuracy of the details reported, is deleted; instead, the Council proposes to add the possibility – for NFCs that do not meet the conditions referred to in the second subparagraph of Article 10(1) – to report the details of their OTC derivative contracts to a trade repository. In that case they must inform the FCs beforehand. In addition, counterparties not required to report the details of the derivative contracts must make all necessary arrangements to ensure that the CCP or the reporting counterparties receive all details necessary for them to correctly fulfil their reporting obligation. Lastly, counterparties and CCPs subject to the reporting obligation can delegate that obligation, in which case the counterparties and CCP effectively carrying the reporting obligation will be responsible and legally liable for the reporting (Article 9(1a));
- > finally, the Council tasks the Commission with:
 - > reviewing and reporting on the application of Article 9(1a);
 - > assessing whether trades directly resulting from post-trade risk reduction services should be exempted from the clearing obligation referred to in Article 4(1). For both those initiatives, it also tasks ESMA, in cooperation with the ESRB, to submit reports to the Commission (Article 85(6)).

On 16 May 2018, the Parliament's Committee on Economic and Monetary Affairs (ECON) adopted its [report](#) (Rapporteur: Werner Langen, EPP, Germany). The committee report focuses, among other things, on the following main points:

- > it limits the scope of AIFs falling under the regulation as FCs, to AIFs established in the Union or managed by an EU AIF Manager (Article 2, point (8));
- > obliges 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 entrusts the European Securities and Market Authority (ESMA) with developing regulatory technical standards (RTS), specifying the conditions under which commercial terms are 'FRAND' (Article 4 (3a and 3b));
- > 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 (Article 9(1ba));
- > it 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 (Article 11(3));
- > in Article 63, relative to ESMA on-site inspections, it changes 'business premises or land' to 'business services or property' (Article 63(1) and (2));
- > it 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 (Article 64(4));
- > it 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 (Article 67(1), new subparagraph);
- > lastly, it tasks the Commission with imposing a 'best effort obligation' on stakeholders able to 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 (Article 85 (3)); in the same vein, it 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 (Article 89(1)).

The Parliament 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.



References

EP supporting analysis

EPRS [Implementation Appraisal](#), 2017.

EPRS Initial Appraisal of the Commission IA , '[European Market Infrastructure Regulation-Regulatory Fitness and Performance \(REFIT\) proposal](#)', 2017.

EPRS in-depth analysis, '[EMIR – The regulation of OTC derivatives in the EU](#)', 2017.

Other sources

[European Market Infrastructure Regulation \(EMIR\): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories](#), European Parliament, Legislative Observatory (OEL).

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