Next Step for EMIR Refit Proposals

The European Commission's proposed Regulation to amend EMIR is heading for trilogue negotiations between the Commission, the EU's Council of Ministers and the European Parliament, and could be adopted before the end of 2018.

As set out in our previous briefing (here), the Commission's proposals have broad implications for the definition of a financial counterparty ("**FC**") as well as for the EMIR requirements on clearing, risk mitigation and reporting. This briefing outlines the positions of the EU's Council of Ministers and European Parliament, respectively, on some of the key changes proposed by the Commission.

Commission Proposal	Council Position	European Parliament Report
Definition of Financial Counterparty		
The definition of FC is extended to include: • all alternative investment funds ("**AIFs**"); • central securities depositories ("**CSDs**"); and • securitisation special purpose entities ("**SSPEs**").	To be an FC, an AIF must either be an EU AIF or have an authorised or registered AIFM. The definition of an FC includes CSDs but not SSPEs.	Same as Council with the exception of an additional carve out for AIFs and UCITS related to an employee share purchase plan.

Application of Clearing Requirements for FCs, NFCs and Pension Scheme Arrangements (PSAs)		
A smaller FC is exempt from the clearing requirement if it meets the clearing thresholds.	Largely the same.	Largely the same.
FCs and NFCs must assess the application of the clearing requirement once a year.	Same.	The same except that an FC/NFC is able to avoid carrying out an annual assessment through opting up to full NFC/FC status.
An NFC is subject to the clearing requirement in respect of a specific asset class once it exceeds the clearing threshold for that asset class.	Same.	The same, except also provides that the margin requirements will only apply to the asset class for which the clearing threshold is exceeded.
The existing exemption for PSAs is extended by a further three years. The Commission has the power to extend the exemption once by two years by means of a delegated act.	Same.	The further three year exemption is limited to "small PSAs" and entities established to provide compensation to their members if a PSA defaults. A two year exemption applies to other PSAs.
The clearing requirement no longer applies to certain OTC derivatives contracts entered into or novated before the date the clearing requirement takes effect (ie, the "frontloading" requirement is disapplied).	Same.	Same.
Clearing services must be offered under fair, reasonable and non-discriminatory commercial terms ('FRAND'). The Commission is empowered to adopt a delegated act to clarify what this means.	Similar, although clearing services must also be offered under transparent terms (FRANDT). The Council's amendments explicitly state that there should be no obligation to provide clearing services and set out criteria as to matters to be taken into account by the Commission when clarifying what FRANDT means.	Similar to Council, but specific obligations are imposed on clearing members and their clients to avoid conflicts of interests within a group of affiliated entities that may adversely affect FRANDT.

The Commission has the power to suspend temporarily any clearing requirement for a specific class of OTC derivatives or type of counterparty, on certain grounds for an initial period of 3 months extended by further 3 month periods up to a maximum of 12 months.	Similar. National competent authorities may request that ESMA submit a suspension request to the Commission. The Implementing Act suspending the clearing requirement will also suspend the MiFIR trading obligation.	Similar to Council but no automatic suspension of MiFIR trading obligation. Suspensions to be for a maximum one month period not exceeding 12 months in aggregate. The Parliament's amendments include a new recital which states that the Commission should report on the changes made to the EMIR clearing obligation that should also be made to the MiFIR trading obligation for derivatives.
Assets and positions recorded in the separate accounts maintained by a CCP for a clearing member or by a clearing member for its clients under Article 39 of EMIR are not part of the insolvency estate of the CCP or clearing member maintaining it.	National insolvency laws must not prevent a CCP from complying with existing EMIR obligations in respect of omnibus and individual segregated accounts held at the clearing member and CCP.	Same as Council.
Risk Mitigation Techniques		
	Recital restricting the mandatory exchange of variation margins on physically settled FX forwards to transactions between the "most systemic counterparties".	Similar to Council. Also refers to physically settled FX swaps.
		Margining for uncleared derivatives should not apply for asset classes where NFC+ does not exceed clearing thresholds.
Reporting		
An FC transacting OTC with an NFC- is responsible for reporting on behalf of both counterparties.	Accepted, although NFC- may choose to report on its own behalf. In addition, the recitals specifically provide that an NFC- must provide certain information to an FC that reports on behalf of the NFC-.	Same as Council, but FC is to report a single data set. In addition, the Parliament's amendments exempt an NFC- from the reporting obligation when it concludes a derivative contract with a third country entity that would be an FC if established in the EU, once certain conditions are met.

A CCP is responsible for reporting an Exchange Traded Derivative on behalf of both counterparties.	Not accepted.	Not accepted.
Intragroup transactions do not have to be reported where at least one of the two counterparties is an NFC.	Exemption only applies if each of the counterparties is, or would be if established in the EU, an NFC.	Exemption only applies where at least one of the counterparties is an NFC and certain other conditions are met, including that the parent undertaking is not an FC.
Derivative contracts entered into before 12 February 2014 and not outstanding on that date do not need to be reported (ie, "backloading" requirement disapplied).	Same.	The reporting obligation applies to derivative contracts entered into on or after 12 February 2014.
Pre-approval of Collateral Risk Management Procedures		
Supervisors to pre-approve risk-management procedures regarding the timely, accurate and appropriate segregated exchange of collateral and any changes to them. ESAs mandated to develop draft RTS specifying supervisory procedures.	Same.	Same.

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