



BANKING AND FINANCE

Public consultation on Regulation (EU) no 648/2012 on OTC derivatives, central counterparties and trade repositories

Fields marked with * are mandatory.

Important comment: this document is a working document of the Financial Stability, Financial Services and Capital Markets Union Directorate General of the European Commission for discussion and consultation purposes. It does not purport to represent or pre-judge any formal proposal of the Commission.

Introduction

The Regulation

On 4 July 2012 the Council and the European Parliament adopted [Regulation \(EU\) No 648/2012 on OTC derivatives, central counterparties and trade repositories \(EMIR\)](#).

EMIR responded to the [commitment by G-20 leaders in September 2009](#) that: "All standardised OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at latest. OTC derivatives contracts should be reported to trade repositories".

The core requirements set out under EMIR are:

1. Clearing and risk mitigation obligations for OTC derivative contracts;
2. Reporting obligations for derivative contracts;
3. Requirements for Central Counterparties;
4. Requirements for Trade Repositories.

EMIR has been further supplemented by a number of delegated and implementing acts, some of which are adopting regulatory and implementing technical standards developed by the European Supervisory Authorities (ESAs) in accordance with their mandates under the Regulation. Unless otherwise specified, references to EMIR should therefore be considered to include both the primary Regulation (Regulation (EU) No 648/2012) and relevant delegated and implementing acts.

Report on the Regulation

In accordance with Article 85(1) of EMIR, the Commission is required to prepare a general report on EMIR which shall be submitted to the European Parliament and the Council, together with any appropriate proposals.

The Commission must in particular:

(a) Assess, in cooperation with the members of the ESCB (the European System of Central Banks), the need for any measure to facilitate the access of CCPs to central bank liquidity facilities;

(b) Assess, in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;

(c) Assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs;

(d) Assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area;

(e) Assess in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users.

The Commission services will also take into account when preparing the report any other key issues that have been identified during the implementation of EMIR to date. In particular, the Commission services will take into account the findings of reports submitted by ESMA in accordance with Article 85(3) of EMIR.

Feedback

The purpose of this document is to consult all stakeholders on their views and experiences in the implementation of EMIR to date. Interested parties are invited to send their contributions by 13 August 2015 through the online questionnaire below. Only responses received through the online questionnaire will be included in the report summarising responses. The responses to this consultation will provide important guidance to the Commission services in preparing their final report.

Responses to this consultation should relate to the legislative text of EMIR. Responses are expected to be of most use where issues raised in response to the questions are supported with data or detailed narrative, and accompanied by specific suggestions for solutions to address them. Such suggestions may relate to either the primary Regulation or to relevant delegated and implementing acts. Supplementary questions providing for free text responses may appear depending on the response to a multiple choice question.

The Commission services recognise that certain core requirements and procedures provided for under EMIR are yet to be implemented or completed. In particular, at this stage clearing obligations and obligations to exchange collateral in respect of non-cleared OTC derivatives transactions are not yet in force. It is therefore envisaged that the report required under Article 85(1) will focus primarily on those aspects of EMIR which have been implemented.

Nonetheless, the Commission services welcome the views of stakeholders as to any identified issues with respect to the implementation of upcoming requirements. However, this consultation does not seek views on any regulatory technical standards that have not yet been adopted by the Commission. This includes the proposed regulatory technical standards on the mandatory clearing of certain interest rate products in accordance with Article 5 of EMIR, delivered to the Commission by ESMA on 3rd October 2014 and the joint draft regulatory technical standards of the ESAs on margin for uncleared OTC derivatives transactions mandated in accordance with Article 11(3) of EMIR.

Further, with respect to the regulatory and implementing technical standards on trade reporting adopted by the Commission in accordance with Article 9 of EMIR (Regulation No. 148/2013 and Regulation No. 1247/2012) the Commission services note that ESMA recently conducted its own consultation on amended versions of these standards. This consultation does therefore not seek any views with respect to the content of either [Regulation No. 148/2013](#) and [Regulation No. 1247/2012](#) nor the amended versions proposed by ESMA.

The Commission services will publish all responses received on the Commission website unless confidentiality is requested.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-c2@ec.europa.eu.

More information:

- [on this consultation](#)
- [on the protection of personal data regime for this consultation](#) 

1. Information about you

*Are you replying as:

- ☐ a private individual
- ☒ an organisation or a company
- ☐ a public authority or an international organisation

*Name of your organisation:

Assogestioni - The Italian Asset Management Association

Contact email address:

The information you provide here is for administrative purposes only and will not be published

manuela.mazzoleni@assogestioni.it

*Is your organisation included in the Transparency Register?

(If your organisation is not registered, [we invite you to register here](#), although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#))

- ☒ Yes
☐ No

*If so, please indicate your Register ID number:

89046007765-76

*Type of organisation:

- | | |
|---|---|
| <input type="radio"/> Academic institution | <input type="radio"/> Company, SME, micro-enterprise, sole trader |
| <input type="radio"/> Consultancy, law firm | <input type="radio"/> Consumer organisation |
| <input checked="" type="radio"/> Industry association | <input type="radio"/> Media |
| <input type="radio"/> Non-governmental organisation | <input type="radio"/> Think tank |
| <input type="radio"/> Trade union | <input type="radio"/> Other |

*Where are you based and/or where do you carry out your activity?

Italy



*Field of activity or sector (*if applicable*):

at least 1 choice(s)

- ☐ Banking
- ☐ Insurance
- ☒ Pension provision
- ☒ Investment management (e.g. hedge funds, private equity funds, venture capital funds, money market funds, securities)
- ☐ Market infrastructure operation (e.g. CCPs, Trade Repositories, CSDs, Stock exchanges)
- ☒ Trade Association
- ☐ Non-Financial / Corporate enterprise
- ☐ Governmental Organisation / Regulator
- ☐ Law firm / Consultancy
- ☐ Other
- ☐ Not applicable



Important notice on the publication of responses

*Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published?

(see [specific privacy statement](#) )

- ☒ Yes, I agree to my response being published under the name I indicate (*name of your organisation/company/public authority or your name if your reply as an individual*)
- ☐ No, I do not want my response to be published

2. Your opinion

Part I - Questions on elements of EMIR to be reviewed according to Article 85(1)(a)-(e)

Question 1.1: CCP Liquidity

Article 85(1)(a) states that: "The Commission shall assess, in cooperation with the members of the ESCB, the need for any measure to facilitate the access of CCPs to central bank liquidity facilities".

There are no provisions under EMIR facilitating the access of CCPs authorised under EMIR to additional liquidity from central banks in stress or crisis situations, either from the perspective of the members of the ESCB or from the perspective of CCPs. However, it is recognised that in some member states, CCPs are required to obtain authorisation as credit institutions in accordance with Article 6 of Directive 2006/48/EC. Such authorisation creates access to central bank liquidity for those CCPs. On the other hand, other member states do not require CCPs to obtain such an authorisation.

Is there a need for measures to facilitate the access of CCPs to central bank liquidity facilities?

see EFAMA reply

If your answer is yes, what are the measures that should be considered and why?

see EFAMA reply

Question 1.2: Non-Financial Firms

Article 85(1)(b) states that: " The Commission shall.....assess, in coordination with ESMA and the relevant sectoral authorities, the systemic importance of the transactions of non-financial firms in OTC derivatives and, in particular, the impact of this Regulation on the use of OTC derivatives by non-financial firms;"

Non-financial counterparties are subject to certain requirements of EMIR. However, such counterparties will not be subject to the requirements to centrally clear or to exchange collateral on non-centrally cleared transactions provided that they are not in breach of predefined thresholds, in accordance with Article 10 of EMIR. Further, it is recognised that non-financial counterparties use OTC derivative contracts in order to cover themselves against commercial risks directly linked to their commercial or treasury financing activities. Such contracts are therefore excluded from the calculation of the clearing threshold.

(a) Are the clearing thresholds for non-hedging transactions (Article 11, Regulation (EU) No 149/2013) and the corresponding definition of contracts objectively measurable as reducing risks directly relating the commercial activity or treasury financing activity (Article 10, Regulation (EU) No 149/2013) adequately defined to capture those non-financial counterparties that should be deemed as systemically important?

n.a.

If your answer is no, what alternative methodology or thresholds could be considered to ensure that only systemically important non-financial counterparties are captured by higher requirements under EMIR?

n.a.

(b) Please explain your views on any elements of EMIR that you believe have created unintended consequences for non-financial counterparties. How could these be addressed?

n.a.

(c) Has EMIR impacted the use of, or access to, OTC derivatives by non-financial firms? Please provide evidence or specific examples of observed changes if so.

n.a.

Question 1.3: CCP Colleges

Article 85(1)(c) states that: "The Commission shall....assess, in the light of experience, the functioning of the supervisory framework for CCPs, including the effectiveness of supervisory colleges, the respective voting modalities laid down in Article 19(3), and the role of ESMA, in particular during the authorisation process for CCPs."

In order for a CCP established in the Union to provide clearing services, it must obtain authorisation under Article 14 of EMIR. EMIR introduced a college system for the granting of such authorisation, which has, to date, been used for the process of authorisation of sixteen CCPs. The College comprises members from relevant competent authorities, relevant members of the European System of Central Banks and ESMA.

(a) What are your views on the functioning of supervisory colleges for CCPs?

n.a.

(b) What issues have you identified with respect to the college system during the authorisation process for EU CCPs, if any? How could these be addressed?

n.a.

Question 1.4: Procyclicality

Article 85(1)(d) states that: "The Commission shall....assess, in cooperation with ESMA and ESRB, the efficiency of margining requirements to limit procyclicality and the need to define additional intervention capacity in this area."

CCPs authorised in the Union must take into account potential procyclical effects when calculating their margin requirements. The specific factors that must be considered to avoid disruptive movements in margin calculations are provided for under Article 41 EMIR and Article 28 of Commission Delegated Regulation (EU) No 153/2013.

- (a) Are the requirements under Article 41 EMIR and Article 28 Regulation (EU) No 153/2013 adequate to limit procyclical effects on CCPs' financial resources?

see EFAMA reply

If your answer is no, how could they be improved?

see EFAMA reply

- (b) Is there a need to define additional capacity for authorities to intervene in this area?

If your answer is yes, what measures for intervention should be considered and why?

Question 1.5: CCP Margins and Collateral

Article 85(1)(e) states that: "The Commission shall....assess, in cooperation with ESMA the evolution of CCP's policies on collateral margining and securing requirements and their adaptation to the specific activities and risk profiles of their users."

Collateral collected by way of initial and variation margin requirements is the primary source of financial resources available to a CCP. Title IV of EMIR and Commission Delegated Regulation (EU) No 153/2013 provide detailed requirements for the calculation of margin levels by CCPs as well as defining the assets that may be considered eligible as collateral.

(a) Have CCPs' policies on collateral and margin developed in a balanced and effective way?

With reference to the rules on the management of collaterals, in our view, the existing UCITS regulation for the use of collateral implementing at national level the ESMA guidelines for issues related to ETFs and other UCITS offers sufficient guarantees for a safe and efficient management of collateral and should be extended also to the rules on collateral under EMIR.

If your answer is no, for what reasons? How could they be improved?

(b) Is the spectrum of eligible collateral appropriate to strike the right balance between the liquidity needs of the CCP and its participants?

If your answer is no, for what reasons? How could it be improved?

Part II - General questions

Question 2.1: Definitions and Scope

Title I of the Regulation contains Articles 1-2.

Article 1 determines the primary scope of the Regulation, in particular with regard to public and private entities.

Article 2 provides definitions in use throughout the Regulation which further determine the scope of application of certain of its provisions.

Are there any provisions or definitions contained within Article 1 and 2 of EMIR that have created unintended consequences in terms of the scope of contracts or entities that are covered by the requirements?

Assogestioni's shares the European Commission commitments pursued through EMIR to create a safe and resilient market environment for derivatives and appreciates the attempt to identify though the present Review difficulties in the implementation process.

We would however point out that it is still early days to assess the full impact of the Regulation as significant elements of the regulations such as the definition of the regime of collateral management is still to be completed and central clearing has not fully entered into force. In particular, we would like to stress that , with regards to the above, characteristics of investment funds and asset managers should be taken in to account when defining clearing and margin obligations.

Assogestioni supports the views expressed by EFAMA in replying to the presents Review. Here below Assogestioni adds to the views expressed by EFAMA some detailed issues which are of particular concerns to its members.

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

Question 2.2: Clearing Obligations

Under EMIR, OTC derivatives transactions that have been declared subject to a clearing obligation must be cleared centrally through a CCP authorised or recognised in the Union. ESMA has proposed a first set of mandatory clearing obligations for interest rate swaps which are yet to come into force. Counterparties are therefore in the process of preparing to meet the clearing obligation, to the extent that their OTC derivatives contracts are in scope of the requirements.

(a) With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

see EFAMA reply

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

see EFAMA reply

(b) Are there any other significant ongoing impediments or unintended consequences with respect to preparing to meet clearing obligations generally in accordance with Article 4 of EMIR?

see EFAMA reply

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

see EFAMA reply

Question 2.3: Trade reporting

Mandatory reporting of all derivative transactions to trade repositories came into effect in February 2014. The Commission services are interested in understanding the experiences of reporting counterparties and trade repositories, as well as national competent authorities, in implementing these requirements. As noted above, ESMA recently conducted its own consultation on amended versions of these standards. This consultation does therefore not seek any views with respect to the content of either Regulation No. 148/2013 and Regulation No. 1247/2012 nor the proposed amended versions.

Are there any other significant ongoing impediments or unintended consequences with respect to meeting trade reporting obligations in accordance with Article 9 of EMIR?

Compliance with EMIR reporting obligation has required asset managers to implement significant organizational changes, revision of contracts with service providers and counterparties and to invest in IT development. In addition to the expected cost generated by the compliance with a new piece of legislation, asset managers had to face and are still facing numerous operational challenges stemming from the unpreparedness of Trade Repositories to adequately perform their task. At the time of the coming into force of the reporting obligation, even the largest Trade Repository did not appear to be fully prepared to receive the reports submitted by the counterparties nor to provide adequate feedback on the report received. It was and, to a large extent, it still is, difficult to access information on one's position and track the state of a report (whether it has been matched or not). The delay in terms of feedback on matching is still significant (7 days or more) – so much so as to make it irrelevant from a practical point of view and to require counterparties to set up a number of parallel validation processes to compensate for the poor feedback from the TRs. In practice, pending the confirmation of matching from the TR and the resolution of any mismatch, the asset management companies have implemented a series of internal procedures or have had to make use of services offered by the market with inevitable additional cost and inefficiencies.

In addition, as asset managers are the reporting party on behalf of client funds – be it mutual funds or discretionary portfolio – they had to face undue strains in the relationship with the clients for their inability to provide prompt and fully satisfactory evidence of the correct fulfillment of the trade reporting obligation.

With reference to the generation and use of UTI envisaged by the regulation, significant problems still exists. In particular, when UTI code is not generated by execution platforms, counterparties need to agree which UTI code must be used to report the deal. In our opinion UTI code should be always generated by sell side counterparty and transmitted to buy side counterparty within confirmation process.

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

Some examples of issues faced by Assogestioni's members are described below.

It is impossible to view the reporting to TR as third party; as a consequence reports already transmitted cannot be checked and verified. It is impossible to receive a status report at a certain date (only daily and weekly summary of reporting can be obtained) as a consequence, it is difficult for a counterparty to have a global overview of the reports already transmitted.

Summary of reporting submitted is only available for a limited time (if not saved, the summary is cancelled by the TR) as a consequence counterparties need frequent backing up of reporting - in case of mistakes in the backing up process, the report may not be recoverable as it is often no longer available.

Unclear reporting from DTCC: report format and structure unclear, frequently changing standard; it is therefore difficult for counterparties to automate the checking of feedback reporting from TRs. Feedback from TRs (Regis and DTCC in our members' experience) on errors or unmatched deals is poor. In particular:

Regist Tr reporting is hard to understand; reporting format is different depending on the counterparty TR, it is unclear which data are mandatory and which are optional;

DTCC still produces no reporting in this area . As a consequence it is hard for counterparties to monitor compliance with regulation and it is hard for asset managers who perform reporting duties on behalf of clients (eg pension funds) to provide evidence of compliance with regulation.

Question 2.4: Risk Mitigation Techniques

Risk mitigation techniques are provided for under Articles 11(1) and 11(2) of EMIR and further defined in Commission Delegated Regulation (EU) No 149/2013. Risk mitigation techniques began entering into force in March 2013 and apply to OTC derivative transactions that are not centrally cleared. They include obligations with respect to transaction confirmation, transaction valuation, portfolio reconciliation, portfolio compression and dispute resolution.

Are there any significant ongoing impediments or unintended consequences with respect to meeting risk mitigation obligations in accordance with Articles 11(1) and (2) of EMIR?

see EFAMA reply

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

Question 2.5: Exchange of Collateral

Article 11(3) of EMIR mandates the bilateral exchange of collateral for OTC derivative contracts that are not centrally cleared. Article 11(15) mandates the ESAs to further define this requirement, including the levels and type of collateral and segregation arrangements required. The ESAs consulted publically on their draft proposals in the summer of 2014.

The ESA are now in the process of finalising these draft Regulatory Technical Standards. It is therefore recognised that the final requirements are not fully certain at this stage. The Commission services are not seeking comment on the content on the proposed rules published by the ESAs. Nonetheless the Commission services welcome any views from stakeholders on implementation issues experienced to date.

Are there any significant ongoing impediments or unintended consequences anticipated with respect to meeting obligations to exchange collateral in accordance with Article 11(3) under EMIR?

With reference to the rules on the management of collaterals, in our view, the existing UCITS regulation for the use of collateral implementing at national level the ESMA guidelines for issues related to ETFs and other UCITS offers sufficient guarantees for a safe and efficient management of collateral and should be extended also to the rules on collateral under EMIR. ((see also Assogestioni reply to ESMA consultation on RTS on risk mitigation techniques for OTC derivative contracts not cleared by a CCP)

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

Question 2.6: Cross-Border Activity in the OTC derivatives markets

OTC derivatives markets are global in nature, with many transactions involving Union counterparties undertaken on a cross-border basis or using third country infrastructures. EMIR provides a framework to enable cross-border activity to continue whilst ensuring, on the one hand, that the objectives of EMIR are safeguarded and on the other hand that duplicative and conflicting requirements are minimised.

(a) With respect to activities involving counterparties established in third country jurisdictions; are there any provisions or definitions within EMIR that pose challenges for EU entities when transacting on a cross-border basis?

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

(b) Are there any provisions within EMIR that create a disadvantage for EU counterparties over non-EU entities?

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

5000 character(s) maximum

Question 2.7: Transparency

The overarching objective of the trade reporting requirement under EMIR is to ensure that national competent authorities and other regulatory bodies have data available to fulfil their regulatory mandates by monitoring activity in the derivatives markets.

Have any significant ongoing impediments arisen to ensuring that national competent authorities, international regulators and the public have the envisaged access to data reported to trade repositories?

5000 character(s) maximum

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

Question 2.8: Requirements for CCPs

Titles IV and V of EMIR set out detailed and uniform prudential and business conduct requirements for all CCPs operating in the Union. CCPs operating prior to EMIR's entry into force are required to obtain authorisation in accordance with the new requirements of EMIR, through the EU supervisory college process.

- (a) With respect to access to clearing for counterparties that intend to clear directly or indirectly as clients; are there any unforeseen difficulties that have arisen with respect to establishing client clearing relationships in accordance with EMIR?

- (a) Are there any significant ongoing impediments or unintended consequences with respect to CCPs' ability to meet requirements in accordance with Titles IV and V of EMIR?

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

- (b) Are the requirements of Titles IV and V sufficiently robust to ensure appropriate levels of risk management and client asset protection with respect to EU CCPs and their participants?

If your answer is no, for what reasons? How could they be improved?

(c) Are there any requirements for CCPs which would benefit from further precision in order to achieve a more consistent application by authorities across the Union?

5000 character(s) maximum

If your answer is yes, which requirements and how could they be better defined?

Question 2.9: Requirements for Trade Repositories

Titles VI and VII of EMIR set out detailed and uniform requirements for all trade repositories operating in the Union. Trade repositories operating prior to EMIR's entry into force are required to obtain authorisation by ESMA in accordance with the requirements of EMIR. To date, ESMA has authorised six trade repositories. ESMA is the primary supervisor for Union trade repositories and has the power to issue fines for non-compliance with the requirements of EMIR.

Are there any significant ongoing impediments or unintended consequences with respect to requirements for trade repositories that have arisen during implementation of Titles VI and VII of EMIR, including Annex II?

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

Question 2.10: Additional Stakeholder Feedback

In addition to the questions set out above, the Commission services welcome feedback from stakeholders on any additional issues or unintended consequences that have arisen during the implementation of EMIR which are not covered by those questions.

Are there any significant ongoing impediments or unintended consequences with respect to any requirements or provisions under EMIR and not referenced in the preceding questions that have arisen during implementation?

If your answer is yes, please provide evidence or specific examples. How could these be addressed?

3. Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) here:

Useful links

Consultation details (http://ec.europa.eu/finance/consultations/2015/emir-revision/index_en.htm)

Consultation document

(http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/consultation-document_en.pdf)

Specific privacy statement

(http://ec.europa.eu/finance/consultations/2015/emir-revision/docs/privacy-statement_en.pdf)

More on the Transparency register (<http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en>)

Contact

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