

EMIR REGULATION

Reference Text: European regulation – 648/2012

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>

Public Register for the clearing obligation under EMIR

file:///C:/Users/a351652/Downloads/public_register_for_the_clearing_obligation_under_emir.pdf

https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf

Date of application: 16 August 2012

Presentation

This text responds to the undertakings of the G20 (2009 Pittsburgh Summit) in order, by the end of 2012, to increase the transparency of the derivatives market and reduce the current risk induced by transactions which mostly remain dealt bilaterally (pure OTC – Over The Counter). It can be likened to the American Dodd Franck Act which dedicates part of the text (chapter VII) to the regulation of these transactions.

EMIR firstly introduces the “standard contracts” concept and associates them with an obligation for clearing via a Central Counterparty (CCP) with the aim of sharply reducing counterparty risk. The text then imposes an obligation to declare all OTC operations on derivatives, whether or not they relate to standard contracts, to central databases namely “Trade Repositories”. Lastly, for transactions which are not cleared, as an exception or because they relate to non-standard contracts, the text sets out the reinforcement of the rules governing relations between parties, especially in regards to collateral exchange constraints between the parties.

The obligation made by EMIR to use a CCP reinforces the key role of these market infrastructures. It was therefore essential to ensure their solidity and guarantee their longevity. This is the purpose of the second part of the text. EMIR sets out a certain number of standards relative to their supervision, their governance and their organisation, but also to the levels of their capital corresponding to the type of risks they bear. The regulation also addresses the issue of settlement in central bank money, interoperability and access to data flows for trading platforms. Lastly, it establishes a “default waterfall” procedure relative to the ordered use of a CCP in the event of the default of one of its members and resources that are available, whether its own capital or the different types of guarantees (deposited by its members or subscribed with a specialised institution). This new procedure proves more protective for non-defaulting members.

The last part of the text is devoted to the regulation of Trade Repositories, the role of which will be to collect data on all transactions undertaken on OTC derivative products and to feed this information back to the competent authorities. It must be approved to exercise this activity, and failure to comply with the related obligations shall be sanctioned by the relevant supervisory authorities.

The desire to regulate operations now dealt with mainly Over The Counter which is at the origin of EMIR is extended in the proposed MIF regulation (MiFIR) which establishes the obligation to trade any contract deemed standard in the context of EMIR and having a sufficient level of liquidity via a trading platform (regulated market, MTF or OTF).

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.

Current Situation:

- Reporting to a Trade Repository (2014)

ESMA has officially transmitted to the European Commission (13th of November 2015) a RTS and an ITS replacing former approved texts (resp.148/2013 and 1247/2012). The aim of these updated texts is to fix issues appeared since the start of the requirement as well as to incorporate information today provided through its Q&A. On the 5th of April, ESMA has transmitted to the EC a new version of the RTS 151/2013 (rules for access, aggregation and comparison of date across TR). The three amended texts that should enter into force on the same date are still in the process of adoption by the EC.

- Risk mitigation techniques for non cleared contracts (collateral exchange)

The second ESAs' consultation is now closed (July 2015). This new version has taken into account the changes made at the international level: BCBS/CPMI have postponed the mandatory margins exchanges (starting date the 1st of September 2016 instead of December 2015) and have adopted a phase-in also for variable margins (but not the same as for IM).

On the 28th of July 2016, the EC has sent to the ESAs an amended version of the RTS.

The ESAs have rejected some of the amendments proposed by the EC (9/09/2016).

- Clearing obligation

IRS wave 1: has started on the 21st of June 2016 with a phase-in depending on the category of the counterparties: 21/12/2016 for categ 2, 21/06/2017 for categ 3 and 21/12/2018 for categ 4.

IRS wave 2: will follow the same classification of counterparties (9/02/2017 – 9/07/2017 – 9/02/2018 – 9/07/2019)

CDS: will follow the same classification of counterparties (9/02/2017 – 9/08/2017 – 9/02/2018 – 9/05/2019)

NDF FX: no mandatory clearing for the moment

The Public Register for the clearing obligation under EMIR is on the website of ESMA (see page 1)

- CCPs agreements

No change: 16 UE CCPs and 19 from third countries

among them Nasdaq OMX, KDPW_CCP, Eurex clearing AG, LCH.Clearnet SA, CC&G, LCH.Clearnet Ltd and CME Clearing Europe Ltd, LME clear, BME Clearing, CME US

- Equivalence

On the 13th of November, the European Commission has recognised the equivalence of regulation for 5 countries (Canada, Mexico, Switzerland, South Africa and South Korea). It follows previous determinations in 2014 for Australia, Singapore, Japan and Hong Kong.

The European Commission has adopted an equivalence decision regarding US CCPs supervised by the CFTC.

A MoU has been signed between ESMA and South Korean regulators on the 22nd of March 2016.

- FX spots/FX forwards definition

The European issue regarding some FX forwards (which are in or out of the EMIR scope depending on the local transposition of MIFID1) should be fixed thanks to the level 2 of MIFID2. It is proposed in the final draft RTS from the ESAs regarding non cleared contracts to postpone the requirement for variation margins (for FX) to the earlier of the following dates: 31st of December 2018 and the entry into force of the level 2 of MIFID2. Thus fixing the issue related to the different dates of entry into force.

- Other

As expected, the European Commission has issued in 2015 its consultation in respect of the revision process of the regulation

- Documentation

ESMA has issued on the 6th of June a new version of its Q&A on EMIR.

Main steps:

Following its adoption by the Council on the 4th of July 2012, the final text for EMIR was published in the Official Journal of the European Union on 27th of July 2012. Its application date will therefore apply 20 days following its publication, the 16th of August 2012.

It was nevertheless only able to be applied once the technical implementing measures have been specified (the level 2 measures) regarding the recognition procedure for CCPs, the classification of OTC derivatives, the definition of calculation rules for margin calls for the remaining OTC transactions.

Except two of them (on third country and on margin requirements for non-centrally cleared derivatives), standards have been adopted by the Commission on the 19th of December and published in the EU JO the 23rd of February 2013 for an entry into force the 15th of March 2013. This date is the first day for some of the requirements regarding risk mitigation techniques for non cleared contracts like timely confirmation (all parties are concerned) as well as valuation (for financial counterparties and non financial ones when above the thresholds – NFC+). Non financial counterparties are also required as of the 15th of March to declare them as NFC+. This is also the start of the period for Trade Repositories and CCPs to send their application form to their authorities. Other requirements linked to the risk mitigation techniques (except those on the margins) will enter into force 6 months later, ie the 15th of September 2013.

The reporting to a Trade Repository firstly foreseen to September 2013 for IRD and CDS, then postponed to the 1st of January 2014 started finally on the 12th of February 2014 irrespective of the class of assets for both listed and OTC derivatives). Indeed, ESMA agreed the first Trade Repositories on the 28th of November 2013.

On the 18th March 2014, NASDAQ OMX was the first CCP to be agreed under EMIR; this date is important regarding the frontloading requirement. A trade on a product cleared by this CCP concluded or novated at this date or after may be subject to the clearing obligation if that one was pronounced by ESMA

Two years after their Discussion Paper, the 3 ESAs (ESMA, EIOPA et EBA) issued on the 14th of April 2014 their Consultation Paper on risk mitigation techniques for OTC derivatives contracts not cleared by a CCP.

July 2014, ESMA issued two consultation Papers on the clearing obligation; one for IRD, one for CDS.

1st of October 2014: ESMA has communicated its draft RTS on IRD to the Commission for endorsement

29 January 2015: On IRD, a second version of the draft RTS has been published by ESMA following the comments made by the Commission on the first version. A revised opinion has been issued by ESMA on the 6th of March.

2015: ESMA issued a second consultation on the mandatory clearing for other IRDs (fixed-to-float interest rate swaps denominated in CZK, DKK, HUF, NOK, SEK and PLN as well as forward rate agreements denominated in NOK, SEK and PLN).

26 November 2015: a MoU has been signed between ESMA and CFT (Hong Kong) for exchange of data held in Trade Repositories.

8th of March 2016: the ESAs have issued their final draft RTS regarding margins for uncleared contracts and submitted it to the European Commission for approval.

31st of March 2016: ESMA has fined DDRL (subsidiary of DDTC) €64,000 for negligently failing to put in place systems capable of providing regulators with direct and immediate access to derivatives trading data (between March 2014 and December 2014). ESMA has also issued a public notice detailing the negligence.

26 May 2016: the final draft RTS (including both MIFIR and EMIR) on indirect clearing arrangement has been issued. It is now in the process of adoption by the EC.

13th June 2016: the European Commission has informed the European Parliament that the adoption process for the RTS regarding margins for uncleared contracts will last more than the 3 normal months.

21 June 2016: Start of the mandatory clearing for some IRS

Next Steps:

Foreseen

Process of adoption of the ESAs' draft RTS on non cleared contracts
Adoption by the EC of the three texts on reporting to TR

October 2016

Start date of the frontloading for categ 1 and 2 regarding the clearing of CDS

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