

EMIR 3.0 – Overview of European Commission’s proposed amendments to EMIR

On 7 December 2022 the European Commission published a series of proposed measures to further develop the EU’s Capital Markets Union (available [here](#)). The proposals include changes to legislation:

- to make EU clearing services more attractive and resilient;
- to harmonise certain corporate insolvency rules across the EU; and
- to alleviate – through a new Listing Act – the administrative burden for companies listing on stock exchanges.

Of particular relevance for entities trading derivatives in the EU is the [Proposal for a Regulation amending Regulations \(EU\) No 648/2012, \(EU\) No 575/2013 and \(EU\) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets](#). While the title of the regulation suggests a focus on central clearing, the proposal extends beyond clearing and makes a number of other amendments to Regulation (EU) 648/2012 (EMIR) as part of a broader review of EMIR known colloquially as “**EMIR 3.0**”.

From the perspective of derivatives users, the main changes proposed in EMIR 3.0 are:

- **Intragroup clearing and margin exemptions** - when an EU entity trades with a non-EU affiliate, the intragroup transaction exemptions from EMIR clearing and margin requirements will no longer depend on an equivalence decision having been made in respect of the relevant third country in which the affiliate is based. Instead there will be a list of third countries for which an exemption should not be granted. These third countries will be those that are listed as high-risk third countries that have strategic deficiencies in their regimes on anti-money laundering and counter terrorist financing, in accordance with Article 9 of Directive (EU) 2015/849, and those listed in Annex I of the EU list of non-cooperative jurisdictions for tax purposes. The Commission will also be empowered to add other third countries to the list.
- **Clearing obligation; Third country pension schemes** - Article 4 of EMIR will be amended to introduce an exemption from the clearing obligation where an EU financial counterparty or a non-financial counterparty which is subject to the EMIR clearing obligation (an FC+ or NFC+) trades with a pension scheme arrangement established in a third country which is exempted from the clearing obligation under its national law.

- **Clearing obligation; calculation of FC+ status** – Article 4a of EMIR will be amended so that, when calculating their clearing thresholds, financial counterparties will only have to count those derivative contracts that are not cleared at a CCP authorised or recognised under EMIR.
- **Active accounts; mandatory clearing at EU CCPs** – A new Article 7a will be introduced which will require FC+ and NFC+ to hold active accounts, directly or indirectly, at central counterparties (CCPs) established in the EU, and to clear at least a certain proportion of the services identified as of substantial systemic importance at EU CCPs, and to report on such clearing. The aim of this requirement is to reduce excessive exposures in substantially systemic clearing services offered by non-EU CCPs in order to safeguard financial stability.
- **Information on clearing services** – A new Article 7b will be introduced to require clearing members and clients that provide clearing services to inform their clients about the possibility to clear a relevant contract at an EU CCP, and to report to their competent authority the scope of clearing undertaken at non-EU CCPs.
- **Removal of intra-group reporting exemption** – Article 9 of EMIR will be amended to remove the exemption from reporting requirements for transactions between counterparties within a group, where at least one of the counterparties is a non-financial counterparty, in order to ensure visibility on intra-group transactions.
- **Review of the hedging exemption** – Article 10 of EMIR will be amended to require ESMA to review and clarify, where appropriate, the regulatory technical standards relating to the criteria for establishing which OTC derivative contracts are objectively measurable as reducing risks (the so-called hedging exemption) and the designation of clearing thresholds. Article 10 will also be amended to require, when calculating derivatives positions towards the thresholds, that only those derivative contracts that are not cleared at a CCP authorised or recognised under EMIR should be included in that calculation.
- **Risk-mitigation techniques for OTC derivative contracts** – Article 11 of EMIR will be amended to provide non-financial counterparties that become subject for the first time to the obligation to exchange collateral for OTC derivative contracts not cleared by a CCP, with an implementation period of 4 months in order to negotiate and test the arrangements to exchange collateral.
- **Transparency of margin calls** – Article 38 of EMIR will be amended to ensure that clients and indirect clients have better visibility and predictability of margin calls from CCPs.
- **Continuous review of margin requirements** – Article 41 of EMIR will be amended to ensure that CCPs continuously revise the level of their margins while taking into account any potentially procyclical effects of such revisions, reflecting current market conditions and considering the potential impact of their intraday margin collections and payments on the liquidity position of their participants. This is particularly important considering the ongoing difficulties in relation to very large margin calls received by commodity and energy companies in light of current market volatility.
- **New eligible collateral for CCPs** – Article 46 of EMIR will be amended to allow bank guarantees and public guarantees to be considered eligible as highly liquid collateral provided that they are unconditionally available upon request within the liquidation period and making sure a CCP takes them into account when calculating its overall exposure to the bank.

The foregoing are the main points that will be of interest for derivatives users. EMIR 3.0 also contains significant amendments to the way CCPs are authorised and monitored on an ongoing basis, and the recognition of third country CCPs.

The EMIR 3.0 proposal, together with the five other proposal published today as part of the CMU package, will now be submitted to the European Parliament and the Council for review and adoption.

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