

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.