

EMIR Legislative Tracker

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The Simmons & Simmons EMIR Legislative Tracker

This Legislative Tracker provides you with an update on EMIR setting out:

- a high level background to, and summary of the main aims of, EMIR;
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents);
- a table setting out what is currently known about the consultation process for Level 2/ Level 3 measures; and
- an annex setting out (i) adopted Level 2 measures, (ii) adopted Level 3 measures, and (iii) equivalence decisions and cooperation arrangements for the regulatory regimes for central counterparties (CCPs).

Background

The EU's *Regulation on OTC derivatives, central counterparties and trade repositories*, also known as the **European Market Infrastructure Regulation (EMIR)**, is part of a coordinated global regulatory effort to increase the stability of the financial system in general, and the over-the-counter (OTC) derivatives market in particular.

This initiative followed the onset of the financial crisis in 2008, when the near-collapse of Bear Sterns in March 2008, the default of Lehman Brothers on 15 September 2008 and the bail-out of AIG the following day together highlighted shortcomings in the functioning of the European OTC derivatives market.

Summary

EMIR formally entered into force on 16 August 2012 and introduced requirements aimed at (i) improving the transparency of OTC derivatives markets and (ii) reducing the risks associated with those markets.

It ensures European implementation of the Pittsburgh 2009 G20 commitments and requires that:

- OTC derivatives which meet certain requirements are subject to a clearing obligation

- risk mitigation techniques must be applied in respect of all OTC derivatives that are not centrally cleared
- all derivatives transactions must be reported to trade repositories (TRs), and
- organisational conduct of business and prudential standards must be met by both TRs and CCPs.

Key EMIR provisions include:

- reporting obligation for derivatives contracts
- requirements for TRs – EU-based TRs need to be authorised, and third country (non-EU) based TRs which are doing business in the EU need to be recognised by the European Securities and Markets Authority (ESMA), in order for counterparties to use them for their EMIR reporting requirements.

Once registered, TRs will be supervised by ESMA in order to ensure that they comply on an on-going basis with all EMIR requirements, and that EU national competent authorities are able to access the data and details of derivative contracts

- clearing obligation for OTC derivatives and risk mitigation techniques for non-cleared OTC derivatives, including non-financial counterparties (NFC) obligations
- requirements for clearing houses/ CCPs – EMIR introduces a harmonised set of organisational, business conduct and prudential requirements for clearing service providers. Firms wanting to offer CCP services in the EU must seek authorisation under EMIR. National securities regulators are responsible for the authorisation of EU-based CCPs. CCPs based outside the EU who want to offer clearing services within the EU, need to be recognised by ESMA.

EMIR contains exemptions for trades by certain counterparties. It does not apply to European central banks, public bodies charged with or intervening in the management of public debt or the Bank for International Settlements. The European Commission has been empowered by EMIR to adopt delegated acts to amend the list of exempt entities. On 12 July 2013, the European Commission adopted such an act in a form of a *Delegated Regulation* to include the central banks and debt management offices of Japan and the United States in the list of exempt entities, in line with the *Report adopted by the European Commission on 22 March 2013*. The *Delegated Regulation* was subsequently published in the Official Journal in October 2013. Also, on 02 March 2017, the European Commission adopted a *Delegated Regulation* expanding the list of exempted entities under EMIR to include central banks and public bodies charged with or intervening in the management of the public debt from Australia, Canada, Hong Kong, Mexico, Singapore, and Switzerland in line with a *Report on the international treatment of central banks and public entities managing public debt with regard to OTC derivatives transactions*. The *Delegated Regulation* was published in the Official Journal in June 2017.

Application

- **12 February 2014:** the reporting obligation applies – details of all classes of derivative contract (both OTC and exchange traded derivatives) must be reported to recognised TRs
- clearing obligation:
 - G4 Currency interest rate swaps (IRS):
 - **Category 1:** clearing members – **21 June 2016**
 - Effective start of frontloading for financial counterparties (FCs) only – **21 February 2016**

- **Category 2:** FCs and alternative investment funds (AIFs) that are non-financial counterparties above the clearing threshold (NFC+), which are not included in Category 1 – **21 December 2016**
 - Effective start of frontloading for FCs only – **21 May 2016**
- **Category 3:** FCs and AIFs that are NFC+ which are not included in Categories 1 or 2 – **21 June 2019**¹
- **Category 4:** NFC – **21 December 2018**
- **EEA Currency IRS:**
 - **Category 1:** clearing members of relevant CCPs – **09 February 2017**
 - Effective start of frontloading – **09 October 2016**
 - **Category 2:** FCs and AIFs which are NFC+ with more than EUR8bn aggregate month-end three month average notional amount of uncleared trades – **09 August 2017**
 - Effective start of frontloading for FCs only – **09 October 2016**
 - **Category 3:** FCs and AIFs which are NFC+ which are not included in Categories 1 or 2 – **21 June 2019**²
 - **Category 4:** Other NFC+ which do not fall into Categories 1, 2 or 3 – **09 August 2019**
- **Credit default swaps (CDS):**
 - **Category 1:** clearing members of CCPs – **09 February 2017**
 - Effective start of frontloading for FCs only – **09 October 2016**
 - **Category 2:** FCs and AIFs which are NFC+ with more that EUR 8bn aggregate month-end three month average notional amount of uncleared trades – **09 August 2017**
 - Effective start of frontloading for FCs only – **09 October 2016**
 - **Category 3:** FCs and AIFs which are NFC+ which do not fall in Category 1 or 2 – **21 June 2019**³
 - **Category 4:** Other NFC+ which do not fall into Categories 1, 2 or 3 – **09 May 2019**
- **04 February 2017:** Phase 1 application of initial and variation margin (AANA for March, April, May 2016 above EUR 3 trillion)
- **01 March 2017:** Phase 2 application of variation margin (everyone else)
- **1 September 2017 to 1 September 2020:** Phase 2 application of initial margin (depending on AANA for March, April, May in the relevant year).

¹ The *Delegated Regulation* delaying the clearing start date for Category 3 counterparties until 21 June 2019 for G4 currency IRS, European index CDS and EEA currency IRS entered into force on 19 May 2017.

² Ibid.

³ Ibid.

EMIR Review

In accordance with Article 85(1) EMIR, the European Commission launched a review of the legislation on 21 May 2015 by publishing a *questionnaire*. The purpose of the public consultation was to obtain feedback from stakeholders on their experiences in the implementation of EMIR, and provide the European Commission with guidance in preparing a final report. The review closed on 13 August 2015, and the European Commission published a *final report* on 23 November 2016. The final report is part of a process that may lead to some targeted amendments of EMIR in early 2017.

ESMA provided its input to the EMIR Review in the following reports:

- *EMIR Review Report no.1 – Review on the use of OTC derivatives by non-financial counterparties*
- *EMIR Review Report no.2 – Review on the efficiency of margining requirements to limit procyclicality*
- *EMIR Review Report no.3 – Review on the segregation and portability requirements*
- *EMIR Review Report no.4 – ESMA input as part of the Commission consultation on the EMIR Review*

On 30 January 2017, ESMA wrote a *letter* to the European Commission to ask it to consider a number of issues relating to its supervisory and sanctioning powers under EMIR, in the context of the ongoing review.

On 04 May 2017, the European Commission adopted a *proposal* and *Annex* (together, the Proposal). for a *Regulation amending EMIR* 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 Proposal will now be subject to consideration by the European Parliament (EP) and Council of the EU (Council), with agreement - through trilogue negotiations between the EP, Council and European Commission - being reached perhaps as early as Q1 2018. The compromise text reached in trilogue would be subject to a subsequent plenary vote in the EP and endorsement by the Council before being published in the Official Journal. The resulting Regulation could potentially come into force in Q2/3 2018.

Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 Text	Date
<i>Commission proposal</i>	15 September 2010
<i>European Parliament report</i>	07 June 2011
Political Agreement	09 February 2012
<i>European Parliament adoption (Corrigendum)</i>	29 March 2012
European Council adoption	04 July 2012
<i>Publication in OJ</i>	27 July 2012
Entry into force	16 August 2012

Table 2: Development of Level 2 / Level 3 measures

Paper	Published	Closed	Outcome
Final Report: Draft regulatory technical standards (RTS) on the clearing obligation for G4 currency IRS	Oct. 2014	N/A	<i>Revised Opinion</i> (March 2015)
CP: <i>Clearing obligation for CDS (no. 2)</i>	July 2014	Sep. 2014	<i>Final report</i> (October 2015)
CP: <i>Clearing obligation for FX Non-Deliverable Forwards (NDF) (no. 3)⁴</i>	Oct. 2014	Nov. 2014	<i>Feedback Statement</i> (February 2015)
CP: <i>Draft RTS on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP</i>	April 2014	July 2014	<i>Final draft RTS</i> (March 2016)
<i>Second consultation on the draft RTS on risk mitigation techniques for OTC derivative contracts not cleared by CCP under EMIR</i>	June 2015	July 2015	<i>Amendments and Annexes</i> (July 2016)
CP: <i>Review of the technical standards on reporting under Article 9 of EMIR</i>	Nov. 2014	Feb. 2015	<i>Final Report</i> (November 2015)
CP: <i>Clearing Obligation for EEA currency IRS (no.4)</i>	May 2015	July 2015	<i>Final Report</i> (Nov. 2015)
CP: <i>Indirect clearing arrangements under EMIR and MiFIR</i>	Nov. 2015	Dec. 2015	<i>Final Report</i> (26 May 2016)
CP: <i>Review of Article 26 of RTS No 153/2013 with respect to MPOR for client accounts</i>	Dec. 2015	Feb. 2016	<i>Final Report</i> (April 2016)
CP: <i>Draft technical standards on access to data and aggregation and comparison of data across TR under Article 81 of EMIR</i>	Dec. 2015	Feb. 2016	<i>Final Report</i> (April 2016)
CP: <i>The clearing obligation for financial counterparties with a limited volume of activity</i>	July 2016	Sep. 2016	<i>Final Report</i> (November 2016)
CP: <i>Draft technical standards on data to be made</i>	Dec. 2016	Feb. 2017	<i>Final Report</i>

⁴ On 04 February 2015, ESMA published a Feedback Statement to the CP on the clearing obligation for FX NDF and decided not to apply the EMIR clearing requirement to FX NDF at this stage.

publicly available by TRs under Article 81 of EMIR

(July 2017)

CP: ESMA's Guidelines on transfer of data between TRs

Jan. 2017

Mar. 2017

Table 3: EMIR Review – Key stages in development of legislative proposals

- a) Regulation 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

Level 1 Text	Date
Commission proposal	04 May 2017

- b) Regulation amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs

Level 1 Text	Date
Commission proposal	13 June 2017
Amendment of proposal	20 September 2017

Annex

Level 1

1. *Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR) (consolidated version dated 30 June 2017) (July 2012)*
2. *Commission Delegated Regulation amending EMIR with regard to the list of exempted entities (June 2017)*
3. *Commission Delegated Regulation on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in CRR and EMIR (June 2017)*

Adopted Level 2 measures

1. Delegated Acts

- a) *Rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority (ESMA) (March 2014)*
- b) *Fees charged by the ESMA to trade repositories (July 2013)*

2. Regulatory Technical Standards (RTS)

- a) *Risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (October 2016) and Correcting Regulation (January 2017)*
- b) *Clearing obligation (EEA currency IRS), Corrigendum (June 2016) and Amending Regulation (March 2017)*
- c) *Clearing obligation (CDS) (March 2016) and Amending Regulation (March 2017)*
- d) *Clearing obligation (G4 IRS) (August 2015) and Amending Regulation (March 2017)*
- e) *Direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations (February 2014)*
- f) *Colleges for central counterparties (May 2013)*
- g) *Capital requirements for CCPs (December 2012)*
- h) *Requirements for CCPs (December 2012) and Amending Regulation (April 2016)*
- i) *Indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (December 2012)*
- j) *Minimum details of the data to be reported to trade repositories (December 2012) and Amending Regulation (October 2016)*
- k) *Details of the application for registration as a trade repository (December 2012)*
- l) *Data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data (December 2012) and Amending Regulation (June 2017)*

3. Implementing Technical Standards

- a) *Hypothetical capital of a central counterparty according to EMIR (May 2014)*
- b) *Format of the records to be maintained by central counterparties (December 2012)*
- c) *Minimum details of the data to be reported to trade repositories (December 2012) and Amending Regulation (October 2016)*
- d) *Details of the application for registration as a trade repository (December 2012)*

Adopted Level 3 measures

1. *Practical guidance for the recognition of third country CCPs by ESMA* (March 2016)
2. *Guidelines and Recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of CCPs* (September 2014)
3. *Guidelines and recommendations for establishing consistent, efficient and effective assessment of interoperability arrangements* (June 2013)
4. *Guidelines and recommendations regarding written agreements between members of CCP colleges* (June 2013)
5. *Practical guidance for the registration of Trade Repositories by ESMA* (April 2013)

Equivalence Decisions and Cooperation Arrangements for the regulatory regimes for CCPs

1. Australia
 - *EC Equivalence Decision* (October 2014)
 - *Memorandum of Understanding* (November 2014)
2. Brazil
 - *Memorandum of Understanding* (February 2017)
3. Canada
 - *EC Equivalence Decision* (November 2015)
 - Memoranda of Understanding: *Alberta, Manitoba, Ontario and Quebec* (January 2016)
4. Dubai
 - *Memorandum of Understanding* (February 2017)
5. Hong Kong
 - *EC Equivalence Decision* (October 2014)
 - *Memorandum of Understanding* (December 2014)
6. India
 - *Memorandum of Understanding* (February 2017)
7. Japan
 - *EC Equivalence Decision* (October 2014)
 - *Memorandum of Cooperation* (February 2015)
 - *Memorandum of Understanding* (February 2017)
8. Mexico
 - *EC Equivalence Decision* (November 2015)
 - *Memorandum of Understanding* (January 2016)
9. Republic of Korea
 - *EC Equivalence Decision* (November 2015)
 - *Memorandum of Understanding* (March 2016)

10. Singapore

- *EC Equivalence Decision* (October 2014)
- *Memorandum of Understanding* (February 2015)

11. South Africa

- *EC Equivalence Decision* (November 2015)
- *Memorandum of Understanding* (November 2015)

12. Switzerland

- *EC Equivalence Decision* (November 2015)
- *Memorandum of Understanding* (January 2016)

13. UAE

- *Memorandum of Understanding* (February 2017)

14. US

- *EC Equivalence Decision* (March 2016)
- *Memorandum of Understanding* (June 2016)



Allan Yip
Partner – London
Financial Markets
D +44 20 7825 3626
E allan.yip@simmons-simmons.com



Craig Bisson
Partner – London
Financial Markets
D +44 20 7825 4691
E craig.bisson@simmons-simmons.com



Penny Miller
Partner – London
Financial Markets
D +44 20 7825 3532
E penny.miller@simmons-simmons.com



Julia Hotton
Of Counsel – London
Financial Markets
D +44 20 7825 3289
E julia.hotton@simmons-simmons.com

Offices

Abu Dhabi

Simmons & Simmons Middle East LLP
Level 10 The ADNIC Building Khalifa Street
PO Box 5931 Abu Dhabi United Arab Emirates
T +971 2 651 9200 F +971 2 651 9201

Amsterdam

Simmons & Simmons LLP
PO Box 79023 1070 NB
Claude Debussylaan 247 1082 MC Amsterdam
The Netherlands
T +31 20 722 2500 F +31 20 722 2599

Beijing

Simmons & Simmons
33rd Floor China World Tower 3
1 Jianguomenwai Avenue
Beijing 100004 People's Republic of China
T +86 10 8588 4500 F +86 10 8588 4588

Bristol

Simmons & Simmons LLP
One Linear Park Temple Quay
Bristol BS2 0PS United Kingdom
T +44 20 7628 2020 F +44 20 7628 2070

Brussels

Simmons & Simmons LLP
Avenue Louise 149 b 16 1050 Brussels Belgium
T +32 2 542 09 60 F +32 2 542 09 61

Doha

Simmons & Simmons Middle East LLP
Level 5 Al Mirqab Tower Al Corniche Street
PO Box 23540 Doha State of Qatar
T +974 4409 6700 F +974 4409 6701

Dubai

Simmons & Simmons Middle East LLP
Level 7 The Gate Village Building 10
Dubai International Financial Centre
PO Box 506688 Dubai United Arab Emirates
T +971 4 709 6600 F +971 4 709 6601

Düsseldorf

Simmons & Simmons LLP
BroadwayOffice Breite Straße 31
40213 Düsseldorf Germany
T +49 2 11-4 70 53-0 F +49 2 11-4 70 53-53

Frankfurt

Simmons & Simmons LLP
MesseTurm Friedrich-Ebert-Anlage 49
60308 Frankfurt am Main Germany
T +49 69-90 74 54-0 F +49 69-90 74 54-54

Funchal

Sociedade Rebelo de Sousa in association with
Simmons & Simmons
Av. Zarco nº2-2º 9000-069 Funchal Madeira
T +351 291 20 22 60 F +351 291 20 22 61

Hong Kong

Simmons & Simmons
13th Floor One Pacific Place
88 Queensway Hong Kong
T +852 2868 1131 F +852 2810 5040

Jeddah

Hammad & Al-Mehdar in alliance with Simmons & Simmons
Office #1209, King Road Tower, Malik Road,
PO Box 864 Jeddah 21421
Kingdom of Saudi Arabia
T +966 92000 4626 F +966 2 606 9190

Lisbon

Sociedade Rebelo de Sousa in association with
Simmons & Simmons
Rua D. Francisco Manuel de Melo 21
1070-085 Lisbon Portugal
T +351 21 313 2000 F +351 21 313 2001

London

Simmons & Simmons LLP
CityPoint One Ropemaker Street
London EC2Y 9SS United Kingdom
T +44 20 7628 2020 F +44 20 7628 2070

Luxembourg

Simmons & Simmons Luxembourg LLP
Royal Monterey 26A Boulevard Royal
Luxembourg L-2429 Luxembourg
T +352 26 21 16 01 F +352 26 21 16 02

Madrid

Simmons & Simmons LLP
Calle Miguel Angel 11 5th floor 28010 Madrid Spain
T +34 91 426 2640 F +34 91 578 2157

Milan

Studio Legale Associato in affiliation with
Simmons & Simmons LLP
Corso Vittorio Emanuele II 1 20122 Milan Italy
T +39 02 72505.1 F +39 02 72505.505

Munich

Simmons & Simmons LLP
Lehel Carré, Thierschplatz 6
80538 Munich Germany
T +49 89-20 80 77 63-00 F +49 89-20 80 77 63-01

Paris

Simmons & Simmons LLP
5 boulevard de la Madeleine 75001 Paris France
T +33 1 53 29 16 29 F +33 1 53 29 16 30

Riyadh

Hammad & Al-Mehdar in alliance with Simmons & Simmons
Office No 1802 Level 18 Al Anoud Tower 2
Olaya King Fahad Road
Riyadh Kingdom of Saudi Arabia
T +966 11 484 7145 F +966 12 606 9190

Shanghai

Simmons & Simmons
40th Floor Park Place 1601 Nanjing Road West
Shanghai 200040 People's Republic of China
T +86 21 6249 0700 F +86 21 6249 0706

Singapore

Simmons & Simmons Asia LLP
12 Marina Boulevard #38-04
Marina Bay Financial Centre Tower 3 Singapore 018982
T +65 6831 5600 F +65 6831 5688

Tokyo

Simmons & Simmons Gaikokuho Jimu Bengoshi Jimusho
(Gaikokuho Joint Enterprise TMI Associates)
23rd floor Roppongi Hills Mori Tower
6-10-1 Roppongi Minato-ku Tokyo 106-6123 Japan
T +81 3 6438 5255 F +81 3 6438 5256

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