Basic information

2010/0250(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Regulation	Procedure completed
OTC derivatives, central counterparties and trade repositories (EMIR, European Market Infrastructure Regulation) Amending Directive 98/26/EC 1996/0126(COD) Amended by 2011/0202(COD) Amended by 2011/0296(COD) Amended by 2012/0150(COD) Amended by 2013/0025(COD) Amended by 2014/0017(COD) Amended by 2015/0226(COD) Amended by 2016/0360A(COD) Amended by 2016/0365(COD) Amended by 2017/0090(COD) Amended by 2017/0136(COD) Amended by 2020/0266(COD) Amended by 2021/0296(COD) Amended by 2022/0403(COD) **Subject** 2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 2.50.08 Financial services, financial reporting and auditing 2.50.10 Financial supervision	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
ECON Economic and Monetary Affairs	LANGEN Werner (PPE)	21/09/2010
	Shadow rapporteur DOMENICI Leonardo (S&D) BOWLES Sharon (ALDE) CANFIN Pascal (Verts/ALE) SWINBURNE Kay (ECR) KLUTE Jürgen (GUE/NGL)	

Committee for opinion	Rapporteur for opinion	Appointed
ITRE Industry, Research and Energy	KALFIN Ivailo (S&D)	01/12/2010
JURI Legal Affairs	BOWLES Sharon (ALDE)	27/10/2010

Council of the European Union	

Council configuration	Meetings	Date
Economic and Financial Affairs ECOFIN	3100	2011-06-20
Economic and Financial Affairs ECOFIN	3141	2012-01-24
Economic and Financial Affairs ECOFIN	3115	2011-10-04
Economic and Financial Affairs ECOFIN	3148	2012-02-21

European Commission

Commission DG	Commissioner
Financial Stability, Financial Services and Capital Markets Union	BARNIER Michel

Key events

Date	Event	Reference	Summary
15/09/2010	Legislative proposal published	COM(2010)0484	Summary
07/10/2010	Committee referral announced in Parliament, 1st reading		
24/05/2011	Vote in committee, 1st reading		Summary
07/06/2011	Committee report tabled for plenary, 1st reading	A7-0223/2011	
20/06/2011	Debate in Council		
04/07/2011	Debate in Parliament		
05/07/2011	Decision by Parliament, 1st reading	T7-0310/2011	Summary
05/07/2011	Results of vote in Parliament		
04/10/2011	Debate in Council		
24/01/2012	Debate in Council		
29/03/2012	Decision by Parliament, 1st reading	T7-0106/2012	Summary
29/03/2012	Results of vote in Parliament		
04/07/2012	Act adopted by Council after Parliament's 1st reading		
04/07/2012	Final act signed		
04/07/2012	End of procedure in Parliament		
27/07/2012	Final act published in Official Journal		

Technical information

Procedure reference	2010/0250(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)

Procedure subtype	Legislation
Legislative instrument	Regulation
Amendments and repeals	Amending Directive 98/26/EC 1996/0126(COD) Amended by 2011/0202(COD) Amended by 2011/0296(COD) Amended by 2012/0150(COD) Amended by 2013/0025(COD) Amended by 2014/0017(COD) Amended by 2015/0226(COD) Amended by 2016/0360A(COD) Amended by 2016/0365(COD) Amended by 2017/0090(COD) Amended by 2017/0136(COD) Amended by 2020/0266(COD) Amended by 2021/0296(COD) Amended by 2022/0403(COD)
Legal basis	Treaty on the Functioning of the European Union TFEU 114-p1
Other legal basis	Rules of Procedure EP 165
Stage reached in procedure	Procedure completed
Committee dossier	ECON/7/03848

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE456.945	04/02/2011	
Amendments tabled in committee		PE460.860	30/03/2011	
Amendments tabled in committee		PE460.906	30/03/2011	
Amendments tabled in committee		PE460.907	30/03/2011	
Committee opinion	JURI	PE454.714	05/04/2011	
Committee opinion	ITRE	PE456.881	15/04/2011	
Committee report tabled for plenary, 1st reading/single reading		A7-0223/2011	07/06/2011	
Text adopted by Parliament, partial vote at 1st reading /single reading		T7-0310/2011	05/07/2011	Summary
Text adopted by Parliament, 1st reading/single reading		T7-0106/2012	29/03/2012	Summary

Council of the EU

Document type	Reference	Date	Summary
Draft final act	00008/2012/LEX	04/06/2012	

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2010)0484	15/09/2010	Summary

Document attached to the procedure	SEC(2010)1058	15/09/2010	
Document attached to the procedure	SEC(2010)1059	15/09/2010	
Commission response to text adopted in plenary	SP(2012)323	02/05/2012	
Follow-up document	COM(2013)0158	22/03/2013	Summary
Follow-up document	COM(2015)0039	03/02/2015	Summary
Follow-up document	COM(2016)0857	23/11/2016	Summary
Follow-up document	COM(2017)0104	02/03/2017	Summary
Follow-up document	COM(2019)0062	30/01/2019	
Follow-up document	COM(2020)0574	23/09/2020	
Follow-up document	COM(2021)0172	12/04/2021	
Follow-up document	COM(2021)0224	06/05/2021	
Follow-up document	COM(2022)0254	09/06/2022	

National parliaments

Document type	Parliament /Chamber	Reference	Date	Summary
Contribution	AT_NATIONALRAT	COM(2010)0484	18/10/2010	
Contribution	PT_PARLIAMENT	COM(2010)0484	01/12/2010	
Contribution	CZ_SENATE	COM(2010)0484	31/01/2011	
Contribution	IT_SENATE	COM(2010)0484	02/05/2011	

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
ECB	European Central Bank: opinion, guideline, report	CON/2011/0001 OJ C 057 23.02.2011, p. 0001	13/01/2011	Summary
EDPS	Document attached to the procedure	N7-0068/2011 OJ C 216 22.07.2011, p. 0009	19/04/2011	Summary

Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	

Final act	
Regulation 2012/0648 OJ L 201 27.07.2012, p. 0001	Summary

Delegated acts	
Reference	Subject
2015/2826(DEA)	Examination of delegated act
2016/2674(DEA)	Examination of delegated act
2013/2686(DEA)	Examination of delegated act
2013/2785(DEA)	Examination of delegated act
2013/2729(DEA)	Examination of delegated act
2013/2730(DEA)	Examination of delegated act
2013/2784(DEA)	Examination of delegated act
2013/2808(DEA)	Examination of delegated act
2013/2809(DEA)	Examination of delegated act
2013/2810(DEA)	Examination of delegated act
2013/2807(DEA)	Examination of delegated act
2014/2581(DEA)	Examination of delegated act
2014/2682(DEA)	Examination of delegated act
2015/2742(DEA)	Examination of delegated act
2016/2601(DEA)	Examination of delegated act
2017/2589(DEA)	Examination of delegated act
2019/2994(DEA)	Examination of delegated act
2019/2679(DEA)	Examination of delegated act
2019/3011(DEA)	Examination of delegated act
2016/2782(DEA)	Examination of delegated act
2017/2617(DEA)	Examination of delegated act
2017/2759(DEA)	Examination of delegated act
2016/3050(DEA)	Examination of delegated act
2019/2680(DEA)	Examination of delegated act
2017/2532(DEA)	Examination of delegated act
2017/2859(DEA)	Examination of delegated act
2018/2998(DEA)	Examination of delegated act

2019/2549(DEA)	Examination of delegated act
2016/2930(DEA)	Examination of delegated act
2016/2950(DEA)	Examination of delegated act
2018/3004(DEA)	Examination of delegated act
2018/3003(DEA)	Examination of delegated act
2018/2991(DEA)	Examination of delegated act
2018/2993(DEA)	Examination of delegated act
2021/2529(DEA)	Examination of delegated act
2021/2617(DEA)	Examination of delegated act
2020/2943(DEA)	Examination of delegated act
2021/2528(DEA)	Examination of delegated act
2021/2744(DEA)	Examination of delegated act
2020/2942(DEA)	Examination of delegated act
2020/2726(DEA)	Examination of delegated act
2020/2720(DEA)	Examination of delegated act
2020/2729(DEA)	Examination of delegated act
2020/2785(DEA)	Examination of delegated act
2021/2680(DEA)	Examination of delegated act
2022/2723(DEA)	Examination of delegated act
2022/2914(DEA)	Examination of delegated act
2022/2913(DEA)	Examination of delegated act
2025/2755(DEA)	Examination of delegated act
2022/2721(DEA)	Examination of delegated act
2022/2718(DEA)	Examination of delegated act
2022/2722(DEA)	Examination of delegated act
2022/2899(DEA)	Examination of delegated act
2023/2909(DEA)	Examination of delegated act
2023/3008(DEA)	Examination of delegated act
2022/2724(DEA)	Examination of delegated act
2022/2908(DEA)	Examination of delegated act
2025/2964(DEA)	Examination of delegated act
2026/2718(DEA)	Examination of delegated act
2026/2832(DEA)	Examination of delegated act

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

2010/0250(COD) - 23/11/2016 - Follow-up document

In accordance with the requirements of Regulation (EU) No 648/2012 of the European Parliament and of the Council on over-the-counter (OTC) derivatives, central counterparties and trade repositories (EMIR), the Commission presents a report on the review of the Regulation.

To recall, EMIR enacts, at EU level, the reform in the OTC derivatives market that were agreed at the G20 summit in Pittsburgh in 2009. It aims to **promote transparency and standardisation in derivatives markets** as well as reduce systemic risk through the application of its core requirements, these being:

- central clearing of standardised OTC derivative contracts;
- margin requirements for OTC derivative contracts that are not centrally cleared;
- reporting of all derivative contracts;
- requirements for central counterparties (CCPs) and for trade repositories.

The report provides a summary of the areas where consultation responses and specific input received from various authorities, such as the European Securities and Markets Authority (ESMA) and the European System Risk Board (ESRB), have shown that action is necessary to ensure fulfilment of the objectives of EMIR in a more proportionate, efficient and effective manner.

The main conclusion is that **fundamental changes should not be made to the nature of the core requirements of EMIR.** These requirements are integral to ensuring transparency and mitigating systemic risks in the derivatives markets.

However, there are a number of areas where the **EMIR requirements could be adjusted** without compromising on its overall objectives in order to:

1. Simplify and increase the efficiency of the requirements.

In this respect, the report suggests:

- introducing a mechanism to **suspend the clearing obligation**: the Commission will propose a mechanism for suspending a clearing obligation as part of the proposal on CCP recovery and resolution;
- **facilitating the predictability of margin requirements**, through: (i) better information sharing to make compliance with margin requirements more efficient for market participants and enable them to better manage their own assets, and (ii) establishing a mandate for initial margin models endorsed by authorities;
- promoting transparency by **streamlining reporting requirements to trade repositories.** Further assessment of the current rules should be undertaken to take specific actions to achieve that goal;
- exploring alternative methods for providing access to **third country authorities** of trade repositories' data that provide appropriate safeguards.

2. Reduce disproportionate costs and burdens.

The report suggests:

- reviewing to what extent **transactions entered into before the clearing obligation enters into force** and intragroup transactions should remain within scope of the relevant requirements;
- assessing whether it is necessary to amend the scope of the core requirements in EMIR in order to deal with the challenges faced by **non-financial counterparties** (NFCs). The report suggests that further consideration should also be given to whether any NFCs, or only some of them based on the volume and type of activity in derivatives markets, should be captured by clearing and margin requirements;
- considering measures to **address the obstacles to client clearing**. In addition to the difficulties faced by NFCs, small financials and industry associations and some public authorities noted that when undertaking limited derivatives activity they were facing significant challenges in establishing the access to clearing necessary to meet upcoming clearing obligations;
- considering whether the current exemption for **pension scheme arrangements** could be extended or made permanent without compromising on EMIR's objective of reducing systemic risk.

The Commission will propose **a legislative review of EMIR in 2017,** in the framework of REFIT that will be accompanied by an impact assessment which will considers the various issues at stake in more depth.

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

2010/0250(COD) - 02/03/2017 - Follow-up document

The Commission presents a report on the international treatment of central banks and public entities managing public debt with regard to OTC derivatives transactions.

The Regulation on OTC derivatives, central counterparties and trade repositories (EMIR) imposes obligations on various actors in the derivatives markets. It implements at EU level the reforms of the OTC derivative market as agreed at the 2009 G20 summit in Pittsburgh.

According to Article 1(4) of EMIR, the Union’s central banks and Union public bodies charged with or intervening in the management of public debt are exempted from EMIR and are therefore not subject to these obligations.

EMIR gives the **Commission power to amend the list of exempted entities by way of a delegated act** if it concludes, after assessment, that the exemption of the monetary responsibilities of those third-country central banks from the clearing and reporting obligation is necessary.

On 22 March 2013, the Commission adopted a report concluding that the legislative frameworks of **Japan and the United States** fulfilled the conditions for exemption from certain EMIR requirements.

This assessment includes four jurisdictions (**Australia, Hong Kong, Switzerland and Canada**) included in the first assessment but not recommended for an exemption at that time as well as two other jurisdictions (**Mexico and Singapore**), which requested an assessment.

The assessment concludes that the **legislative frameworks** implementing the OTC derivative reforms agreed in Pittsburgh in 2009 **are now fully in place in Australia, Hong Kong, Mexico, and Switzerland, and will be so shortly in Canada and Singapore**. Furthermore, in all of these jurisdictions, the legislative frameworks either do or will not apply to central banks and public debt management bodies.

The Commission therefore concludes that **Article 1(4) of EMIR should be amended** to exempt from certain EMIR requirements the central banks and public bodies charged with or intervening in the management of public debt from Australia, Canada, Hong Kong, Mexico, Singapore and Switzerland.

The Commission will monitor developments in these and other G20 jurisdictions. It will update the report as the reform process in these jurisdictions advances, including by removing certain third countries from the list of exempted entities should the regulatory arrangements in those third countries no longer meet the conditions for an exemption.

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

2010/0250(COD) - 22/03/2013 - Follow-up document

The Commission presents a report on the International treatment of central banks and public entities managing public debt with regard to OTC derivatives transactions.

Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) was adopted on 4 July 2012 and entered into force on 16 August 2012. This Regulation requires the central clearing of all standardised OTC derivatives contracts (clearing obligation), margins for non-centrally cleared contracts (margins requirements) and the reporting of all derivatives contracts to trade repositories (reporting obligation).

The Union's central banks and Union public bodies charged with or intervening in the management of public debt are exempted from EMIR and are, therefore, not subject to the clearing obligation, to risk-mitigation techniques for uncleared trades or to the reporting obligation.

At the time of adoption of the EMIR Regulation, **there were uncertainties on the treatment of foreign central banks in the application of OTC derivatives reforms in other jurisdictions**. The European Parliament and the Council therefore postponed a decision on the application of EMIR to third-country central banks until more clarity could be reached on this issue. The Commission was requested **to analyse the international treatment of central banks and of public bodies managing public debt in other jurisdictions' legal framework** and to present a report of its comparative analysis three months after the entry into force of EMIR.

The report concludes that **central banks and public bodies charged with or intervening in the management of public debt will not be subject to the clearing and reporting obligation under the US and Japanese and upcoming Swiss regulatory frameworks.** They are also likely to be exempted under the forthcoming Australian and Hong Kong legal frameworks. Exemptions under the Canadian regime can also be expected.

The comparative analysis contained in the report is by no means exhaustive. It is also based on some third-countries' legislation that is not final. The report will need to be updated regularly as the reform process advances in these and other G20 jurisdictions

At this stage, **the Commission concludes a delegated act is required to amend Article 1(4) of EMIR and to exempt the central banks and public bodies charged with or intervening in the management of public debt from Japan and the United States**, which are the two jurisdictions with final rules on OTC derivatives in place.

As Australia, Canada, Hong Kong and Switzerland proceed with finalising their rules, the Commission will monitor and report on the latest developments with a view to also exempting their respective central banks and debt management offices on the basis of the rules that are currently proposed in those jurisdictions.

In order to ensure that third country central banks and other public bodies charged with or intervening in the management of public debt continue to perform adequately their tasks, **other countries will also be considered in the future, as needed**. Further amendments of Article 1(4) of EMIR to include countries not listed in this first report may, therefore, be expected.

In the immediate future, no market disruption will be imposed on third countries that are not included in the first delegated act, since the obligations related to central clearing and risk mitigation techniques for uncleared trades have not yet entered into force in the Union. The European Commission will pay close attention to the timing of the entry into force of these obligations with the exemptions of third country central banks.

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

2010/0250(COD) - 26/06/2013

PURPOSE: Corrigendum to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (Regulation first published in OJ L 176 of 27.6.2013).

The corrigenda concern the dates and time limits set out previously, relating to:

Common Equity Tier 1 items:

- With respect to issuances after **28 June 2013** (and not 31 December 2014), institutions shall classify capital instruments as Common Equity Tier 1 instruments only after permission is granted by the competent authorities, which may consult EBA.
- The EBA shall establish and publish a list of all the forms of capital instruments in each Member State that qualify as Common Equity Tier 1 instruments **by 1 February 2015** for the first time.
- The EBA may, after the review process set out in the Regulation, decide to remove non-State aid capital instruments issued after **28 June 2013** (and not 31 December 2014) from the list and may make an announcement to that effect.

Draft regulatory technical standards: the EBA shall submit draft regulatory technical standards to the Commission by **28 July 2013** and not (1 February 2015) with regard particularly to: certain elements of own assets, reporting obligations, information to be published by the authorities, additional reductions, etc.

Other amendments are made to dates and time limits initially provided, with regard to: the percentages applicable to deductions, the Commission report on the impact of the own funds requirements and the delegation of power to the Commission.

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

2010/0250(COD) - 03/02/2015 - Follow-up document

In accordance with Regulation (EU) No 648/2012 on over-the-counter (OTC) derivatives, central counterparties and trade repositories (EMIR), the objective of this Commission report is to assess the progress and effort made by central counterparties (CCPs) in developing technical solutions for the transfer by **pension scheme arrangements** (PSAs) of non cash collateral as variation margins, as well as the need for any measures to facilitate such solution.

In order to assess the current situation fully, the Commission ordered a baseline study on this issue which was prepared by Europe Economics et Bourse Consult.

Current provisions of the EMIR Regulation: the EMIR Regulation, which entered into force on 16 August 2012, is designed to improve the stability of the over-the-counter (OTC) derivative markets throughout the EU. Under EMIR, OTC derivatives that are standardised (i.e. that have met predefined eligibility criteria), including a high level of liquidity, will be subject to a mandatory central clearing obligation and must be cleared through central counterparties (CCPs).

Under current arrangements, PSAs – which encompass all categories of pension funds – would have to source cash for central clearing. Given that PSAs hold neither significant amounts of cash nor highly liquid assets, imposing such a requirement on them would require very far-reaching and costly changes to their business model which could ultimately affect pensioners' income.

Pension Scheme Arrangements (PSAs) in many Member States are active participants in the OTC derivatives markets. **A specific exemption in the Regulation states that 'pension scheme arrangements' are exempt from the clearing obligation of certain derivatives until August 2015.** The exemption can be extended by up to a further three years in total. This transition period was explicitly provided for under EMIR in order to provide further time for CCPs to develop technical solutions for the transfer of non-cash collateral to meet VM calls.

Pension Scheme Arrangements: the report noted that at this stage, only one CCP has demonstrated any notable effort to develop a solution for the posting of non-cash assets in order to meet variation margin calls. The relevant CCP is actively developing a service (the PSA repo service) which could address PSAs' needs to use non-cash assets in order to meet the cash VM calls it requires.

As the PSA repo service is still under development, **certain important questions as to the viability of such a service remain at this stage**. This potential service is still under development. It is planned to be launched in the first half of 2015. The Commission will continue to engage with the CCP in question and PSAs as the service comes to the market in order to assess its ability to serve the needs of PSAs.

Other technical solutions: as the proposed service is yet to be launched, the Commission has explored additional potential technical solutions in order to identify whether there are other measures which might be taken by CCPs in enabling PSAs to post non-cash assets to meet variation margin calls. These potential technical solutions are outlined below:

- collateral transformation by CCPs;
- direct acceptance of non-cash assets with pass through to receivers of VM;
- acceptance of non-cash assets with security interest passed through to receivers of VM;
- quad-party collateral for VM security interest;
- collateral Transformation by Clearing Members;

- agency stock lending;
- secured lending by non-financial entities.

Progress and efforts made: the report noted that, with the exception of the proposed PSA repurchase service, no sufficient progress appears to have been made by CCPs in order to develop technical solutions for the transfer of non-cash collateral as variation margins.

None of the infrastructure based potential alternative solutions analysed in the report appear to be being pursued by any CCPs. It can be concluded that this is due to the obstacles that this report identifies. Nonetheless, **CCPs should continue to consider ways in which the obstacles identified to the implementation of the potential alternative solutions could be overcome in practice**.

However, the Commission recognised that, in the absence of a solution, PSAs will ultimately be required to substitute securities for cash in order to maintain a sufficient cash buffer to meet potential variation margin calls, from **August 2018** at the latest.

In conclusion, the Commission recommended an **extension of the three-year period of EMIR by two years** through means of a Delegated Act.

The Commission shall continue to monitor the situation with regards to technical solutions for PSAs to post non-cash assets to meet CCP VM calls in order to assess whether this period should be extended by a further one year.

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

2010/0250(COD) - 05/07/2011 - Text adopted by Parliament, partial vote at 1st reading/single reading

The European Parliament amended, at first reading of the ordinary legislative procedure, the proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.

The vote on the legislative resolution has been postponed to a later date.

Subject matter of the Regulation: Parliament clarifies that the Regulation lays down uniform requirements for derivative contracts, specific provisions to improve the transparency and risk management of the OTC derivatives market as well as uniform requirements for the performance of activities of CCPs and trade repositories.

In order to ensure the uniform application of the Regulation, the European Securities and Markets Authority (ESMA) shall develop draft regulatory technical standards laying down guidelines for the interpretation and application, for the purposes of this Regulation, of Directive 2004/39/EC. ESMA shall submit drafts for these regulatory technical standards to the Commission by 30 June 2012.

The clearing obligations of this Regulation shall not apply to the Bank for International Settlements. Further derogations from this Regulation shall require the adoption of a specific regulation of the European Parliament and of the Council drawn up on the basis of international standards and equivalent Union sectoral rules**.**

Strengthening the role of ESMA: Members state that the three European Supervisory Authorities have a crucial role to play in safeguarding the stability of the financial sector. It is therefore essential to continuously ensure that the development of their work is a matter of high political priority and that they are adequately resourced.

In view of its pivotal role, **ESMA should decide**, after consulting the Commission and the European Systemic Risk Board whether a class of derivatives meets the eligibility criteria, whether the clearing obligation should be applied and from when the clearing obligation should take effect, including, where appropriate, any 'phase-in' implementation standards.

In determining whether a class of derivatives is to be subject to clearing requirements, ESMA should aim for a **reduction in systemic risk and avoidance of systemic repercussions**. This includes taking into account in the assessment factors: such as the future date from which the clearing obligation takes effect, the interconnectedness of the relevant class of derivative in the market, the level of contractual and economic standardisation of contracts, the effect on the performance and competitiveness of EU companies in the global markets, the operational and risk management ability of CCPs to handle the volume and obligations of this directive, the degree of settlement risk and counterparty credit risk and the impact of cost on the real economy and investment in particular.

The Commission and ESMA should ensure that mandatory clearing arrangements also protect investors.

As part of the preparation for the establishment of technical guidelines and regulatory technical standards, and in particular when setting the clearing threshold for non-financial counterparties under this Regulation, ESMA should organise public hearings of market participants.

Members consider that it is imperative that **ESMA should be involved in the authorisation and supervisory process**. ESMA should involve other competent authorities in the Member States concerned in the work of preparing recommendations and decisions.

For the purpose of the clearing obligation, ESMA shall establish and manage a **public register**. The register shall be publicly available on ESMA's website.

Clearing obligations: Members consider that OTC derivatives contracts entered into **before the date** from which the clearing obligation takes effect for that class of derivatives are **exempted** from the clearing obligation. That clearing obligation shall apply to all OTC derivative contracts which, following publication of ESMA decision are classified as derivatives eligible for the clearing obligation. There shall be no clearing obligation in the case of derivative contracts between subsidiary undertakings of the same parent company or between a parent company and a subsidiary undertaking.

Validity of transactions: in general, the obligations under this Regulation should apply only to future transactions, thereby making a smooth transition possible and enhancing the stability of the system while reducing the need for subsequent adjustments. In that connection, clearing and reporting obligations should be dealt with in different ways. Whilst a retrospective clearing obligation is hardly feasible on legal grounds, given the need for post-collateralisation, the same is not true of a retrospective reporting obligation. In this case, on the basis of the results of an impact study, and using rules tailored to classes of derivatives, technical requirements and remaining periods to maturity, a retrospective reporting obligation could be laid down.

Pension funds: pension funds as defined in Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision with a risk-averse risk-profile and that use derivates to hedge their pension liability risks should be made subject to the reporting obligations and the risk-mitigation techniques for OTC derivative contracts not cleared by a CCP as laid down in this Regulation. Those pensions should not, however, be subject to the clearing obligation in order to avoid disproportionate costs for pensioners.

Institutions for occupational retirement provision as defined in Directive 2003/41/EC:institutions for occupational retirement provision or arrangements offering similar level of risk mitigation and recognised under national law for the purpose of retirement provision using derivative contracts that are objectively measurable as reducing risks directly related to the solvency of the institution that operate a pension scheme should be subject to the provisions for bilateral collateralisation as set out in this Regulation to be reviewed in 2014.

Non-financial counterparties: non-financial counterparties should explain the use of derivatives through their annual report or other appropriate means. The clearing threshold for non-financial counterparties is a very important figure for all market participants. Both qualitative and quantitative criteria should be assessed and given a suitable weighting when the clearing threshold is set. In that connection, appropriate efforts should be made to standardise OTC contracts to a considerable extent and to recognise the importance of risk mitigation for non-financial counterparties in the context of their normal business activity.

SME exemption: with a view to exempting small and medium-sized enterprises (SMEs) from the clearing obligation, consideration should also be given to sector-specific OTC clearing thresholds based on the total volume of contracts concluded by an undertaking. In addition, ESMA should examine whether a de minimis rule might be introduced for SMEs in connection with the reporting obligation.

Reporting obligation: the Regulation provides for mandatory reporting requirements. Moreover, a retrospective reporting obligation is needed, to the largest possible extent, for both financial counterparties and non-financial counterparties over the threshold, in order to provide ESMA with comparative data. If such retrospective reporting is not feasible for any classes of OTC derivatives, an appropriate justification should be provided to the respective trade repository.

Penalties: there should be effective, proportionate and dissuasive penalties with regard to the clearing and reporting obligations. Member States should enforce those penalties in a manner that does not reduce the effectiveness of those rules. Member States should ensure that the penalties imposed are publicly disclosed and that assessment reports on the effectiveness of existing rules are published at regular intervals.

Agreements with supervisory authorities of third countries: in view of the global nature of financial markets, agreements with CCPs established in third countries on the provision of clearing services within the Union are necessary according to the Parliament. Such agreements should cover the authorisation by ESMA and the competent authority of the Member State in which the CCP concerned intends to provide clearing services of authorisation of a CCP established in a third country or the granting by the Commission of an exemption from the authorisation conditions and procedure, provided that the Commission has recognised the legal and supervisory framework of that third country as equivalent to the Union framework and that the requisite conditions are met.

Central counterparties (CCP): a CCP shall have a permanent and available initial capital of at least **EUR 10 million** to be authorised pursuant to the text. The draft Regulation states that CCPs should have robust governance arrangements, senior management of good repute and independent members on its board, irrespective of its ownership structure. At least one third and no less than two members of the board should be independent members. Those independent members should not act as independent members in more than one other CCP. Their remuneration should not be linked in any way with the performance of the CCP. Outsourcing of functions should be approved by the risk committee of the CCP.

Parliament feels that the development of a highly robust risk management should remain the primary objective of a CCP. However, it may adapt its features to the specific activities and risk profiles of the clients of the clearing members, and if deemed appropriate, may include in the scope of the highly liquid assets accepted as collateral at least cash and government bonds subject to adequate haircuts. CCPs' risk management strategies should be sound, and should not transfer risk to the taxpayer..

Interoperability arrangements: given the additional complexities involved in an interoperability arrangement between CCPs clearing OTC derivative contracts, it is appropriate at this stage to require a grace period of three years between receiving clearing authorisation for derivatives and eligibility to apply for authorisation for interoperability as well as to restrict the scope of subsequent interoperability arrangements to cash securities. However, by 30 September 2014, ESMA should submit a report to the Commission on whether and when an extension of that scope to other financial instruments would be appropriate.

Maintenance of website by ESMA: Members require ESMA to maintain a website which provides the following information:(a) contracts eligible for the clearing obligation; (b) CCPs authorised to offer services or activities in the Union that are a legal person established in the Union, and the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation; (c) penalties

imposed for breaches of the Regulation; (d) CCPs authorised to offer services or activities in the Union established in a third country, and the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation; (e) trade repositories authorised to offer services or activities in the Union;(g) penalties and fines imposed (h) the public register referred to in the Regulation.

Delegated acts: in defining the delegated acts, the Commission should make use of the expertise of the relevant ESAs (ESMA, EBA and EIOPA). In view of the expertise of ESMA regarding issues concerning securities and securities markets, ESMA should play a central role in advising the Commission on the preparation of the delegated acts. However, where appropriate, ESMA should consult EBA and EIOPA. In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers.

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

2010/0250(COD) - 15/09/2010 - Legislative proposal

PURPOSE: to establish common rules with the aim of increasing the security and efficiency of the over-the-counter (OCT) derivatives.

PROPOSED ACT: European Parliament and Council Regulation.

BACKGROUND: in its Communication of 4 March 2009 on “Driving European Recovery”, the Commission committed itself to deliver appropriate initiatives to increase transparency and to address financial stability concerns. In its Communication of 3 July 2009, it examined the role played by derivatives in the financial crisis and, in its 20 October 2009 Communication, it set out the future policy actions the Commission intended to propose to increase transparency of the derivatives market, reduce counterparty and operational risk in trading and enhance market integrity and oversight.

In September 2009, G-20 Leaders agreed in Pittsburgh that all standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest and that OTC derivative contracts should be reported to trade repositories. In June 2010, G20 Leaders in Toronto reaffirmed their commitment and also committed to accelerate the implementation of strong measures to improve transparency and regulatory oversight of OTC derivatives in an internationally consistent and non-discriminatory way.

This initiative is **part of a larger international effort** to increase the stability of the financial system in general, and the OTC derivatives market in particular. Given the global nature of the OTC derivatives market an internationally coordinated approach is crucial.

This proposal for a Regulation delivers the Commission's commitments to proceed rapidly and with determination. It takes also into account the strong support and the many of the measures suggested in Parliament’s Resolution of 15 June 2010, on "Derivatives markets: future policy actions". It is also consistent with the recently adopted US legislation on OTC derivatives, the so-called Frank-Dodd Act.

IMPACT ASSESSMENT: the impact assessment concludes that the largest net benefits would be achieved through the adoption of measures that would:

- require the use of Central Counterparty (CCP) clearing for OTC derivatives that meet predefined eligibility criteria;
- set specific targets for legal and process standardisation;
- set specific targets for the bilateral clearing of OTC derivatives transactions;
- require market participants to report all the necessary information on their OTC derivatives portfolios to a trade repository or, if that would not be possible, directly to regulators; and
- require the publication of aggregate position information.

LEGAL BASE: Article 114 of the Treaty on the Functioning of the European Union (TFEU). A uniform process at EU level is needed to determine which OTC Derivatives are eligible for mandatory clearing through CCPs.

CONTENT: the scope of the Regulation is wide and lays down **uniform requirements** covering financial counterparties, non-financial counterparties (exceeding certain thresholds) and all categories of OTC derivative contracts. Its prudential parts apply to central counterparties as a result of the clearing obligation and, for the reporting requirement, to trade repositories.

The authorisation and supervision requirements for CCPs apply irrespective of the financial instrument the CCPs clear - whether OTC or other. Exemptions are explicitly foreseen for the members of the European System of Central Banks, public bodies charged with or intervening in the management of the public debt and to multilateral development banks.

The main features of the proposal are as follows:

Clearing, reporting and risk mitigation of OTC Derivatives: 'standardised' contracts will mean those contracts that are eligible for clearing by CCPs. In order to apply this, the Regulation establishes a process that will take into account the risk aspects connected to mandatory clearing.

In order to establish a process that ensures that as many OTC contracts as possible will be cleared, the Regulation introduces two approaches to determine which contracts must be cleared:

- a '*bottom-up'* approach, according to which a CCP decides to clear certain contracts and is authorised to do so by its competent authority, who is then obliged to inform the European Securities and Markets Authority (ESMA) once it approves the CCP to clear those contracts. ESMA will then have the powers to decide whether a clearing obligation should apply to all of those contracts in the EU. ESMA will need to base that decision on certain objective criteria;
- a '*top-down'* approach according to which ESMA, together with the European Systemic Risk Board (ESRB), will determine which contracts should potentially be subject to the clearing obligation. This process is important to identify and capture those contracts in the market that are not yet being cleared by a CCP.

Counterparties that are subjected to the clearing obligation cannot simply avoid the requirement by deciding not to participate in a CCP. If those counterparties do not meet the participation requirements or are not interested in becoming clearing members, they must enter into the necessary arrangements with clearing members to access the CCP as clients.

Furthermore, CCPs should not be allowed to accept only those transactions concluded on execution venues with which they have a privileged relationship or which are part of the same group.

As regards **non-financial (corporate) counterparties**, they will in principle not be subject to the rules of this Regulation, unless their OTC derivatives positions reach a threshold and are considered to be systemically important.

The Regulation sets out a process that helps to identify the non-financial institutions with systemically important positions in OTC derivatives and subjects them to certain obligations specified under the Regulation. The process is based on the definition of two thresholds: a) an information threshold and b) a clearing threshold. These thresholds will be specified by the European Commission on the basis of draft regulatory standards proposed by ESMA, in consultation with the ESRB and other relevant authorities.

Moreover, as not all OTC derivatives will be considered eligible for central clearing, there remains a need to improve arrangements and the safety of those contracts that will continue to be managed on a so-called 'bilateral' basis. The Regulation therefore requires the **use of electronic means** and the existence of risk management procedures with timely, accurate and appropriately segregated exchange of collateral, and an appropriate and proportionate holding of capital.

Lastly, financial counterparties and non-financial counterparty above the clearing threshold must report the details of any derivative contract they have entered into and any modification thereof (including novation and termination) to a registered trade repository. In the exceptional case that a trade repository is not capable of recoding the details of a particular OTC derivatives contract, the Regulation requires that this information should be provided directly to the relevant competent authority. The Commission will need to be empowered to determine the details, type, format and frequency of the reports for the different classes of derivatives, following draft technical standards to be developed by ESMA.

Requirements applicable to CCPs: given that CCPs have to assume additional risks, the Regulation requires that, for security reasons, they are subjected to rigorous organisational, conduct of business and prudential requirements (internal governance rules, increased capital requirements, etc.).

To begin with, a CCP must have in place robust governance arrangements. These will respond to any potential conflicts of interest between owners, management, clearing members and indirect participants. The role of independent board members is particularly relevant.

Secondly, to be authorised to exercise its activity, a CCP is required to have a minimum quantum of capital. The Regulation will require a CCP to have a mutualised default fund to which members of the CCP will have to contribute.

Authorisation and supervision of trade repositories: the Regulation provides for a reporting requirement of OTC derivative transactions to increase the transparency of this market. The information must be reported to trade repositories. In view of the central role of trade repositories in the collection of regulatory information, the Regulation gives ESMA the powers to register trade repositories, withdraw the registration and to perform the surveillance of trade repositories.

Requirements for trade repositories:the Regulation also contains provisions for trade repositories to guarantee their compliance with a set of standards. These are designed to ensure that the information that trade repositories maintain for regulatory purposes is reliable, secured and protected. In particular, trade repositories will be subject to organisational and operational requirements and ensure appropriate safeguarding and transparency of data.

BUDGETARY IMPLICATION: the proposal has no implication for the EU budget.

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

2010/0250(COD) - 13/01/2011 - European Central Bank: opinion, guideline, report

OPINION OF THE EUROPEAN CENTRAL BANK

On 13 October 2010, the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.

The ECB supports the proposed regulation’s aim to lay down uniform requirements for OTC derivative contracts, and for the performance of activities of central counterparties (CCPs) and trade repositories (TRs).

However, the ECB has concerns with respect to some of the provisions of the proposed regulation.

On a general note, the ECB makes the following observations:

it is necessary to **ensure the adequate involvement of the ECB and the national central banks (NCBs) in the ESCB** in various aspects of the proposed regulation (in particular concerning decisions to grant or withdraw authorisation, including for the extension of activities; ongoing risk assessments of CCPs; the definition of the technical standards for CCPs and TRs; and decisions to allow third country CCPs and TRs to conduct their activities in the Union) needs to be ensured without regulating, in substance, on central bank competencies;

CCPs should be strictly regulated. In this regard, it should also be considered further whether an amendment of the **definition of 'credit institution'** in Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (recast) (1) is warranted in order to ensure that CCPs are classified as credit institutions with a limited purpose banking licence.

On a more specific level, the ECB considers that it is critical to ensure **effective cooperation between supervisors and overseers** in the context of the proposed regulation:

(1) the determination of eligibility for the clearing obligation should not be carried out by ESMA in isolation, but in cooperation with the members of the ESCB;

(2) the setting of regulatory technical standards, guidelines and recommendations for CCPs and TRs should be conducted in close cooperation with the members of the ESCB;

(3) the relevant members of ESCB should, both from an oversight perspective and as central banks of issue, as the case may be, be involved in all tasks of the college, including in the authorisation and ongoing review of CCPs under Title III of the proposed regulation;

(4) with regard to relations with third countries, the decision to recognise third country CCPs under Article 23 of the proposed regulation should not be taken by ESMA without close cooperation with the relevant members of the ESCB, both from an oversight perspective and as central banks of issue, in order to ensure that any central bank concerns and policies regarding, for instance, liquidity and risk management are adequately reflected. In addition, the ECB recommends that a requirement for such recognition should be the reciprocal treatment of CCPs from the Union under the relevant laws of such third countries.

(5) there must be adequate participation and cooperation between all relevant authorities, bodies and central banks. In the case of central banks, this applies with respect to both their participation in the college and with regard to the exchange of necessary information, including for financial stability, oversight and statistical purposes.

The ECB states that the proposed regulation requires that CCPs have '**access to adequate liquidity**' as a pre-condition for obtaining authorisation to perform services and activities as a CCP.

The adequate liquidity referred to 'could result from access to central bank liquidity or to creditworthy and reliable commercial bank liquidity'. The ECB considers that commercial bank money does not truly eliminate risks, whilst central bank money does. Therefore, the proposed regulation should not present central bank liquidity and commercial bank money as two equally safe and preferable options.

At the same time, the ECB positively notes that the proposed regulation does not contain any suggestions about regulating access to central bank credit.

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

2010/0250(COD) - 19/04/2011 - Document attached to the procedure

Opinion 2011/C 216/04of the European Data Protection Supervisor on the proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.

The EDPS points out that he has not been consulted by the Commission, although this is required by Regulation (EC) No 45/2001, but has instead adopted this Opinion acting on his own initiative.

Access to records of telephone and data traffic: the proposal empowers ESMA to require records of telephone and data traffic in order to carry out duties related to the supervision of trade repositories. However, the scope of the provision and in particular the exact meaning of 'records of telephone and data traffic' is not clear. Nevertheless, it cannot be excluded that the records of telephone and data traffic concerned include personal data within the meaning of Directive 95/46/EC and Regulation (EC) No 45/2001 and, to the relevant extent, Directive 2002/58/EC (the e-Privacy Directive), i.e. data relating to the telephone and data traffic of identified or identifiable natural persons. As long as this is the case, it should be assured that the conditions for fair and lawful processing of personal data, as laid down in the Directives and the Regulation, are fully respected.

In order to be considered necessary and proportionate, the power to require records of telephone and data traffic should be limited to what is appropriate to achieve the objective pursued and not go beyond what is necessary to achieve it. As it is currently framed, the provision at stake does not meet these requirements as it is too broadly formulated. In particular, the personal and material scope of the power, the circumstances and the conditions under which it can be used are not sufficiently specified. Neither does the proposal provide for important procedural guarantees or safeguards against the risk of abuses.

The EDPS notes that this observation is also relevant for the application of existing legislation and for other pending and possible future proposals containing equivalent provisions. The market abuse Directive (Directive 2003/6/EC), the MIFID Directive (Directive 2004/39/EC on markets in financial

instruments), the UCITS Directive (Directive 2009/65/EC on undertakings for collective investment in transferable securities), the current Regulation on credit rating agencies (Regulation (EC) No 1060/2009) all contain similar powers. This is particularly the case where the power in question is entrusted, as in this proposal, to an EU authority without referring to the specific conditions and procedures laid down in national laws (e.g. the proposal for a Regulation on amending Regulation (EC) No 1060/2009 on credit rating agencies.

Accordingly, the EDPS advises the legislator to:

- clearly specify the categories of telephone and data traffic records which trade repositories are required to retain and/or to provide to the competent authorities. Such data must be adequate relevant and not excessive in relation to the purpose for which they are processed;
- limit the power to require access to records of telephone and data traffic to trade repositories;
- make explicit that access to telephone and data traffic directly from telecom companies is excluded;
- limit access to records of telephone and data traffic to identified and serious violations of the proposed regulation and in cases where a reasonable suspicion (which should be supported by concrete initial evidence) exists that a breach has been committed;
- clarify that trade repositories shall provide records of telephone and data traffic only where they are requested by formal decision specifying, among others, the right to have the decision reviewed by the Court of Justice;
- require that the decision shall not be executed without prior judicial authorisation from the national judicial authority of the Member State concerned (at least where such authorisation is required under national law);
- require the Commission to adopt implementing measures setting out in detail the procedures to be followed, including adequate security measures and safeguards.

Other parts of the proposal: the EDPS goes on to make certain observations on other parts of the proposal, referring particularly to the need for purpose limitation which is a basic requirement of data protection law, as well as necessity and data quality. He points out that the proposal obliges financial counterparties and non-financial counterparties meeting certain threshold conditions to report the details of any OTC derivative contract they have entered into and any modification or termination thereof to a registered trade repository. Such information is meant to be held by trade repositories and made available by the latter to various authorities for regulatory purposes. In case one of the parties to a derivative contract subject to the above clearing and reporting obligations is a natural person, information about this natural person constitutes personal data which is processed under Directive 95/46/EC. Even in case where the parties to the transaction are not natural persons, personal data may still be processed in the framework of the proposal, such as the names and contact details of the directors of the companies. The provisions of Directive 95/46/EC (or Regulation (EC) No 45/2001) would therefore be applicable to the present operations.

The EDPS also makes certain observations on on-site inspections and international transfers of personal data.

He advises the legislator to:

- include a reference to Directive 95/46/EC and Regulation (EC) No 45/2001 at least in the recitals of the proposed Directive and preferably in a substantive provision as well, stating that the provisions of the proposed regulation are without prejudice to, respectively, the Directive and the Regulation;
- specify the kind of personal information that can be processed under the Proposal in compliance with the necessity principle, define the purposes for which personal data can be processed by the various authorities/entities concerned and fix precise, necessary and proportionate data retention periods for the above processing;
- limit the power to carry out on-site inspections and to impose periodic penalty payments only to trade-repositories and other legal persons clearly and substantially related to them, since this is not clear in the text. Should the Commission indeed envisage allowing inspections of non-business premises of natural persons, this should be made clear and more stringent requirements should be inserted in order to ensure compliance with necessity and proportionality principles (particularly with regards to the indication of the circumstances in which and the conditions on which such inspections can be carried out);
- several provisions of the proposed regulation allow for broad exchanges of data and information between ESMA, competent authorities of Member States and competent authorities of third countries. The text must make explicit that international transfers of personal data should be in conformity with the relevant rules of Regulation (EC) No 45/2001 and Directive 95/46/EC, introduce clear limits as to the kind of personal information that can be exchanged and define the purposes for which personal data can be exchanged.

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 measureable 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.

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

2010/0250(COD) - 04/07/2012 - Final act

PURPOSE: to establish common rules with the aim of increasing the security and efficiency of the over-the-counter (OCT) derivatives and regulating the activities of central counterparties and trade repositories.

LEGISLATIVE ACT: Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories.

CONTENTS: the Council adopted a Regulation aimed at **increasing transparency on all derivatives and reducing risk in the over-the-counter (OTC) derivatives market**. The adoption of the Regulation followed a compromise agreement with the European Parliament; as a result, the Council adopted all of the amendments adopted at first reading by the Parliament on 5 July 2012.

Over-the-counter derivatives ("OTC derivative contracts") lack transparency as they are privately negotiated contracts and any information concerning them is usually only available to the contracting parties. They create a complex web of interdependence which can make it difficult to identify the nature and level of risks involved.

The financial crisis has demonstrated that such characteristics increase uncertainty in times of market stress and, accordingly, pose risks to financial stability. This Regulation lays down conditions for mitigating those risks and improving the transparency of derivative contracts.

Subject matter and scope: This Regulation shall apply to financial counterparties (CCPs) and their clearing members, to CCPs and to trade repositories. It shall apply to non-financial counterparties and trading venues where so provided. Specifically it foresees:

the **clearing** of standardised OTC derivative contracts through CCPs in order to reduce counterparty risk (i.e. the risk of default by one party to the contract). This is aimed at preventing the default of one market participant causing the collapse of other market players, thereby putting the entire financial system at risk.

To be authorised CCP shall have a permanent and available initial capital of at least **EUR 7.5 million**. Specifically, the draft Regulation requires a CCP to have a mutualised default fund to which members of the CCP would have to contribute.

The **obligation to report** all derivative contracts to trade repositories (i.e. central data centres) and the clearing of standardised OTC derivative contracts through central counterparties (CCPs) in order to reduce counterparty risk (i.e. the risk of default by one party to the contract). Trade repositories would have to publish aggregate positions by class of derivatives, thereby offering market participants a clearer view of the OTC derivatives market.

Role of the European Securities and Markets Authority (ESMA): this will be responsible for the surveillance of trade repositories and for granting and withdrawing their registration. It can:

- conduct **investigations and on-site inspections**;
- 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 an on-site inspection;
- impose **fines** on trade repositories where it finds that they have committed, intentionally or negligently, an infringement of this Regulation.

The European Securities and Markets Authority (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.

Third countries: the decisions determining **third-country legal regimes as equivalent** to the legal regime of the Union should be adopted only 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 and standards set out by the G20 in September 2009.

Reports and review:

- By 17 August 2015, the Commission shall review and prepare a general report on this Regulation.
- By 17 August 2014, the Commission shall prepare a report, after consulting ESMA and EIOPA, assessing the progress and effort made by CCPs in developing technical solutions for the transfer by **pension scheme arrangements** of non-cash collateral as variation margins, as well as the need for any measures to facilitate such solution.

ENTRY INTO FORCE: 13/08/2012.

DELEGATED ACTS: The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) is delegated to the Commission in respect of amendments to the list of entities exempt from this Regulation and further rules of procedure relating to the imposition of fines or periodic penalty payments. The power to adopt such acts is conferred upon the Commission for an **indeterminate period of time**. The European Parliament or the Council can object to delegated acts within a period of **three months** of notification of that act (this notification can be extended by three months). If the European Parliament or the Council object the delegated act will not come into force.