EMIR (EUROPEAN MARKET INFRASTRUCTURE REGULATION)

Updated in July 2024

Considering the lessons from the 2008 financial crisis, the G20 leaders made a commitment during the 2009 Pittsburgh Summit to enhance transparency on the derivatives market and mitigate the current risk generated by transactions that were mostly carried out on an over-the-counter (OTC) basis. The declared objective was to implement the measures adopted by the end of 2012.

EMIR (effective as from August 2012) is Europe's translation of these measures into a regulation similar to the Dodd Frank Act (DFA), which equally sets out regulations for the same transactions in Title VII thereof.

EMIR is built on three main pillars:

1. **RISK MITIGATION** for OTC derivatives contracts:
   - The clearing obligation for all products considered sufficiently standardised.
   - For uncleared transactions, the rules have been strengthened to mitigate the counterparty risk (by setting an obligation of bilateral exchange of initial margin and variation margin) and the operational risk.

2. **TRANSPARENCY** by setting an obligation of reporting to a Derivatives Trade Repository.

3. **INFRASTRUCTURE**
   - More stringent requirements for clearing houses.
   - Establishment of a European legal framework for Trade Repositories.

The EMIR review process started in 2015 has led to two regulations amending the 2012's text. The first one (known as EMIR Refit or 2019/834) has been published in May 2019 and entered into force on the 17/06/2019. Thus some of the original requirements have been modified or even finally not applied. The second one dedicated to the supervision of CCPs with major new requirements applying on non-EU CCPs is named EMIR 2.2 (or 2019/2099) and has entered into force on the 1st of January 2020.

EMIR Refit   EMIR 2.2

In December 2022, the EC has issued the first draft of a future EMIR3. This new version of EMIR should enter into force in 2024.

1. Overview

a. Key aspects of the Regulation

- **Obligation of reporting to a Trade Repository (effective as from 2014)** EMIR Refit

TRANSPARENCY

EMIR sets a reporting requirement for all derivatives contracts.

The reporting should be made to a Trade Repository selected from the list of ESMA-agreed Repositories. The collected data will be accessible to both national regulators and ESMA. This is a bilateral reporting (required from both parties to the contract). This obligation transcends the G20 requirements, given that it equally applies to listed derivatives (ETDs), namely contracts concluded on a regulated market. The inclusion of ETDs and the bilateral reporting are two notable differences compared with US requirements (DFA).

The reporting obligation applies also on certain contracts closed prior to the implementation date (12/02/2014). Initially, ESMA's objective was to be well ahead of the game, such that immediately EMIR comes into operation, it would have gained a practical insight into the OTC derivatives universe. Two types of contracts are involved by this backloading:

- Those still open at the effective date of EMIR (16/08/2012) and closed prior to the effective date of the obligation
- Those concluded as from 16/08/2012 and closed before 12/02/2014; initially set for 12/02/2017 (3 years after the implementation date of the reporting obligation), the deadline for reporting these contracts has been shifted to 12/02/2019. This obligation has been finally removed in the perspective of EMIR Refit.

To be noted, EMIR Refit included a potential review of the requirement to report to Trade Repositories (additional data, new international standards, new obligations, …). ESMA has sent its proposals to the EC end 2020. Following them, the EC has adopted on the 10/06/2022 several delegated acts. They have entered into application the 29/04/2024 (18 months after their entry into force).

- **Operational risk mitigation techniques for uncleared contracts (effective from 2013)**

RISK MITIGATION

EMIR sets out risk mitigation requirements for contracts not bound by a clearing obligation (either because the product is not or because at least one of the parties to the contract is not bound by same). These requirements apply to various processes, including: contract confirmation, portfolio valuation and compression, portfolio reconciliation and dispute management.

- **Counterparty risk mitigation techniques for uncleared contracts (as of 2017)**

RISK MITIGATION

The key EMIR requirement, namely the initial / variation margin exchange obligation for uncleared contracts, only came into application in early 2017 (Delegated Regulation (EU) 2016/255).

Effective from 1 March 2017, the exchange of variation margins is mandatory (except in special cases). Although the law has set this as a firm date, the various regulators (local, European or international) have all admitted, in one way or the other, that implementing this obligation poses a challenge considering the high volume of contracts that will need to be revised. As for the initial margin exchange obligation its implementation was spread out over several years (2017-2020).

IN BRIEF:

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

(**) Cf. item on FX forwards below.

This implementation phase-in was aligned with the 2015's international schedule, save for the first deadline (namely 06/02/2017). However, one should note that:

- The Basel Committee and IOSCO agreed to a one year extension of the final implementation phase (the 01/09/2020 becomes the 01/09/2021) and to create an additional implementation phase whereby as of 1 September 2020 covered entities with an AANA of non-centrally cleared derivatives greater than €50 billion will be subject to the requirements.
- Due to the Covid-19 and its impacts, the Basel Committee and IOSCO have decided a one-year postponement of phase 5 and phase 6 (announced in April 2020)

On the 18th of February 2021, the EU has aligned its calendar to the new international one via the entry into force of the delegated act 2021/236 amending the DA 2016/2251.

	2 parties above 3000 billion €	**2 parties above 2250 billion €**	**2 parties above 1500 billion €**	**2 parties above 750 billion €**	**2 parties above 50 billion €**	**2 parties above 8 billion €**
Initial Margin (IM)	06/02/2017	01/09/2017	01/09/2018	01/09/2019	01/09/2021	01/09/2022

To be noted, EMIR Refit has introduced the Initial Margin Models Validation EMIR Refit

RISK MITIGATION

- **Clearing obligation (effective from June 2016)** EMIR Refit

The clearing obligation is applied on a product-by-product basis. It is endorsed by the European Commission based on a proposal by ESMA. The products considered by the latter are derivatives eligible for clearing by a CPP (Central Counterparty Clearing House) accredited pursuant to EMIR. In practice, new agreements are notified to ESMA, whereupon the latter begins its analysis and consultations. In addition to the standard procedure, ESMA may notify the European Commission of any derivatives that it feels may be submitted to the compensation, but are not admitted by an agreed CCP.

3 criteria are assessed by ESMA:

- C1: degree of standardisation of the relevant class, in terms of the contractual terms as well as the operational processes
- C2: liquidity (proportionate margins, stability of the market size and depth, market dispersion and number and value of the transactions)
- C3: availability of fair, reliable and generally accepted pricing information in the relevant classes of OTC derivative contracts

The register of products submitted to the clearing obligation is available on the ESMA website (cf. below).

A contract should be cleared if the product is subject to clearing and if both parties to the contract are equally subject to same. Implementation of the obligation is spread out over time, depending on the type of the parties. The original EMIR defined 4 different categories: members of a CCP (Cat. 1), active financial counterparties (Cat. 2), other financial counterparties (Cat. 3) and NFC+ non-financial counterparties (Cat. 4).

INTEREST RATE SWAPS (IRS) & CONTRACT DEFAULT SWAPS (CDS)

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

Due to EMIR Refit the dates for categories 3 and 4 will not apply as such. The new date is based on the entry into force of EMIR Refit (4 months after 17/06/2019). It should also be noted that the category 3 disappears; EMIR Refit has splitted FC into FC+ and FC-.

For your attention, the list of IRS/CDS submitted to the clearing obligation has been modified due to the Benchmark Regulation.

NON DELIVERABLE FX FORWARDS (NDFX)
No clearing obligation for now.

- **Accreditation of CCPs (effective from 2014)**

INFRASTRUCTURE

Since EMIR requires compensation for products considered standard, there was a need to ensure that Clearing Houses (CCPs) are robust. Apart from specific requirements for derivatives OTC contracts, the regulation introduces further requirements (capital needs, governance, operational procedures, risk hedging, clearing member default management, etc...). These obligations apply to all CCPs regardless of the type of product cleared. EMIR requires all CCPs located within the Union to obtain their agreement under EMIR (no grandfather clause for already operational CCPs). Agreement needed by CCPs of non-EU countries (third country CCPs) to offer services to regulated entities in the Union (trading / affirmation platforms and clearing members) is given by ESMA. Initially, the European Commission must have recognised that the jurisdiction of the third country is equivalent to the European one.

The register of accredited CCPs is available on the ESMA website (cf. below).

ESMA has updated its "Methodology for Mandatory Peer Reviews in relation to CCPs' authorisation and supervision under EMIR".
Kindly note that CCP defaults are dealt with in the regulation on *CCP recovery and resolution.*

EMIR 2.2

- **Accreditation of Trade Repositories (effective from 2013)**

INFRASTRUCTURE

EMIR introduces the European statute for Trade Repositories and sets out the regulatory framework for their activities (agreement, oversight requirements, etc.). ESMA may carry out on-site investigations or inspections and levy penalties or fines in case of duly-established negligence or violation.

b. Other aspects

RISK MITIGATION

- **Covered bonds and Securitization Special Purpose Entity**

OTC contracts concluded by a covered bond entity in connection with a covered bond or by a SSPE in connection with a securitisation may face issues to comply with EMIR requirements. Therefore, and under certain conditions they both have been exempted from the clearing obligation by the Securitisation Regulation (2017/2402) amending EMIR level 1. In addition, EMIR level 2 exempts under certain conditions covered bonds from bilateral exchanges of initial and variation margins for non-cleared contracts.

- **Combined with MIFID II / MIFIR: Indirect clearing (03/01/2018)**

RISK MITIGATION

The indirect compensation principle was introduced in EMIR to allow counterparties submitted to the clearing obligation to comply accordingly. Not all counterparties are members of a CCP. Moreover, it may even be difficult for them to be clients of a clearing member. Indirect clearing gives them access (under certain conditions) to a CCP as clients of a client of a CCP's clearing member.

Two regulations were published jointly (namely 2017/2154 related to MIFIR and 2017/2155 amending EMIR regulation 149/2013). Both regulations revisit the issue of access to indirect clearing of OTC derivatives (EMIR provision) and ETDs (MIFIR provision). They set out the obligations applicable to the various providers of indirect clearing services (CCPs, clearing members and the client).

- **FX forwards (definition and level playing field)**

RISK MITIGATION

On two occasions, FX forwards were addressed specifically.

It should be noted firstly that FX derivatives are not submitted to the clearing obligation. As a result, they fall under the uncleared contracts regime. In addition, they are exempted from the initial margin exchange obligation. Thus, they are bound by the variation margin exchange obligation with effect from 1 March 2017 (at the latest).

Within FX derivatives, physically-settled FX forwards differentiated themselves from the others because they were considered or not as financial instruments depending on the EU Member State (following the translation of MIFID into local law), which made them included or excluded from the scope of EMIR. The revised MIFID (MiFID II) has clarified this aspect by highlighting the (rare) cases where these products may not be considered as financial instruments. Effective as from early 2017, the EMIR delegated regulation

(2016/2251) on uncleared contracts provided for a temporary exemption valid until the coming into application of MIFID II. This took place on 3 January 2018, thereby introducing a de facto obligation of variation margin exchange.

However, the issue of applying variation margins to physically-settled FX forwards remains pending. In practice, the variation margin exchange obligation validated internationally was domesticated in different ways from one region to another. Whereas the European Union enshrined it in the law, the USA instead opted for guidelines enacted by regulators (same approach applied in Asia). The European authorities were informed by industry about the issue of competition and considered the complaint admissible. End December 2017, Europe's three regulators (ESMA, EBA and EIOPA) tabled a proposed amendment to Delegated Regulation 2016/255 to the European Commission.

The FX topic has been included in EMIR Refit (level 1) but only via a recital that restrits mandatory variation margins for FX forwards and FW swaps to contracts between the most systemic counterparties. In addition the recital 21 opens the door to other cases of international regulatory divergence. The delegated regulation 2021/236 (level 2) has addressed this issue by limiting the VM requirement for FX forwards and FX swaps physically settled: the requirement now only applies for contracts between two institutions (an investment firm or a credit institution). Otherwise, counterparties may decide to not exchange VM but this needs to be in the contractual provision. EMIR Refit

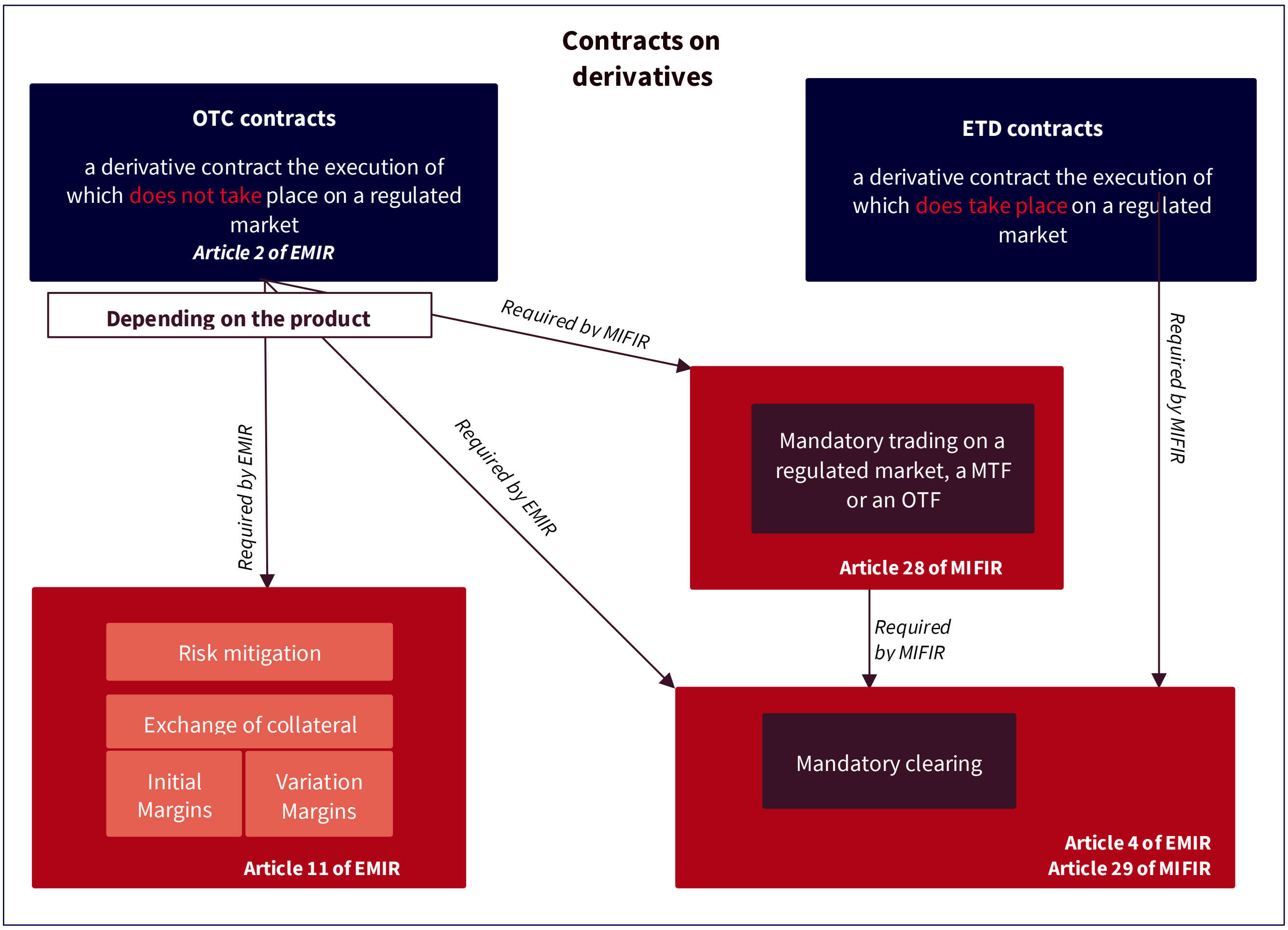
- **Trading / Clearing obligation (2018)**

RISK MITIGATION

EMIR identified products considered as sufficiently standardised to undergo mandatory clearing. MIFIR supplements this process by identifying within the family of mandatorily-cleared products, those that will be considered as sufficiently liquid to further undergo a trading obligation on a trading venue (regulated market, MTF or OTF). The products identified by the European Commission are:

- For IRSs: fixed versus variable interest rate swaps in Euros, USD and GBP.
- For CSD: iTraxx Europe Main and iTraxx Europe Crossover

On the other hand, with the implementation of EMIR, OTC derivatives contracts may be submitted to a clearing obligation, whereas there was no previous equivalent for listed derivatives (ETDs). MIFIR harmonises the requirements by imposing a clearing obligation for all ETDs.



c. Progress update and way forward:

- **New dates / updates for the original EMIR**

The entry into force of the delegated regulation 2021/236 has covered other topics too:

- Temporary exemption of **initial and variable margins** for individual equity options and index options: the exemption was valid until January 4, 2024, 3 years longer than in the 2019 version.

  In December 2023, the ESAs have proposed to extend the exemption for equities and index options until the 04/01/2026 and issued both an amendment of the delegated act and a no action opinion to apply from the 04/01/2024 until a decision is taken by the EC

- Temporary exemption of **initial and variable margins** for intra-group transactions involving a third country entity where no equivalence has been recognised between the European Union and the third country; the exemption was valid until the 30/06/2022 (instead of December 21, 2020 in the 2019 version). The new date (officialised by the 2022/7326) is now the 30th of June 2025.
- **Transfer into the Union** of contracts originally concluded between a party of the Union of 27 and one in the UK: the text contains a legislative mechanism that will allow new contracts (the relocated ones) to benefit from the same exemptions as the original contracts under EMIR (for example, the exemption of bilateral exchanges of initial margin).

In parallel, the delegated regulation 2021/237 amended the 3 delegated regulations relating to the clearing requirements (2015/2205 and 2016/1178 for interest rate derivatives and 2016/592 for credit default derivatives)

- Extension until the 30/06/2022 of the **temporary clearing exemption for intra-group** transactions involving a third-country entity where no equivalence has been recognised between the European Union and the third country. Since the entry into force of the 2022/7175 act, the new date is now the 30th of June 2025.
- Establishment of a legislative mechanism covering possible **transfers within the Union** of contracts originally concluded between a party of the Union of 27 and a party of the UK; new contracts may, under certain conditions, benefit from the exemption from compensation if the original contract was not itself subject to this obligation.
- Finally, following the withdrawal of the frontloading obligation (due to EMIR Refit), the references to the Minimum remaining maturity (MRM) are no longer useful and have therefore been removed from the three delegated texts.

The clearing exemption granted to **Pension Scheme Arrangements (PSA)** that was extended until the 18th of June 2022 (in June 2021) should now end in June 2023. Having in mind that the delegated act officialising this additional extension would not be published before the 2022's deadline, ESMA has issued on the 16/06/2022 a letter requesting competent authorities to not prioritise their supervisory actions on this part of EMIR. The delegated act (2022/1671) has officialised the extension until the 18/06/2023.

NEW!

The future EMIR 3 will provide a clearing exemption for third country Pension Scheme Arrangement when the TC PSA is exempted from the clearing obligation under that third country's national law. Since EMIR 3 has not entered into force so far, ESMA has issued a public statement in which the regulator expect national competent authorities not to prioritise their supervisory actions in relation to such transactions (27/03/2024).

- **Amendments**

The threshold for commodities is now equal to 4 billions (delegated act 2022/2310)

The EC eases the criteria for highly liquid collateral than can been accepted by CCPs (except in specific cases, "*until 7 September 2024, for the purposes of Article 46(1) of Regulation (EU) No 648/2012, public guarantees that meet the conditions set out in Annex I shall be considered as highly liquid collateral*"). The delegated corresponding act 2024/818 has been published in the EU OJ (06/03/2024).

- **Reviews of EMIR**

The review of the regulation began in August 2015 according to the 2012's regulation and leads to two texts :

- EMIR REFIT: see our dedicated Analysis document (the text has entered into force on the 17th of June 2019)
- EMIR 2.2: see our dedicated Analysis document (the text has entered into force on the 1st of January 2020)

- EMIR 3: the review continues with the publication by the EC of a proposal on the 7th of december 2022. This draft is part of a set of measures to further develop the EU's Capital Markets Union (CMU). As regards clearing, it aims making EU clearing services more attractive and resilient (in particular in the aftermath of the Brexit). EMIR 3 is about being adopted.

2. Reference text(s)

- European Parliament - Presentation
- European Parliament - Procedure File
- Level 1 law
- Level 2 laws (delegated regulations) published in 2013
- Level 2 law (delegated regulation) on counterparty risk for uncleared contracts
- Register of EU CCPs accredited under EMIR
- Register of Third Country CCPs recognised under EMIR
- Q&A by ESMA
- ESMA's October 2018 statement on the clearing obligation
- BIS and IOSCO one year extension
- 2021/2236 - non cleared contracts amending 2016/2251
- 2021/2237 - clearing amending 2015/2205 2016/592 and 2016/1178
- 2023/315 amending 2015/2205,, 2016/592, 2016/1178
- 2023/314 amending 2016/2251
- 2022/2310 : threshold for commodities
- December 2022 EC's review proposal
- ESMA guidelines for new reporting under EMIR (as of 2024)
- ESMA's consultation on position calculation (TR)
- ESAs' letter on equity / index options
- ESMA's opinion on CCP back testing requirements
- Amended RTS for equity index options
- No action opinion for equity / index options
- 2024/818
- ESMA public statement on TC PSA

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The table below lists the articles of the original EMIR that have been updated either by EMIR Refit or by EMIR 2.2 or may be updated by EMIR 3 (according to the EC's proposal) and also mentions articles created or to be created by the following versions of EMIR. In the list of "untouched" articles one can find some important ones like the default fund (A42) or the default waterfall (A45).

TITLE I: SUBJECT MATTER, SCOPE AND DEFINITIONS				
article 2	Definitions	EMIR REFIT		
article 3	Intragroup transactions			*EMIR 3*

TITLE II: CLEARING, REPORTING AND RISK MITIGATION OF OTC DERIVATIVES				
article 4	Clearing obligation	EMIR REFIT		*EMIR 3*
article 4a	Financial counterparties that are subject to the clearing obligation	**new**		*EMIR 3*
article 5	Clearing obligation procedure	EMIR REFIT		
article 6	Public register	EMIR REFIT	EMIR 2.2	
article 6a	Suspension of clearing obligation	**new**		
article 7a	*Active account*			***new***
article 7b	*Information on clearing services*			***new***
article 9	Reporting obligation	EMIR REFIT		*EMIR 3*
article 10	Non-financial counterparties	EMIR REFIT		*EMIR 3*
article 11	Risk-mitigation techniques for OTC derivative contracts not cleared by a CCP	EMIR REFIT		*EMIR 3*
article 13	Mechanism to avoid duplicative or conflicting rules			*EMIR 3*

TITLE III: AUTHORISATION AND SUPERVISION OF CCPs				
CHAPTER 1: Conditions and procedures for the authorisation of a CCP				
article 14	Authorisation of a CCP			*EMIR 3*
article 15	Extension of activities and services		EMIR 2.2	*EMIR 3*
article 17	Procedure for granting and refusing authorisation		EMIR 2.2	*EMIR 3*
article 17a	*Non-objection procedure for granting a request for extension of activities or services*			***new***
article 17b	*Procedure for seeking the opinion from ESMA and the college*			***new***
article 18	College		EMIR 2.2	*EMIR 3*
article 19	Opinion of the college		EMIR 2.2	*EMIR 3*
article 20	Withdrawal of authorisation			*EMIR 3*
article 21	Review and evaluation		EMIR 2.2	*EMIR 3*
CHAPTER 3: Cooperation				
article 23	Cooperation between authorities			*EMIR 3*
article 23a	Supervisory cooperation between competent authorities and ESMA …		**new**	*EMIR 3*
article 23b	*Joint Supervisory Teams*			***new***
article 23c	*Joint Monitoring Mechanism*			***new***
article 24	Emergency situations		EMIR 2.2	*EMIR 3*
CHAPTER 3A: CCP Supervisory Committee				
article 24a	CCP Supervisory Committee		**new**	*EMIR 3*
article 24b	Consultation of central banks of issue		**new**	
article 24c	Decision making within the CCP Supervisory Committee		**new**	
article 24d	Decision making within the Board of Supervisors		**new**	
article 24e	Accountability		**new**	
CHAPTER 4: Relations with third countries				
article 25	Recognition of a third-country CCP		EMIR 2.2	*EMIR 3*
article 25a	Comparable compliance		**new**	
article 25b	Ongoing compliance with the conditions for recognition		**new**	*EMIR 3*
article 25c	Third-country CCP college		**new**	
article 25d	Fees		**new**	
article 25e	Exercise of the powers referred to in Articles 25f to 25h		**new**	
article 25f	Request for information		**new**	
article 25g	General investigations		**new**	
article 25h	On-site inspections		**new**	

article 25i	Procedural rules for taking supervisory measures and imposing fines		new	
article 25j	Fines		new	
article 25k	Periodic penalty payments		new	
article 25l	Hearing of the persons concerned		new	
article 25m	Disclosure, nature, enforcement and allocation of fines and periodic penalty …		new	
article 25n	Review by the Court of Justice		new	
article 25o	Amendments to Annex IV		new	
article 25p	Withdrawal of recognition		new	*EMIR 3*
article 25q	Supervisory measures by ESMA		new	
article 25r	*Public notice*			***new***

TITLE IV: REQUIREMENTS FOR CCPs				
CHAPTER 1: Organisational requirements				
article 26	General provisions			*EMIR 3*
article 31	Information to competent authorities			*EMIR 3*
article 32	Assessment		EMIR 2.2	*EMIR 3*
article 35	Outsourcing		EMIR 2.2	*EMIR 3*
CHAPTER 2: Conduct of business rules				
article 37	Participation requirements			*EMIR 3*
article 38	Transparency	EMIR REFIT		*EMIR 3*
article 39	Segregation and portability	EMIR REFIT		
CHAPTER 3: Prudential requirements				
article 41	Margin requirements			*EMIR 3*
article 44	Liquidity risk controls			*EMIR 3*
article 46	Collateral requirements			*EMIR 3*
article 49	Review of models, stress testing and back testing		EMIR 2.2	*EMIR 3*

TITLE V: INTEROPERABILITY ARRANGEMENTS				
article 54	Approval of interoperability arrangements			*EMIR 3*

TITLE VI: REGISTRATION AND SUPERVISION OF TRADE REPOSITORIES				
CHAPTER 1: Conditions and procedures for registration of a trade repository				
article 56	Application for registration	EMIR REFIT		
article 62	General investigations	EMIR REFIT		
article 63	On-site inspections	EMIR REFIT		
article 64	Procedural rules for taking supervisory measures and imposing fines	EMIR REFIT		
article 65	Fines	EMIR REFIT		
article 72	Supervisory fees	EMIR REFIT		
CHAPTER 2: Relations with third countries				
article 76a	Mutual direct access to data	new		

TITLE VII: REQUIREMENTS FOR TRADE REPOSITORIES				
article 78	General requirements	EMIR REFIT		
article 80	Safeguarding and recording	EMIR REFIT		
article 81	Transparency and data availability	EMIR REFIT		
article 82	Exercise of the delegation	EMIR REFIT	EMIR 2.2	*EMIR 3*

TITLE IX: TRANSITIONAL AND FINAL PROVISIONS				
article 85	Reports and review	EMIR REFIT	EMIR 2.2	*EMIR 3*
article 86	Committee procedure	EMIR REFIT		
article 89	Transitional provisions	EMIR REFIT	EMIR 2.2	
article 90	Staff and resources of ESMA		EMIR 2.2	*EMIR 3*