

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 2019¹**
- **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 2019²**
 - **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 than 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 2019³**
 - **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)
- **01 September 2017 to 01 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

(a) Proposal to amend EMIR pursuant to Article 85(1) 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.

(b) Proposal to amend EMIR supervisory regime for EU and third country CCPs

On 13 June 2017, the Commission adopted a *proposal for a Regulation* and *annex*, the aim of which was to amend both the Regulation establishing ESMA and EMIR with respect to the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs.

On 20 September 2017, as part of its wider proposals to reform the European System of Financial Supervision, the Commission adopted a further *legislative proposal* (COM (2017) 539), the effect of which was to make changes to the pending proposal which had been adopted on 13 June 2017. On the same day, the Commission published a *modified legislative proposal*, which consolidated the changes contained in its previous two proposals – this modified proposal is to be read in conjunction with the explanatory memorandum found at the start of (COM (2017) 539).

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
EMIR Review	
(a) Proposal pursuant to Article 85(1)	
<i>Commission proposal and annex</i>	04 May 2017
Council of the EU – compromise proposal (1)	28 September 2017
Council of the EU – compromise proposal (2)	15 November 2017
(b) Proposal to amend EMIR supervisory regime for EU and third country CCPs	
<i>Commission proposal and annex</i>	13 June 2017
<i>Commission amended proposal</i>	20 September 2017
<i>Commission modified proposal</i>	20 September 2017

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	Revised Opinion (March 2015)
CP: Clearing obligation for CDS (no. 2)	July 2014	Sep. 2014	Final report (October 2015)
CP: Clearing obligation for FX Non-Deliverable Forwards (NDF) (no. 3)⁴	Oct. 2014	Nov. 2014	Feedback Statement (February 2015)
CP: Draft RTS on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP	April 2014	July 2014	Final draft RTS (March 2016) Amendments and Annexes (July 2016)
Second consultation on the draft RTS on risk mitigation techniques for OTC derivative contracts not cleared by CCP under EMIR	June 2015	July 2015	
CP: Review of the technical standards on reporting under Article 9 of EMIR	Nov. 2014	Feb. 2015	Final Report

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.

			(November 2015)
CP: Clearing Obligation for EEA currency IRS (no.4)	May 2015	July 2015	Final Report (Nov. 2015)
CP: Indirect clearing arrangements under EMIR and MiFIR	Nov. 2015	Dec. 2015	Final Report (26 May 2016)
CP: Review of Article 26 of RTS No 153/2013 with respect to MPOR for client accounts	Dec. 2015	Feb. 2016	Final Report (April 2016)
CP: Draft technical standards on access to data and aggregation and comparison of data across TR under Article 81 of EMIR	Dec. 2015	Feb. 2016	Final Report (April 2016)
CP: The clearing obligation for financial counterparties with a limited volume of activity	July 2016	Sep. 2016	Final Report (November 2016)
CP: Draft technical standards on data to be made publicly available by TRs under Article 81 of EMIR	Dec. 2016	Feb. 2017	Final Report (July 2017)
CP: ESMA's Guidelines on transfer of data between TRs	Jan. 2017	Mar. 2017	Final Report (August 2017)
CP: ESMA's Guidelines on position calculation under EMIR	Nov. 2017	Jan. 2018	
Draft RTS amending margin requirements	Dec. 2017	-	
Final Report: EMIR RTS on the novation of contracts for which the clearing obligation has not yet taken effect	08 November 2018	-	
Final Report: EMIR RTS on the novation of bilateral contracts not subject to bilateral margins	27 November 2018	-	
Final Report: Final draft RTS amending Delegated Regulation (EU) 2016/2251 on risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (CCP) under Article 11(15)	12 December 2018		
Final Report: Amendments to the EMIR Clearing Obligation under the Securitisation Regulations	12 December 2018		

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

- 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

Level 1 Text	Date
<i>Commission proposal</i>	04 May 2017

- b) Regulation amending the ESMA Regulation (EU) No 1095/2010 and amending EMIR 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
<i>Commission proposal</i>	13 June 2017
<i>Modified proposal (Explanatory Memorandum)</i>	13 October 2017

Review of the European Market Infrastructure Regulation following the Commission's Proposal to reform the European System of Financial Supervision

On 20 September 2017, the Commission adopted a *Proposal for a Regulation* (the ESA Proposal) to amend (among other measures) the Regulations which established the European Supervisory Authorities (i.e., the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority).

On 12 September 2018, the Commission adopted an *amended proposal* and a *proposal for a Directive*. Between them, these would extend the ESA reforms to MLD4, MiFID/MiFIR and Solvency II.

As part of the ESA Proposals, the Commission put forward changes to the **Benchmarks Regulation, under which ESMA would be established as the competent authority for administrators of critical benchmarks and of all benchmarks used in the EU but administered in a third country. ESMA would also be established as the competent authority for the recognition and approval of endorsements of third country administrators and benchmarks respectively.**

Under the ESA Proposals, **the Benchmarks Regulation would also be amended to grant ESMA the power to conduct investigations and on-site inspections.**

The ESA Proposals are now subject to scrutiny by the EP and the Council – each has now determined what amendments it wishes to see to the Commission's text. With the negotiating positions now decided, the EP and the Council will commence trilogue negotiations in February 2019 with a view to agreeing a final version of a Regulation and a Directive. It is the Commission's intention that these are finalised in time to enter into force before the European Parliamentary elections in May 2019.

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) and *Amending Regulation* (21 November 2017)
- 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) *Extension of the transitional periods related to own funds requirements for exposures to CCPs* (December 2017)
- b) *Hypothetical capital of a central counterparty according to EMIR* (May 2014)
- c) *Format of the records to be maintained by central counterparties* (December 2012)

- d) *Minimum details of the data to be reported to trade repositories* (December 2012) and *Amending Regulation* (October 2016)
- e) *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)

Equivalence Decisions – Risk mitigation techniques for OTC derivative contracts not cleared by CCPs

1. US – *Implementing Decision* (October 2017)