

OTC derivatives, central counterparties and trade repositories (EMIR, European Market Infrastructure Regulation)

2010/0250(COD) - 29/03/2012 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 602 votes to 23, with 27 abstentions, a legislative resolution on the proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.

Parliament adopted its position at first reading under the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise negotiated between the European Parliament and the Council. They amend the Commission proposal as follows:

Scope and application: the amended Regulation lays down clearing and bilateral risk management requirements for OTC derivative contracts, reporting requirements for derivative contracts and uniform requirements for the performance of activities of central counterparties and trade repositories. It shall apply to CCPs and their clearing members, to financial counterparties and to trade repositories. It shall apply to non-financial counterparties and trading venues where so provided.

Clearing obligation: counterparties **shall clear all OTC derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation** in accordance with the procedure set out concerning clearing obligation in the text if those contracts fulfil certain conditions specified in the Regulation. Where a competent authority authorises a CCP to clear a class of OTC derivatives, it shall immediately notify [ESMA](#) of that authorisation.

In order to ensure consistent application of provisions on clearing obligation procedures, ESMA shall develop **draft regulatory technical standards** specifying the details to be included in the notifications. ESMA shall submit those draft regulatory technical standards to the Commission by 30 September 2012.

Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and any modification or termination of the contract is **reported to a trade repository registered or recognised**. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.

The reporting obligation shall apply to derivative contracts which: (a) were entered into before the date of entry into force of this Regulation and are outstanding on the date of entry into force of the Regulation; (b) are entered into on or after the date of entry into force of the Regulation.

Strengthening the role of ESMA: ESMA acts within the scope of this Regulation by safeguarding the stability of financial markets in emergency situations and ensuring the consistent application of Union rules by national supervisory authorities and settling disagreements between them. It is also entrusted with developing draft regulatory and implementing technical standards and has a central role in the authorisation and monitoring of central counterparties and trade repositories.

On the basis of draft regulatory technical standards developed by ESMA, the Commission should decide whether a class of OTC derivatives is to be subject to a clearing obligation, and from when the clearing obligation takes effect.

In determining what classes of derivatives are to be subject to the clearing obligation, ESMA should take due account of the specific nature of the relevant classes of OTC derivatives.

In determining whether a class of OTC derivatives is to be subject to clearing requirements, ESMA should aim for a **reduction in systemic risk**.

In order to exercise its supervisory powers effectively, ESMA will be able to conduct **investigations and on-site inspections**. It should be able to impose **periodic penalty payments** to compel trade repositories to put an end to an infringement, to supply complete and correct information required by ESMA or to submit to an investigation or on-site inspection.

ESMA should also be able to **impose fines** on trade repositories where it finds that they have committed, intentionally or negligently, an infringement of this Regulation. Fines should be imposed according to the level of seriousness of the infringements. ESMA decisions imposing fines and periodic penalty payments should be enforceable and the enforcement should be governed by the rules of civil procedure that are in force in the State in the territory of which it is carried out.

ESMA shall establish, maintain and keep up to date **a register** to correctly and unequivocally identify the classes of derivatives subject to the clearing obligation. The register shall be publicly available on ESMA's website.

Intra-group transactions: the text states that an intragroup transaction is a transaction between two undertakings which are included in the same consolidation on a full basis and are subject to appropriate centralised risk evaluation, measurement and control procedures. Intragroup transactions may be necessary for aggregating risks within a group structure and intragroup risks are therefore specific. Since the submission of those transactions to the clearing obligation may limit the efficiency of those intragroup risk-management processes, **an exemption of intragroup transactions from the clearing obligation** may be beneficial, provided that this exemption does not increase systemic risk. As a result, adequate exchange of collateral is substituted to the central counterparty clearing of those transactions, where this is appropriate to mitigate intragroup counterparty risks.

However, some intragroup transactions could be exempted, in some cases on the basis of the decision of its competent authority, from the collateralisation requirement provided that their risk-management procedures are adequately sound, robust and consistent with the level of complexity of the transaction and there is no impediment to the prompt transfer of own funds or repayment of liabilities between the counterparties.

Recognition of third country CCPs: decisions determining third country legal regimes as equivalent to the legal regime of the Union will only be adopted if the legal regime of the third country provides for an **effective equivalent system** for the recognition of CCPs authorised under foreign legal regimes in accordance with the general regulatory goals set out by the G-20 in September 2009, which are: (i) improving transparency in the derivatives markets; (ii) mitigating systemic risk, and protecting against market abuse. Such a system should be considered equivalent if it ensures that the substantial result of the applicable regulatory regime is similar to Union requirements and should be considered effective if those rules are being applied in a consistent manner.

In order to foster financial stability within the Union, **it might be necessary also to subject the transactions entered into by entities established in third countries** to the clearing and risk-mitigation techniques obligations, provided that the transactions concerned have a direct, substantial and foreseeable effect within the Union or where such obligations are necessary or appropriate to prevent the evasion of any provisions of the Regulation.

Pension schemes: the clearing obligation should not apply to pension schemes until a suitable technical solution for the transfer of non-cash collateral as variation margins is developed by CCPs to address this problem. This technical solution should take into account a special role of pension schemes arrangements and avoid materially adverse effects on pensioners.

During a period of three years from the date of entry into force of the Regulation, **the clearing obligation shall not apply** to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension schemes arrangements

During the transitional period, OTC derivative contracts entered into with a view to decreasing investment risks directly relating to the financial solvency of pension schemes arrangements should be subject not only to the reporting obligation, but also to bilateral collateralisation requirements. The ultimate aim is, however, central clearing as soon as this is tenable.

The Regulation aims to ensure that only appropriate entities and arrangements receive special treatment as well as to take into account the diversity of pension systems across the Union, while also to provide for a level playing field for all pension scheme arrangements. **Therefore, the temporary derogation will apply** : (i) to institutions for occupational retirement provisions registered in accordance with Directive 2003/41/EC, including any authorised entity responsible for managing such an institution and acting on its behalf well as any legal entity set up for the purpose of investment by such institutions, acting solely and exclusively in their interest; (ii) the occupational retirement provision businesses of institutions referred to in Directive 2003/41/EC; (iii) the occupational retirement provision businesses of life insurance undertakings provided that all corresponding assets and liabilities are ring-fenced, managed and organised separately, without any possibility of transfer.

The temporary derogation will also apply to any other authorised and supervised entities operating on a national basis only or arrangements that are provided mainly in the territory of one Member State, only if both of them are recognised by national law and their primary purpose is to provide benefits upon retirement.

Non-financial counterparties: in order to ensure that non-financial institutions have the opportunity to state their views on the clearing thresholds, ESMA should, when preparing the relevant regulatory technical standards, conduct an open public consultation ensuring the participation of non-financial institutions. ESMA should also consult all relevant authorities, for example the Agency for the Cooperation of Energy Regulators, in order to ensure that the particularities of these sectors are fully taken into account.

Access to trading venues: trading venues should provide the CCPs with trade feeds on a transparent and non-discriminatory basis. The right of access of a CCP to a trading venue should allow for arrangements whereby multiple CCPs are using trade feeds of the same trading venue. However, this should not lead to interoperability for derivatives clearing or create liquidity fragmentation.

This Regulation should not block fair and open access between trading venues and CCPs in the internal market, subject to the conditions laid down in the Regulation and in the regulatory technical standards developed by ESMA and adopted by the Commission. The latter should continue to closely monitor the evolution of the OTC derivatives market and should, where necessary, intervene in order to prevent competitive distortions from occurring in the internal market with the aim of ensuring a level playing field in the financial markets.

Authorisation: a CCP shall have a permanent and available initial capital of at least EUR 7.5 million to be authorised. The applicant CCP shall submit an application for authorisation to its competent authority.

The CCP **should not be authorised** when all the members of the college, excluding the competent authorities of the Member State where the CCP is established, reach a joint opinion by mutual agreement that the CCP should not be authorised. If, however, a sufficient majority of the college have expressed a negative opinion and any of the competent authorities concerned, based on that majority of two-thirds of the college, have referred the matter to ESMA, the competent authority of the Member State where the CCP is established should defer its decision on the authorisation and await any decision that ESMA may take regarding conformity with Union law, and should take its decision in conformity with the decision of ESMA.

Where all the members of the college, excluding the authorities of the Member State of establishment of the CCP, reach a joint opinion why they consider that the requirements are not met, that the CCP should not receive authorisation, the competent authority of the Member State where the CCP is established may refer the matter to ESMA to decide on the conformity with Union law.

The CCP's competent authority shall **withdraw the authorisation** where the CCP does not fulfil certain conditions. Where the competent authority considers that one of the circumstances has been met, it shall within five working days notify ESMA and the members of college. The competent authority shall send ESMA and the members of the college its fully reasoned decision and shall take into account the reservations of the members of the college.

The decision on the withdrawal of authorisation **shall take effect throughout the Union**.

Reports and review: three years after entry into force of the Regulation, the Commission shall review and prepare a general report on the Regulation. It shall assess in particular:

- in cooperation with the members of the ESCB, the need for any measure to facilitate the access of CCPs to central bank liquidity facilities;
- in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;
- in the light of experience the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting and the rule of ESMA, in particular during the authorisation process for CCPs;
- cooperation with ESMA and ESRB the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area;
- in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users.

Two years following entry into force of the Regulation, the Commission shall prepare a report, in consultation with ESMA and EIOPA, assessing the progress and effort made by CCPs in developing technical solutions for the transfer by pension schemes arrangements of non-cash collateral as variation margins, as well as the need for any measures to facilitate such solution.