



**COUNCIL OF  
THE EUROPEAN UNION**

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**REPORT**

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from : Presidency  
to : Council

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No. Cion prop.: 13917/10 EF 117 ECOFIN 543 CODEC 879

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Subject : Proposal for a Regulation of the European Parliament and of the Council on derivative transactions, central counterparties and trade repositories (EMIR) - Orientation debate

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**I. INTRODUCTION**

1. On 17 September 2010, the Commission transmitted to the Council its proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (EMIR) (doc. 13917/10 EF 117 ECOFIN 543 CODEC 879).
2. The European Central Bank adopted its opinion on the proposal on 13 January 2011. The European Economic and Social Committee adopted its opinion on 8 December 2010.
3. The ECON Committee of the European Parliament adopted its report on the proposal on 24 May 2011. The European Parliament has indicated its intention to vote on its first reading position during the Plenary Session on 4-7 July 2011.

4. The proposal has been examined by the Working Party on Financial Services at 17 meetings under the Belgian and Hungarian Presidencies.
5. On 8 June and 17 June, the COREPER examined the stage of preparation of the file and the main outstanding issues, and concluded that further work was needed before an agreed position could be formulated on the entire Regulation at Council level.
6. However, given the urgency of the file, the Presidency considers it important to hold an orientation debate at ECOFIN on the two key political matters (below), with a view to better steering further work on the outstanding issues at the Working Party level.

## II. STATE OF PLAY

7. Following the discussion at COREPER on 17 June 2011, there is a broad measure of agreement on a large part of the Presidency compromise as set out in doc. 11058/1/11 REV1 EF 81 ECOFIN 314 CODEC 966. There remain, however, some important outstanding issues. The Presidency has decided to seek political guidance from Ministers on the following two political issues:

### A. Supervisory powers and the role of ESMA

8. Discussions on the **authorisation and supervision of CCPs**<sup>1</sup> (Articles 13 to 15) focus largely on the balance of powers between ESMA, the national authority of the Member State where a CCP is seeking authorisation and the supervisory college which is to deliver a prior opinion thereon. The college is expected to adopt a joint opinion within two months, failing which the opinion should be adopted by majority voting.

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<sup>1</sup> The ultimate responsibility for the authorisation and supervision of CCPs is the core controversial issue. Other related concerns focus on the recognition of third-country CCPs (Art.23) and on the registration and supervision of TRs, incl. fines (Art.51 to 61d) as well as recognition of third-country TRs (Art.63).

9. Furthermore, in the latest Presidency compromise, ESMA takes part in the vote on the opinion. The voting modalities applicable in the college are to be framed by implementing standards to be adopted by the Commission. A positive opinion by the college may be overruled by the national authority of the Member State where a CCP is seeking authorisation.
10. The Presidency has in its compromise aimed at bridging the gap between delegations that support entrusting the concerned national competent authority with the ultimate authority for all these matters and those supporting a central, possibly decisive role for ESMA.
11. Discussion in COREPER has however shown that the current compromise gives rise to a number of misgivings, including on the determination of the voting modalities, which delegations argued should be set out in the Regulation itself and on the role of ESMA, which should not have a voting right in the view of a number of speakers.

## **B. Scope**

12. Regarding the **scope of application of the Regulation, i.e. whether it should cover only OTC derivative transactions or apply to all derivatives transactions**, there are potentially four relevant issues:
  - i/ the **clearing obligation**, i.e. to make it mandatory to clear derivatives trades through CCPs (re mainly Article 3): the Presidency text covers **all derivatives - this is the most controversial issue**.

Here, BG, DE, ES, IT, LU, LV and PL want to maintain the scope limited to OTC derivatives only, while SE maintains an open position. IT wants to extend the original Commission's scope to include derivative contracts negotiated on regulated markets, multilateral trading facilities and other organised, multilateral trading venues, which have not been cleared by a CCP.

- ii/ the **reporting obligation**, i.e. to impose compulsory reporting of (all) trades to TRs (re Article 7): the Presidency text covers **all derivatives**.

This is somewhat less controversial (though BG, CZ, DE are opposed), and no blocking minority appears to hinder a compromise.

- iii/ the **right of access of any venue of execution** (e.g. an exchange or a multilateral trading platform) **to a CCP** (Article 8) : the Presidency text covers **only OTC derivatives**.

p.m. Extension to all derivatives was opposed by BG, DE, ES, IT, LU, LV and PL.

- iv/ the **right of access of a CCP to the trade flow of any venue of execution** (Article 8a): the Presidency text covers **only OTC derivatives**.

However, the principle of such right of access is totally rejected by BG, DE, ES, LU, LV, PL, and RO. IT has reservations on the impact in terms of fragmentation of the liquidity of the markets if interoperability of CCPs is not meanwhile promoted in the derivatives segment. FR could also oppose if this paved the way for interoperability of CCPs.

### III. CONCLUSION

13. Against this background, the Council is invited to:

- provide political guidance, in particular, on the two issues set out above; and,
- invite the Presidency to pursue the finalisation of a compromise that meets with a QMV support.