

## **EMIR REGULATION**

**Reference Text:** European regulation – 648/2012

Link :

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&rid=1>  
[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2010/0250\(COD\)&l=EN](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2010/0250(COD)&l=EN)  
<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1219218&t=f&l=en>

Public Register for the clearing obligation under EMIR

Public Register for third country CCPs agreed by ESMA:

[file:///C:/Users/a351652/Downloads/public\\_register\\_for\\_the\\_clearing\\_obligation\\_under\\_emir.pdf](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](https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf)

Q&A:

[https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52\\_qa\\_on\\_emir\\_implementation.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.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 is made up of three main topics

- The mitigation of the risk for OTC derivatives contracts
  - Mandatory clearing for products considered sufficiently standards
  - For contracts not cleared, reinforcement of the rules to mitigate both the operational risk and the counterparty risk (for example via bilateral exchanges of initial / variation margins)
- Transparency via the mandatory reporting to Trade Repository of derivatives contracts (ETD and OTC)
- Infrastructures :
  - Reinforced requirements for Central Counterparties
  - Creation of a EU Trade Repository status

*For more information please refer the European Parliament (Legislative Observatory); links are indicated in the Link paragraph of this document*

**Current Situation:**

- Reporting to a Trade Repository (since 2014)

ESMA has proposed to modify the deadline as regards backloading.

Backloading concerns contracts that have been:

- Either concluded before the entry into force of EMIR (16/08/2012), still open at that date and closed before the start of the reporting obligation (12/02/2014)
- Or concluded after the 16/08/2012 and closed before the 12/02/2014

Texts amending the delegated acts 148/2013 and 1247/2012 have entered into application on the 1<sup>st</sup> November 2017. The new deadline for backloading is the 12/02/2019.

According to its 2018 workplan, ESMA intends to launch a consultation on the details and type of the reports in relation to article 9(5) of EMIR.

ESMA has issued an updated version of its validation rules (1<sup>st</sup> March).

ESMA has issued on the 27<sup>th</sup> of March guidelines on how Trade Repositories should calculate derivative positions. These should set out a consistent and harmonised approach.

- Operational risk mitigation techniques for non-cleared contracts (since 2013)

No change compared to the initial requirements

- Counterparty risk mitigation techniques for non-cleared contracts (since 2017)

The delegated regulation on risk mitigation techniques for OTC derivative contracts non-cleared by a CCP, has started on the 6<sup>th</sup> of February (reference of the text: 2016/2251)

As of the 1<sup>st</sup> of March, exchanges of variation margins are always required (except for specific cases); regulators at different levels (international, European as well as domestic) have recognised the difficulty for parties change current contracts.

	2 counterparties above 3000 billion €	2 counterparties above 2250 billions €	2 counterparties above 1500 billions €	2 counterparties above 750 billion €	2 counterparties above 8 billion €	At least 1 counterparty below 8 billion €
<b>Initial Margin (IM)</b>	06/02/2017	01/09/2017	01/09/2018	01/09/2019	01/09/2020	No IM
<b>Variation Margin (VM)</b>	06/02/2017	01/03/2017	01/03/2017	01/03/2017	01/03/2017	01/03/2017
<b>VM (FX forwards) (**)</b>	03/01/2018	03/01/2018	03/01/2018	03/01/2018	03/01/2018	03/01/2018

(\*\*) see above point on FX forwards definition

Man should note that the same phase-in exists at an international level; except for the first date (6/02/2017) the EU calendar is consistent with the former.

According to its 2018 workplan, ESMA intends to launch a consultation (jointly with the ESAs) on “EMIR risk management techniques for OTC derivatives not cleared in relation to covered bonds and securitisation”

- Clearing obligation

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

**IRS et CDS:**

The clearing start date for “category 3 contracts” is officially postponed until the 21/06/2019. The delegated act (2017/751) has been published in the EU Official Journal on the 29<sup>th</sup> of April. The new date is the same for all the products.

Accordingly counterparties in category 4 will start before. This is not seen by ESMA as inconsistent since it appears, ESMA says, that counterparties in category 4 (namely NFC+) may be more active than small FC (those in category 3).

The new calendar:

	Categ 1	Categ 2	Categ 3	Categ 4
<b>IRS wave 1</b>	21/06/2016	21/12/2016	21/06/2019	21/12/2018
<b>CDS</b>	09/02/2017	09/08/2017	21/06/2019	09/05/2019
<b>IRS wave 2</b>	09/02/2017	09/07/2017	21/06/2019	09/07/2019

**NDF FX:** no mandatory clearing for the moment

According to its 2018 workplan, ESMA intends to launch:

- a consultation on “new classes of derivatives subject to the clearing obligation”
- a consultation (jointly with the ESAs) on “the criteria about mitigation of counterparty credit risk in relation to covered bonds and securitisation and with respect to the EMIR clearing obligation”

ESMA has published responses to its consultation about the clearing obligation under the Securitisation regulation

ESMA has issued a new consultation related to the exemption of clearing for intra-group transactions with a third country entity. Actually, ESMA’s proposal is to extend the current temporary exemption for two years. The new date will be the 21<sup>st</sup> December 2020 (for all the products). This extension is justified by the fact that for the time being no equivalence with third country has been stated.

With regards to the end (on the 17<sup>th</sup> August 2018) of the temporary exemption of clearing for pension funds, ESMA has made it clear that it doesn’t expect competent authorities to prioritize their supervisory actions on this topic since this exemption should be renewed under EMIR Refit.

- Intersection with MIFID2/MIFIR: trading obligation (2018)

EMIR defines products that are considered sufficiently standards to be under a mandatory clearing; MIFID2 will complete the process by defining within those « to be cleared » products the ones seen as sufficiently liquid to be additionally under a trading obligation on a trading venue (i.e. regulated market, MTF or OTF).

Following the recommendations of ESMA, the EC has decided that the products below will be under a mandatory trading:

- For IRS: Fixed-to-float interest rate swaps denominated in EUR, USD and GBP
- For CSD: iTraxx Europe Main and iTraxx Europe Crossover

- Jointly with MIFID2/MIFIR: indirect clearing (3/01/2018)

Two regulations have been published together (the 2017/2154 in relation to MIFIR and the 2017/2155 which amends the 149/2013 regulation of EMIR). These two texts focus on the access to clearing when not being a clearing member or a client of it (the so called indirect clearing arrangement). MIFIR handles ETD when EMIR is about OTC derivatives.

- FX spots/FX forwards definition

As of the 3<sup>rd</sup> of January 2018 (date of entry into application of MIFID2/MIFIR) contracts on physically-settled FX forwards shall include exchange of variation margins. This obligation will lead to an issue in terms of completion since there is no equivalent requirement either in the US or in Asia. There is an ongoing process at the EU level and the European Supervisory Authorities have transmitted on the 18<sup>th</sup> of December to the European Commission their draft amendment of the current delegated regulation. Aware of the tight calendar as regard the 3<sup>rd</sup> of January 2018 they also called the local regulators to exercise their supervision task in a proportionate manner.

The ESA's proposal is still to be adopted by the European Commission

- EMIR review (EMIR Refit)

The European Commission has published on the 4<sup>th</sup> May 2017 its draft proposal. The main points are:

- FC split in FC+ and FC- (same as for NFC): FC- will be exempted from the clearing obligation
- NFC+ will be under the clearing obligation only for the class(es) of assets for which they are above the threshold
- ETD reported solely by the CCP, transactions involving a NFC- and a FC reported solely by the latter, exemption for intra-group transactions involving NFC counterparties (however not a single side reporting)
- pension scheme exemption is maintained
- suspension of the clearing obligation by request from ESMA

The European Council has published its amendments to the EC's proposal. It should be noted that the Council has proposed a change in relation to mandatory Variation Margins for physically settled FX forwards in line with the ESAs' proposal. As it has been done by the Parliament.

The text has now entered the "Trilogue phase". The Commission, the Parliament and the Council will try to reach a consensus on a final text to be adopted.

Whereas no real issue has been raised by the amendments proposed by the Parliament as well as by those of the Council, it is likely that the Trilogue will take time. The entry into force of the final text is for the time being foreseen for the start of 2019. The entry into application would then happen at a point in time still to be decided (could be the standard period - 20 days after the publication – or a specific one as for example the 5 months suggested by the Parliament).

- EMIR – proposal for a more robust supervision of CCPs

The European Commission has put forward on the 13<sup>th</sup> of June 2017 its proposals:

- For EU CCPs: a more pan-European approach for their supervision, closer cooperation between regulators and central banks responsible for EU currencies, a strengthened role given to ESMA
- For non-EU CCPs: a classification of third country CCPs (Tier 1 / Tier 2) depending on the risk they could represent to the EU; the recognition process is reinforced for Tier 2 CCPs due to the key systemic importance they have for the EU
- Depending on the systemic risk a third country CCP may represent, the European Commission may decide to require the CCP to be established in the EU in order to provide its services in the EU

At the European Parliament level, amendments have been voted during a ECON meeting on the 16<sup>th</sup> of May 2018.

The Council has published its compromise proposal on the 26<sup>th</sup> of June 2018.

- Documentation

A Q&A dedicated to EMIR and regularly updated could be found on the ESMA's website (please refer to paragraph Link)

### Next Steps:

Ongoing

Adoption of the proposal from the ESAs on the VM – FX forwards issue  
New consultations to be issued in relation to [EMIR Refit \(ESMA\)](#)  
Ongoing process in relation to EMIR review proposal (EC, EP and Council)  
[Trilogue process \(EMIR Refit\)](#)

### Key Dates:

Following its adoption by the Council on the 4<sup>th</sup> of July 2012, the final text for EMIR was published in the Official Journal of the European Union on 27<sup>th</sup> of July 2012. Its application date will therefore apply 20 days following its publication, the 16<sup>th</sup> 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 19<sup>th</sup> of December and published in the EU JO the 23<sup>rd</sup> of February 2013 for an entry into force the 15<sup>th</sup> 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 15<sup>th</sup> 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) have entered into force 6 months later, ie the 15<sup>th</sup> of September 2013.

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

On the 18<sup>th</sup> 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.

Immediately after, ESMA has started its process as regards the mandatory clearing (IRS, CDS as well as NDF FX have been assessed according to the 3 criteria defined by ESMA to determine if a product was standard). ESMA's conclusions have been issued between 2014 and 2015. The related delegated acts will be adopted end of 2015 and beginning 2016. The mandatory clearing began on the 21<sup>st</sup> of June 2016 for certain IRS and counterparties that are also clearing members.

Two years after their Discussion Paper, the 3 ESAs (ESMA, EIOPA and EBA) issued on the 14<sup>th</sup> of April 2014 their Consultation Paper on risk mitigation techniques for OTC derivatives contracts not cleared by a CCP. A second consultation took place in 2015, the final draft being officially transmitted to the Commission in March 2016. Then discussions between the two bodies started and lasted until the year's end.

The delegated act imposing the risk mitigation technique for non-cleared contracts has been adopted on the 15<sup>th</sup> of December 2016 for an entry into application in February 2017 (6 February 2017: start of the obligation to exchange initial and variation margins for the biggest player; 1<sup>st</sup> of March 2017: start of the obligation to exchange variation margins for all the others).

End 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.

**SGSS Contact** : Sylvie Bonduelle ([sylvie.bonduelle@sgss.socgen.com](mailto:sylvie.bonduelle@sgss.socgen.com))