Basic information

2017/0090(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Regulation	Procedure completed
European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories Amending Regulation (EU) No 648/2012 2010/0250(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)	06/07/2017
	Shadow rapporteur VON WEIZSÄCKER Jakob (S&D) SWINBURNE Kay (ECR) JEŽEK Petr (ALDE) CARTHY Matt (GUE/NGL) LAMBERTS Philippe (Verts/ALE) MEUTHEN Jörg (EFDD) KAPPEL Barbara (ENF)	

Committee for opinion	Rapporteur for opinion	Appointed
ITRE Industry, Research and Energy	The committee decided not to give an opinion.	
JURI Legal Affairs	The committee decided not to give an opinion.	

Council of the European Union

Council configuration	Meetings	Date
Agriculture and Fisheries	3689	2019-05-14

European Commission	**Commission DG** / **Commissioner** Financial Stability, Financial Services and Capital Markets Union / MOSCOVICI Pierre
European Economic and Social Committee	

Key events

Date	Event	Reference	Summary
04/05/2017	Legislative proposal published	COM(2017)0208	Summary
31/05/2017	Committee referral announced in Parliament, 1st reading		
16/05/2018	Vote in committee, 1st reading		
23/05/2018	Committee report tabled for plenary, 1st reading	A8-0181/2018	Summary
11/06/2018	Debate in Parliament		
12/06/2018	Decision by Parliament, 1st reading	T8-0244/2018	Summary
12/06/2018	Results of vote in Parliament		
12/06/2018	Matter referred back to the committee responsible for interinstitutional negotiations		
21/03/2019	Approval in committee of the text agreed at 1st reading interinstitutional negotiations	PE636.342 PE636.401	
18/04/2019	Decision by Parliament, 1st reading	T8-0437/2019	Summary
18/04/2019	Results of vote in Parliament		
14/05/2019	Act adopted by Council after Parliament's 1st reading		
20/05/2019	Final act signed		
20/05/2019	End of procedure in Parliament		
28/05/2019	Final act published in Official Journal		

Technical information

Procedure reference	2017/0090(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Regulation
Amendments and repeals	Amending Regulation (EU) No 648/2012 2010/0250(COD)
Legal basis	Rules of Procedure EP 61 Treaty on the Functioning of the European Union TFEU 114
Other legal basis	Rules of Procedure EP 165
Mandatory consultation of other institutions	European Economic and Social Committee

Stage reached in procedure	Procedure completed
Committee dossier	ECON/8/09890

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE616.810	26/01/2018	
Amendments tabled in committee		PE619.086	05/03/2018	
Committee report tabled for plenary, 1st reading/single reading		A8-0181/2018	23/05/2018	Summary
Text adopted by Parliament, partial vote at 1st reading /single reading		T8-0244/2018	12/06/2018	Summary
Text agreed during interinstitutional negotiations		PE636.342	06/03/2019	
Committee letter confirming interinstitutional agreement		PE636.401	06/03/2019	
Text adopted by Parliament, 1st reading/single reading		T8-0437/2019	18/04/2019	Summary

Council of the EU

Document type	Reference	Date	Summary
Draft final act	00073/2019/LEX	20/05/2019	

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2017)0208	04/05/2017	Summary
Document attached to the procedure	SWD(2017)0148	04/05/2017	
Document attached to the procedure	SWD(2017)0149	04/05/2017	
Commission response to text adopted in plenary	SP(2019)440	08/08/2019	

National parliaments

Document type	Parliament /Chamber	Reference	Date	Summary
Contribution	PT_PARLIAMENT	COM(2017)0208	20/07/2017	

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
EESC	Economic and Social Committee: opinion, report	CES2566/2017	20/09/2017	

ECB	European Central Bank: opinion, guideline, report	CON/2017/0042 OJ C 385 15.11.2017, p. 0010	11/10/2017	Summary

Additional information		
Source	**Document**	**Date**
European Parliament	Briefing	
European Commission	EUR-Lex	

Final act	
Regulation 2019/0834 OJ L 141 28.05.2019, p. 0042	Summary

European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories

2017/0090(COD) - 04/05/2017 - Legislative proposal

PURPOSE: to propose more simple and more efficient rules for OTC derivatives without putting financial stability at risk, and increasing transparency with regard to the OTC derivatives market.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

BACKGROUND: Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (**EMIR Regulation**) implements in the EU the G20 commitment made in 2009 to increase the stability of the OTC derivatives market.

The main objective of EMIR is to reduce systemic risk by increasing the transparency of the OTC derivatives market, through core requirements. They include: (i) central clearing; (ii) margin requirements; (iii) operational risk mitigation requirements; (iv) reporting obligations for derivative contracts; (v) requirements for central counterparties (CCPs); and (vi) requirements for trade repositories.

In November 2016, the Commission adopted the EMIR report, which pointed to the need to eliminate disproportionate costs and burdens on small companies and to simplify rules without compromising financial stability.

Accordingly, the proposal sets out a **series of targeted amendments to the EMIR Regulation**, in order to simplify the rules and ensure that the latter are more proportionate. At the same time the proposal maintains all key elements of the framework that have proved to allow achieving the objectives of EMIR. It is related to and consistent with the ongoing initiative to establish a Capital Markets Union.

IMPACT ASSESSMENT: the impact assessment analysis the costs and benefits of areas of EMIR where targeted action could ensure fulfilment of the EMIR objectives in a more proportionate, efficient and effective manner. The analysis shows that it would be possible to obtain a reduction of costs and restrictions, and at the same time, simplify the Regulation.

It is estimated that the combined effect of all preferred options, calculated solely for the purpose of the impact assessment, amount to **cost reductions** ranging from EUR 2.3 billion to EUR 6.9 billion in fixed (one-off) costs and from EUR 1.1 billion to EUR 2.66 billion in operational costs.

Overall, businesses, SMEs, and micro-enterprises will, in particular, benefit from (i) reducing regulatory requirements in cases where disproportionate compliance costs appear to outweigh prudential benefits and (ii) improving access to clearing.

There should be no significant relevant social and economic cost.

CONTENT: the Commission proposes to **amend Regulation (EU) No 648/2012 in order to simplify the rules applicable to over the counter derivatives and make them more proportionate** in order to reduce costs and regulatory burden weighing on market participants, without putting at risk financial stability.

The proposal **simplifies reporting requirements for all counterparties**. It re-focuses the scope of the clearing obligation for financial counterparties to include some additional relevant market players while exempting the smallest financial counterparties.

Specifically the proposal:

- removes the requirement to report **historic transactions**, i.e. transactions that were not outstanding on the starting date of the reporting obligation on 12 February 2014;
- introduces improvements to ensure the **quality of reported data** for trade repositories;
- establishes **single-sided reporting** by the central counterparties for exchange-traded derivatives transactions ('ETDs');
- provides that, for transactions **other than ETD transactions**, the responsibility for reporting transactions between a small non-financial counterparty (i.e. not subject to the clearing obligation) and a financial counterparty should be on the financial counterparty to the trade;
- exempts **intragroup transactions** involving any non-financial counterparties from the reporting obligation;
- provides, with regards to **non-financial counterparties**, that only non-hedging contracts are counted towards the thresholds triggering the clearing obligation;
- introduces a new three–year temporary exemption for **pension funds** from central clearing;
- increases the upper limit of basic amount of **fines** for infringements of EMIR requirements by trade repositories;
- clarifies the interaction between EMIR default management tools and national insolvency laws to ensure the i**nsolvency** remoteness of client assets;
- requires observance of the principle to provide clearing services under fair, reasonable and non-discriminatory commercial terms ('**FRAND**' principle).

DELEGATED ACTS: the proposal contains provisions empowering the Commission to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union.

European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories

2017/0090(COD) - 28/05/2019 - Final act

PURPOSE: to adopt updated rules on derivatives and clearing.

LEGISLATIVE ACT: Regulation (EU) 2019/834 of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

CONTENT: Regulation (EU) No 648/2012 on European Market Infrastructure (EMIR) is one of Europe's regulatory responses to the 2007-2008 financial crisis. The obligations it establishes contribute to reducing the systemic risk by increasing the transparency of the OTC derivatives market and reducing the counterparty credit risk and the operational risk associated with OTC derivatives.

Simplified rules on derivatives and clearing

This Regulation introduces a series of targeted amendments to the EMIR Regulation in order to simplify the rules applicable to OTC derivatives and make them more proportionate, with a view to reducing regulatory costs and burdens on market participants, without undermining the primary objective of preserving financial stability and reducing systemic risks.

The updated rules streamline existing reporting obligations in order to improve the quality of reported data, make monitoring more efficient and increase access to compensation by removing unnecessary obstacles.

Small financial counterparts

Some financial counterparties have a volume of activity in OTC derivatives markets that is too low to present a significant systemic risk to the financial system and too low for central clearing to be economically viable.

Under the amending regulation, these counterparties, commonly referred to as small financial counterparties, shall be exempted from the clearing obligation, but they should remain subject to the requirement to exchange collateral to mitigate any systemic risk.

In addition, the smallest financial counterparties shall be subject to reduced clearing obligations.

Non-financial counterparties

Non-financial counterparties are less interconnected than financial counterparties. The scope of the clearing obligation for non-financial counterparties that choose to calculate their positions every 12 months against the clearing thresholds shall therefore be narrowed.

These non-financial counterparties should be subject to the clearing obligation only with regard to the classes of OTC derivatives that exceed the clearing threshold.

To reduce the burden of reporting OTC derivative contracts for non-financial counterparties that are not subject to the clearing obligation, the financial counterparty should, as a rule, be solely responsible, and legally liable, for reporting on behalf of both itself and non-financial counterparties that are not subject to the clearing obligation with regard to OTC derivative contracts entered into by those counterparties, as well as for ensuring the correctness of the details reported.

Pension schemes arrangements

The EMIR Regulation establishes that the clearing obligation is not to apply to pension scheme arrangements until an appropriate technical solution is developed by CCPs for the transfer of non-cash collateral as variation margins.

As no viable solution has yet been developed to facilitate the participation of pension scheme arrangements in central clearing, the Regulation extends by two years (and subsequently provides for the possibility of extending twice by one year) the temporary exemption from the compensation requirement for pension plans.

Powers of the European Securities and Markets Authority (ESMA)

ESMA should periodically review the clearing thresholds and update them where necessary.

To ensure that ESMA can carry out its tasks and duties in relation to the clearing obligation, competent authorities shall notify ESMA without delay of any information received from a CCP regarding the CCP's intention to start clearing a class of OTC derivatives that is covered by its existing authorisation.

In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections on any business premises, land or property of the legal persons. Where the proper conduct and efficiency of the inspection so require, ESMA may conduct the on-site inspection without prior announcement.

ESMA shall refer matters to the relevant authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts that it knows to be liable to constitute a criminal offence under the applicable law.

ENTRY INTO FORCE AND APPLICATION: from 17.6.2019, except certain provisions which apply from 18.12.2019, 18.6.2020 or 18.6.2021.

European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories

2017/0090(COD) - 23/05/2018 - Committee report tabled for plenary, 1st reading/single reading

The Committee on Economic and Monetary Affairs adopted the report by Werner LANGEN (EPP, DE) on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

The committee recommended that European Parliament’s position adopted at first reading under the ordinary legislative procedure should amend the Commission proposal.

Scope: the amended text stipulates that the proposed Regulation shall **not apply to**:

- central banks and other public bodies charged with or intervening in the management of the public debt;
- the Bank for International Settlements;
- multilateral development banks.

Clearing obligation: the amended text specifies that clearing members and clients of clearing members that provide clearing services shall provide these services on **transparent** terms. Such clearing members and clients shall take all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest within a group of affiliated entities, in particular between the trading unit and the clearing unit. Clearing members or clients shall be permitted to control the risks connected to the clearing services offered.

Such clearing members and clients should take all reasonable steps to detect, prevent, manage and monitor **conflicts of interest** within a group of affiliated entities, including between the bargaining unit and the clearing unit. Clearing members and clients could control the risks associated with the proposed clearing services

The European Securities and Markets Authority (ESMA) shall develop draft technical regulatory standards specifying the conditions under which commercial terms for clearing services are considered to be fair, reasonable, non-discriminatory and transparent.

Suspension of clearing obligations: the Commission may suspend the clearing obligation in certain situations. The suspension shall be possible:

- where the criteria on the basis of which a specific class of OTC derivative has been made subject to the clearing obligation are no longer met;
- where a CCP ceases to offer a clearing service for a specific class of OTC derivative or for a specific type of counterparty and other CCPs cannot step in fast enough to take over those clearing services;
- possible where that is deemed necessary to avoid a serious threat to financial stability in the Union.

A designated competent authority **may also request ESMA** to submit a suspension request. ESMA should inform the competent authority concerned of its decision, giving detailed reasons.

Non-financial counterparties: since financial counterparties and non-financial counterparties present different risks, **two distinct clearing thresholds** have been developed. In order to take into account any development of financial markets, those thresholds should be updated regularly.

To reduce the burden of reporting for small non-financial counterparties not subject to the clearing obligation, the financial counterparty should be solely responsible, and legally liable, for reporting a single data set with regard to OTC derivative contracts entered into with a non-financial counterparty that is not subject to the clearing obligation as well as for ensuring the accuracy of the details reported. However, it should be possible for a non-financial counterparty to choose to report its OTC derivative contracts.

Small pension scheme arrangements (PSAs) do not present the same risks as larger PSAs and it is appropriate to allow them a longer exemption from the clearing obligation. For such PSAs, the Commission should extend the exemption from that obligation to three years.

In order to reduce the administrative burden, the amended text stressed that ESMA should introduce a **common Union standard of reporting to trade repositories**. As CCPs and other financial counterparties are taking on delegated reporting duties, a single format would increase efficiency for all participants.

Reporting: the Commission shall prepare a report detailing the changes made in this Regulation to the clearing obligation for derivatives, in particular as regards the scope of entities subject to the clearing obligation and the suspension mechanism. A report shall also be prepared for the trading obligation for derivatives set out in Regulation (EU) No 600/2014.

European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories

2017/0090(COD) - 12/06/2018 - Text adopted by Parliament, partial vote at 1st reading/single reading

The European Parliament adopted by 537 votes to 88 with 52 abstentions, certain **amendments** to the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

The matter was **referred back to the competent committee** for interinstitutional negotiations.

This proposal introduces a series of targeted amendments to Regulation (EU) No 648/2012 of the European Parliament and of the Council (EMIR Regulation) to simplify the rules for over-the-counter derivatives and to make them more proportionate, with a view to reducing regulatory costs and burdens on market participants, without undermining the primary objective of **preserving financial stability and reducing systemic risks**.

Regulation (EU) No 648/2012 should apply to all financial counterparties that could pose a significant systemic risk to the financial system. This involves changing the definition of a financial counterparty.

The main amendments adopted in plenary relate to the following:

Scope: the proposed regulation shall not apply to:

- central banks and other public bodies charged with or intervening in the management of the public debt;
- the Bank for International Settlements;
- multilateral development banks.

Clearing obligation: the amended text specifies that clearing members and clients of clearing members that provide clearing services shall provide these services on **transparent** terms. Such clearing members and clients shall take all reasonable steps designed to identify, prevent, manage and monitor **conflicts of interest** within a group of affiliated entities, in particular between the trading unit and the clearing unit. Clearing members or clients shall be permitted to control the risks connected to the clearing services offered.

The European Securities and Markets Authority (ESMA) shall develop draft technical regulatory standards specifying the conditions under which commercial terms for clearing services are considered to be fair, reasonable, non-discriminatory and transparent.

Suspension of clearing obligations: the Commission may temporarily suspend the clearing obligation for a specific class of over-the-counter derivatives or for a specific type of counterparty, where one of the following conditions is met:

- where the criteria on the basis of which a specific class of OTC derivative has been made subject to the clearing obligation are no longer met;
- where a CCP ceases to offer a clearing service for a specific class of OTC derivative or for a specific type of counterparty and other CCPs cannot step in fast enough to take over those clearing services;
- where suspension is deemed necessary to avoid a serious threat to financial stability in the Union.

A designated competent authority **may also request ESMA** to submit a suspension request. Within 48 hours of receipt of a request from a competent authority, ESMA should either ask the Commission to suspend the clearing obligation or it should reject the request. ESMA should inform the competent authority concerned of its decision, giving detailed reasons.

Non-financial counterparties: since financial counterparties and non-financial counterparties present different risks, **two distinct clearing thresholds** have been developed. In order to take into account any development of financial markets, those thresholds should be updated regularly.

To reduce the burden of reporting for small non-financial counterparties not subject to the clearing obligation, the financial counterparty should be solely responsible, and legally liable, for reporting **a single data set** with regard to OTC derivative contracts entered into with a non-financial counterparty that is not subject to the clearing obligation as well as for ensuring the accuracy of the details reported. However, it should be possible for a non-financial counterparty to choose to report its OTC derivative contracts.

Small pension scheme arrangements (PSAs) do not present the same risks as larger PSAs and it is appropriate to allow them a longer exemption from the clearing obligation. For such PSAs, the Commission should extend the exemption from that obligation to three years, with the option of extending this exemption by two more years.

The exemption for PSAs should continue to apply from the date of entry into force of the Regulation and if this Regulation enters into force after 16 August 2018, should also apply retroactively to all OTC derivative contracts executed after that date.

Risk management: the amended text provides that financial counterparties shall have **risk-management procedures** in place that require timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties may not apply risk-management procedures that require timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are in the asset class or asset classes for which the clearing threshold has not been exceeded

ESMA should establish an **EU-wide register** of financial counterparties established in third countries that choose to comply with the Regulation. It should develop draft regulatory technical standards specifying the details to be provided by a **third-country** financial counterparty for its registration with ESMA

In order to reduce the administrative burden, the amended text stressed that ESMA should introduce **a common Union standard of reporting to trade repositories**. As CCPs and other financial counterparties are taking on delegated reporting duties, a single format would increase efficiency for all participants.

European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories

2017/0090(COD) - 18/04/2019 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 452 votes to 74, with 22 abstentions, a legislative resolution on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

This proposal introduces a series of targeted amendments to Regulation (EU) No 648/2012 of the European Parliament and of the Council (EMIR Regulation) to simplify the rules for over-the-counter derivatives and to make them more proportionate, with a view to reducing regulatory costs and burdens on market participants, without undermining the primary objective of preserving financial stability and reducing systemic risks.

The European Parliament’s position adopted at first reading under the ordinary legislative procedure amended the Commission proposal as follows:

Clearing obligation

Without being obliged to contract, clearing members and clients which provide clearing services, whether directly or indirectly, shall provide those services under fair, reasonable, non-discriminatory and transparent commercial terms.

The amended text stipulated that clearing members and clients shall take all reasonable measures to identify, prevent, manage and monitor conflicts of interest, in particular between the trading unit and the clearing unit, that may adversely affect the fair, reasonable, non-discriminatory and transparent provision of clearing services. Such measures shall also be taken where trading and clearing services are provided by different legal entities belonging to the same group.

Clearing members and clients shall be permitted to control the risks related to the clearing services offered.

The Commission may adopt delegated acts to specify in which cases the commercial terms of clearing services shall be considered fair, reasonable, non-discriminatory and transparent, based on elements such as requirements for fairness and transparency with regard to fees, prices, discount policies and other general contractual terms and conditions relating to the price list.

Suspension of a clearing obligation

The European Securities and Markets Authority (ESMA) may request that the Commission suspend the clearing obligation for specific classes of OTC derivatives or a specific type of counterparty, where one of the following conditions is met:

- the specific classes of OTC derivatives are no longer suitable for central clearing in accordance with the criteria;

- a CCP is likely to cease clearing those specific classes of OTC derivatives and no other CCP is able to clear those specific classes of OTC derivatives without interruption;

- the suspension of the clearing obligation for those specific classes of OTC derivatives or for a specific type of counterparty is necessary to avoid or address a serious threat to financial stability or to the orderly functioning of financial markets in the Union and that suspension is proportionate to those aims.

- the suspension is considered necessary to avoid a serious threat to financial stability in the Union.

The competent authorities responsible for the supervision of clearing members and the competent authorities designated may request that ESMA submit a request for a suspension of the clearing obligation to the Commission.

ESMA shall, within 48 hours of receipt of the request from the competent authority, on the basis of the reasons and evidence provided by the competent authority, either request that the Commission suspend the clearing obligation or reject the request. ESMA shall inform the competent authority concerned of its decision. Where ESMA rejects the request by the competent authority, it shall provide reasons therefor in writing.

Where the Commission rejects the requested suspension, it shall provide reasons therefor in writing to ESMA. The Commission shall immediately inform the European Parliament and the Council thereof and forward them the reasons provided to ESMA. Such information shall not be made public.

Non-financial counterparties

Non-financial counterparties are less interconnected than financial counterparties. Also, they are often predominantly active in only one class of OTC derivatives. Their activity therefore poses less of a systemic risk to the financial system than the activity of financial counterparties. The scope of the clearing obligation for non-financial counterparties that choose to calculate their positions every 12 months against the clearing thresholds should therefore be narrowed.

To reduce the burden of reporting OTC derivative contracts for non-financial counterparties that are not subject to the clearing obligation, the financial counterparty should, as a rule, be solely responsible, and legally liable, for reporting on behalf of both itself and non-financial counterparties that are not subject to the clearing obligation with regard to OTC derivative contracts entered into by those counterparties, as well as for ensuring the correctness of the details reported.

To ensure that the financial counterparty has the data it needs to fulfil its reporting obligation, the non-financial counterparty should provide the details relating to the OTC derivative contracts that the financial counterparty cannot be reasonably expected to possess. However, it should be possible for non-financial counterparties to choose to report their OTC derivative contracts. In such cases, the non-financial counterparty should inform the financial counterparty accordingly and should be responsible, and legally liable, for reporting that data and for ensuring their correctness.

ESMA's powers

In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections on any business premises, land or property of the legal persons. Where the proper conduct and efficiency of the inspection so require, ESMA may conduct the on-site inspection without prior announcement.

The investigation officer shall notify the persons who are subject to the investigations. Such persons shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or to ESMA's internal preparatory documents.

ESMA shall refer matters to the relevant authorities for investigation and possible criminal prosecution where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts that it knows to be liable to constitute a criminal offence under the applicable law.

European Market Infrastructure Regulation (EMIR): clearing obligation, reporting requirements, risk-mitigation techniques, trade repositories

2017/0090(COD) - 11/10/2017 - European Central Bank: opinion, guideline, report

OPINION OF THE EUROPEAN CENTRAL BANK

The ECB has received requests from the Council of the European Union and the European Parliament for an opinion on a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

The ECB generally supports the Commission's initiative to introduce a number of targeted modifications to Regulation (EU) No 648/2012 with a view to simplifying the applicable rules and eliminating disproportionate burdens.

The ECB makes the following observations:

Exemption from central bank transactions: Regulation (EU) No 648/2012 exempts members of the ESCB, but not their counterparts, from the reporting obligation. The ECB considers obliging the counterparties of the members of the ESCB to report all data on their transactions to trade repositories has the unintended consequence of establishing an indirect reporting obligation for central bank transactions, thus limiting the effectiveness of the exemption granted to the members of the ESCB.

The ECB therefore takes the view that in order to ensure that NCBs continue to perform their statutory tasks effectively it is important that central bank transactions are fully exempted from reporting requirements

Reporting obligation: the ECB is concerned about the introduction in the proposed regulation of a reporting exemption for all intragroup trades involving a non-financial counterparty. It considers that the unconditional exemption of intragroup reporting for non-financial counterparties gives rise to the risk of regulatory arbitrage by reporting agents.

The ECB notes that intragroup transactions involving non-financial counterparties are exempted from collateralisation only if certain conditions are met, and subject to authorisation of the competent authorities.

The proposed exemption may potentially lead to sophisticated forms of circumvention of reporting requirements, as trades may be channelled through non-financial subsidiaries of larger financial groups.

Transparency of central counterparties (CCPs): the ECB proposes to include macro prudential intervention tools, in order to prevent the build-up of systemic risks resulting, in particular, from excessive leverage, and to further limit the pro-cyclicality of margins and haircuts.

Macro prudential policy tools should apply to counterparties at the transaction level. In this way, all relevant transactions would be affected, including those contracted by non-banks, regardless of whether these transactions were concluded in the centrally cleared market outside that market or by Union counterparties clearing their trades via a third country CCP.

In addition, the ECB considers that CCPs operating in the Union should be required to publish quantitative and qualitative information consistent with the Committee on Payments and Market Infrastructures-International Organisation of Securities Commissions (CPMI-IOSCO) public disclosure principles.

Classification of securitisation entities in financial counterparties: the ECB reiterates its position that simple, transparent and standardised (STS) securitisation entities should be fully exempted from both the clearing obligation and the legal obligations to provide collateral.

Methodology for calculating counterparties' positions in over-the-counter derivative contracts: the ECB proposes to add in the proposed Regulation a requirement that a financial counterparty and a non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate month-end position in OTC derivative contracts does not lead to a systematic underestimation of the overall position.

ECB advisory role: the ECB considers that it should be consulted in due time on any draft Union acts, including draft delegated and implementing acts, falling within its fields of competence.