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EMIR 3.0 – The new EU Commission proposal

On 7 December 2022, the EU Commission published a proposal for a regulation to amend EMIR (amongst others), with the primary aim of making EU clearing services more attractive to market participants.

According to the EU Commission, it has become apparent that the regulatory burden on EU central counterparties (the entities carrying out the clearing of derivatives) is too high, with the result that market participants tend to clear their derivatives outside the EU. The proposed new rules aim to reduce this regulatory burden to make the EU a more attractive business place for clearing services. The clearing capacity in the EU is considered to be important for the capital markets union (CMU).

In addition, according to the EU Commission, recent developments in energy markets, with several energy companies facing liquidity issues when using derivatives, have illustrated that EMIR needs to be enhanced. In the Commission's view, this means that a safe, robust, and competitive clearing system which can withstand economic shocks, must be put in place.

The proposal for the new regulation contains the following main changes:

- Intragroup exemptions from clearing and collateral exchange requirements

Under the current regime, an intragroup exemption (from clearing or collateral exchange requirements) for transactions with third country entities can only be requested if the third country entity is located in a jurisdiction for which an equivalency decision regarding EMIR has been adopted. This concept will be replaced by a negative list containing jurisdictions with regards to which an exemption cannot be granted.

- Clearing obligation

A further exemption from the clearing obligation will be introduced for derivative transactions, where an EU financial counterparty or non-financial counterparty exceeding the clearing thresholds has as a counterparty a third country pension scheme which is exempt from the clearing obligation under applicable local law.

- Clearing threshold calculation

The clearing threshold calculation for financial counterparties will be amended so that only non-cleared derivatives (and no longer cleared derivatives) will need to be considered when doing the calculation to determine whether the relevant clearing thresholds are exceeded.

- Need to open an active account

Counterparties to derivative transactions which are subject to the clearing calculation will be required to open and maintain active accounts, directly or indirectly, at EU central counterparties, and to clear at least a portion of their derivatives at EU central counterparties.

- Clearing for non-financial counterparties

ESMA will be required to review and clarify the conditions under which derivatives can be considered as objectively reducing risks, i.e. as hedging.

Should you require more detailed information and assistance on the above topic and its implications, please liaise with your usual point of contact at Arendt.

[The Q&A on the Commission's new proposal to make clearing services in the EU more attractive is accessible here_](#)

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