ISDA Safe, Efficient Markets

ISDA MISP Briefing - EMIR Compromise Amendments

ISDA welcomes the opportunity to comment on the European Parliament (EP) compromise amendments to Regulation (EU) No 648/2012 (EMIR) under the Market Integration and Supervision Package (MISP). This briefing focuses on:

- *transaction reporting (Article 9)*
- *treatment of non-financial counterparties (Article 10)*
- *initial margin model authorization (Article 11)*
- *the supervision of recognised third-country CCPs (Article 25)*
- *eligible collateral and tokenised assets (Articles 46, 47 and 50)*

Executive Summary

ISDA stresses that reporting simplification is too complex to address in MISP given the many competing priorities. However, if the EP considers transaction reporting aspects should be part of its final report, we would recommend supporting amendments (AMs) that can be implemented simply without risk of inadvertently increasing complexity and burden.

We support the policy intention of Ferber AM 641 on the calculation of positions by non-financial counterparties (NFCs) and Ferber AM 642 on initial margin model authorization. We oppose Van Overtveldt AMs 700, 701 and 702 to prevent disproportionate and potentially extraterritorial direct supervisory powers over non-EU group entities of recognised third-country CCPs. We also recommend supporting Ferber AMs 103, 104 and 105, together with AM 706, subject to technology-neutral and non-exhaustive drafting that permits other tokenised instruments to qualify where they satisfy equivalent legal, liquidity, credit, market and operational risk standards.

Summary of recommendations

Topic	Articles	Support	Oppose
Transaction reporting	Article 9	Ferber AM 15, 90 and AMs 14 and 91 subject to appropriate revision of drafting, Van Brug AMs 636-639	Ferber AM 92
Non-financial counterparties	Article 10 (new 10(3a))	Ferber AM 641 subject to considerations regarding the scope of entities subject to the CO.	–

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Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on LinkedIn and YouTube.

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Topic	Articles	Support	Oppose
Initial margin model authorisation	Article 11	Ferber AM 642	–
Recognised third-country CCPs	Article 25 (25f, 25g, 25h)	–	Van Overtveldt AMs 700, 701, 702
Eligible collateral and tokenised assets	Articles 46, 47, 50	AMs 103, 104, 105 and 706 (subject to technology-neutral, non-exhaustive drafting)	–

1. Transaction reporting - Article 9

We consider that transaction reporting simplification is too complex an issue to address in MISP given the many competing priorities therein, and strongly believe it should be addressed in a separate dedicated legislative package. However, if the European Parliament deems it critical to include some aspects of reporting simplification, we would support amendments that can be implemented simply without risk of inadvertently increasing complexity and burden, while providing material benefits.

We would support Ferber AMs 15 and 90, which simplify the notification process to make use of the exemption from reporting intragroup reporting and provide material relief in the short-to-medium term with minimal implementation effort. AM 90 should be revised to allow the exemption to apply immediately on notification, rather than after three months.

Ferber AMs 14, 91 and 92 would expand mandatory delegated reporting. This could provide relief, provided:

- It is explicitly clear that responsibility and legal liability lie with the reporting party, and the delegating party's obligation is limited to provision of static referential data that is not known to the reporting party.
- There is no requirement for trade-by-trade reconciliations at a data element level, and no obligation on the delegating party to either check or validate reports of its transactions, or to transmit data to the reporting party on a trade-by-trade basis.

We consider that that mandatory delegated reporting can be safely expanded to transactions between financial counterparties (FCs) and all non-financial counterparties beyond those which currently benefit from mandatory delegated reporting (i.e. NFC+ as well as NFC-). However, expanding mandatory delegated reporting to transactions between financial counterparties would introduce the need to define a hierarchy to designate the party that holds the reporting obligation, with that hierarchy needing to

cater for a wide array of complex scenarios. This is a level of change that would be better addressed in a subsequent legislative vehicle, particularly as it may need to interact with a framework that fully integrates EMIR Article 9 and MiFIR Article 26 reporting.

Accordingly, we would support AMs 14 and 91, subject to revision such that mandatory delegated reporting is only expanded to transactions between FC and NFC+ entities and to address the points around responsibility and legal liability, reconciliation and data transmission made above. This is again a change with relatively low risk and implementation effort that would provide meaningful benefits to corporates and industrial firms in the short-to-medium term. We would oppose AM 92, as this is only necessary for expansion of mandatory delegated reporting to transactions between two FCs.

We would support Van Brug AMs 636-639, which restrict the scope of reporting under Article 9 to OTC derivatives, thereby removing exchange traded derivatives (ETDs) from the scope. This would again be a relatively low risk and implementation effort for material benefits in a short-to-medium term timeframe. However, this should be accompanied by an additional amendment to either Article 2(7) or Article 9 that states that third-country ETDs should be considered as ETDs for the purposes of Article 9 reporting. Retaining reporting of third-country ETDs would negate many of the benefits of removing EEA ETDs from the scope of Article 9.

Should AMs 636-639 not be adopted in the Parliament's final position while AM 91 is, the latter would need to be further revised to include ETDs in the scope of mandatory delegated reporting of transactions between FCs and NFCs.

Finally, in order to ensure that the momentum of reporting simplification is maintained, we support a new mandate in either EMIR or MiFIR that would require the Commission to present legislative proposals for the simplification of financial transaction reporting through an integrated "report once" framework to the Parliament and Council within 12 months of entry into force of the MISP Master Regulation, and to establish an expert stakeholder group to inform the development of those proposals.

- ***Should the EP deem it necessary to progress reporting simplification through MISP, we would recommend supporting AMs 14-15, 90-91 and 636-639, subject to the revisions identified above.***
- ***In addition, we would support a new mandate requiring the EC to present legislative proposals for an integrated "report once" framework to the co-legislators within 12 months, and to establish an expert stakeholder group to inform those proposals.***
- ***We would recommend opposing AM 92, as the hierarchy it would establish is unnecessary for mandatory delegated reporting between FCs and NFCs.***

2. Non-financial counterparties - Article 10

We support the policy intention of Ferber AM 641, as incorporated in new Article 10(3a), because it would provide a more proportionate measure of the relevant commodity derivatives activity of non-financial corporates and commodity trading firms with long-dated contracts such as virtual power purchase agreements (vPPAs).

AM 641 provides that, for an OTC derivative contract with a remaining maturity exceeding twelve months, a non-financial counterparty would include only the notional value attributable to the following twelve-month period when calculating the positions referred to in Article 10(1), rather than the full notional amount of the contract. This would better align the calculation with the counterparty's actual forward exposure and activity during the relevant period. Long-dated derivatives are commonly used by corporates to hedge commercial risks over the life of assets, liabilities or supply arrangements and can be required to secure funding to develop commercial projects such as building renewable power generation assets. Other non-financial counterparties may act as hedge providers, however, counting the entire notional amount at each calculation point can overstate the scale of current derivatives activity and may bring a counterparty above the clearing threshold even where its near-term activity and risk are materially lower.

The amendment does not exempt long-dated contracts from EMIR nor alter the requirement to calculate positions; it changes only the amount attributed to the calculation period. This should support the provision and use of derivatives for genuine risk management by non-financial counterparties without undermining supervisory visibility.

However, the current drafting refers to 'OTC derivative contracts' and 'non-financial counterparty', potentially covering a much broader set of entities and products than long-dated commodity derivatives. The final text should support the above-described policy whilst ensuring that the scope of entities subject to the EMIR CO is not inadvertently altered.

• ***We recommend supporting Ferber AM 641 and retaining the proposed new Article 10(3a) in the compromise text.***

3. Initial margin model authorisation - Article 11

We support Ferber AM 642, which deletes the third and fourth subparagraphs of Article 11(3), and therefore removes the proposed prior-authorisation framework for initial margin models at national NCA and European EBA level.

A prior-authorisation requirement for widely used initial margin models creates a significant implementation burden for firms and supervisors, while risking fragmentation from global practices. Initial margin models used for uncleared derivatives are already subject to detailed regulatory standards, governance, validation and supervisory oversight. An additional EU authorization layer results in duplicative reviews, delays to model changes and uncertainty where internationally used models are updated. These risks would be particularly acute if approvals were required across multiple competent authorities or if the EU timetable diverged from model changes implemented in other major jurisdictions.

The deletion would preserve the ability of competent authorities to assess compliance with the applicable margin requirements through ordinary supervision, while avoiding a separate approval mechanism that may deliver limited additional risk reduction. It would also better preserve international consistency for cross-border derivatives portfolios and avoid placing EU counterparties at a competitive disadvantage.

• ***We recommend supporting Ferber AM 642 and retaining the deletion of the third and fourth subparagraphs of Article 11(3).***

4. Recognised third-country CCPs - Article 25

We oppose Van Overtveldt AMs 700, 701 and 702 to prevent disproportionate and potentially extraterritorial direct supervisory powers over non-EU group entities of recognised third-country CCPs.

These amendments to Articles 25f, 25g and 25h would allow ESMA to request information from, investigate and, for Tier 2 CCPs, conduct on-site inspections at related group entities that deploy resources or perform functions for a recognised CCP. The drafting is not limited to entities established in the Union or to clearly defined outsourced critical functions. It could therefore confer direct supervisory reach over third country group entities merely because they support a recognised CCP, even where those entities are subject to the jurisdiction and supervision of a third-country authority. ISDA understands that regulators themselves share legitimate concerns around such extraterritorial overreach.

This approach raises concerns regarding proportionality, legal certainty and extraterritoriality. Article 35 already requires a CCP to remain fully responsible for outsourced activities and to make information available so that compliance can be assessed. For EU group arrangements, the proposed Article 35(1a) also sets out specific safeguards and notification requirements. ESMA should therefore obtain the information necessary to supervise the recognised CCP from the CCP itself and, where access to a foreign group entity is genuinely necessary, through cooperation arrangements with the relevant home authority. This would be consistent with internationally established approaches to cross-border CCP supervision and would avoid overlapping or conflicting demands on non-EU entities. In fact, NCA feedback collected by ESMA to inform its work on regulatory technical standards (RTS) on reporting in relation to activities at recognised CCPs (EMIR Article 7d) strongly suggests that current transaction reporting data and other data sources are sufficient for supervisory purposes.

Any look-through power should be limited to information that is necessary and directly relevant to the recognised CCP's compliance with EMIR. Direct investigations or inspections outside the Union should depend on the consent of, and cooperation with, the competent home authority.

• ***We recommend opposing Van Overtveldt AMs 700, 701 and 702.***

5. Eligible collateral and tokenised assets - Articles 46, 47 and 50

We broadly support amendments that enable the use of tokenised financial instruments and tokenised settlement assets in CCP collateral and settlement arrangements, but the Level 1 text should remain technology-neutral and non-exhaustive.

Ferber AM 103 would clarify that DLT financial instruments and central bank money in tokenised form may be treated as eligible collateral on the same terms as their non-tokenised equivalents, provided they satisfy the applicable liquidity, credit risk and market risk conditions. Ferber AM 104 would recognise DLT notaries and DLT account keepers for the holding of certain non-cash collateral and treat tokenised central bank

money held in a distributed-ledger account with a central bank as a deposit with the ESCB. Ferber AM 105, together with AM 706, would permit specified tokenised settlement instruments to be used where central bank money is not used, subject to applicable risk management requirements.

Legal uncertainty can prevent CCPs and clearing members from using tokenised versions of assets even where their substantive risk characteristics are comparable to those of existing eligible collateral. The amendments can therefore support innovation and the competitiveness of EU market infrastructure. However, prescribing a closed list of DLT financial instruments, central bank money in tokenised form, e-money tokens, tokenised commercial bank money and asset-referenced tokens could unintentionally exclude other forms of digital instruments as markets and regulation develop. Tokenisation should not, by itself, determine collateral eligibility. Eligibility should depend on functional equivalence and compliance with the same legal, liquidity, credit, market, custody, operational resilience, transferability and settlement-finality requirements that apply to non-tokenised assets.

The final text should therefore make clear that the listed instruments are examples rather than an exhaustive set. ESMA's technical standards should address risk-sensitive conditions, including haircuts, concentration limits, enforceability, segregation, transfer mechanics, operational resilience and recovery in the event of default, without creating technology-specific barriers or duplicating requirements already applicable under other Union legislation. In this context, we also note ESMA's recent publication of its call for evidence in relation to tokenised collateral at CCPs.

- ***We recommend supporting Ferber AMs 103, 104 and 105, together with AM 706, subject to technology-neutral and non-exhaustive drafting.***
- ***The final text should confirm that other tokenised or digital instruments may qualify where they satisfy equivalent legal and risk-management standards.***

Contacts

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