

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 (OTC) 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:

- 1) 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.

- 2) 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.