

PROVISIONAL REQUEST TO THE EUROPEAN BANKING AUTHORITY (EBA) FOR
TECHNICAL ADVICE ON A POSSIBLE DELEGATED ACT SPECIFYING THE METHOD FOR
THE DETERMINATION OF THE AMOUNT OF THE FEES, AND THE MODALITIES OF THE
PAYMENT OF SUCH FEES, TO BE PAID BY FINANCIAL AND NON-FINANCIAL
COUNTERPARTIES REQUIRING THE VALIDATION OF PRO-FORMA MODELS UNDER THE
EUROPEAN MARKET INFRASTRUCTURE REGULATION (EMIR)

With this provisional mandate the Commission seeks EBA's technical advice on a possible delegated act concerning the European Market Infrastructure Regulation (EMIR)¹ as amended by the 2024 EMIR Review² (the "**Regulation as amended**"). This delegated act would be adopted in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).

The provisional nature of the present mandate stems from the fact that the Regulation as amended has not yet entered into force. However, the Council (at the meeting of COREPER on 14 February 2024) and the European Parliament (in an ECON Committee vote on 4 March 2024) have approved the political agreement on the text of the 2024 EMIR Review. Currently, the 2024 EMIR Review is subject to legal revision and translation prior to its publication in the EU Official Journal.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision.

The mandate follows EMIR (Article 82), the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**")³, and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**")⁴.

According to Article 11(12a) of the Regulation as it would be amended under the EMIR Review and with regard to the fees to be charged to financial and non-financial counterparties requiring the validation of pro-forma models⁵, the Commission will be empowered to adopt a delegated act to specify further the method for the determination of the amount of the fees and the modalities of the payment of the fees.

The European Parliament and the Council shall be duly informed about this mandate.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice within the European Securities Committee⁶, the Commission will continue, as appropriate, to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with experts appointed by the Member States within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

¹ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p.1.

² <https://data.consilium.europa.eu/doc/document/ST-6344-2024-INIT/en/pdf>

³ Communication of 9.12.2009. COM (2009) 673 final.

⁴ OJ L 304, 20.11.2010, p. 47.

⁵ A pro-forma model is a widely used model developed by a third-party or a consortium. One such example of a pro-forma model is the Standard Initial Margin Model developed by the International Swaps and Derivatives Association.

⁶ Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L 191, 17.7.2001, p.45.

The powers of the Commission to adopt delegated acts are subject to Article 82 of the EMIR Regulation. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context

1.1 Scope

On 7 December 2022, the Commission published its proposal to amend EMIR as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets. On 7 February 2024, the European Parliament and the Council reached a political agreement on a compromise text, which was formally endorsed by the two institutions respectively on 4 March 2024 and 14 February 2024. Publication in the Official Journal is expected by Q4 2024. The text will enter into force on the twentieth day following its publication.

Based on the political agreement, the Regulation as amended would contribute to making EU clearing services more attractive and robust, preserving financial stability and supporting a well-functioning Capital Markets Union. It would enable central counterparties (CCPs) – which provide clearing services – to bring new products to the EU market faster. The Regulation as amended would give market participants an incentive to clear and build liquidity at EU CCPs.

The Regulation as amended would also allow for a safer and more resilient clearing system, by improving the EU supervisory framework for CCPs, reinforcing the role of the European Securities and Markets Authority (ESMA), and drawing lessons from the market events of the past few years. The Regulation as amended would also contribute to reducing excessive reliance on systemic CCPs in non-EU countries, by requiring all relevant market participants to hold active accounts at EU CCPs and clear a representative portion of certain systemic derivative contracts within the single market.

The Regulation as amended would grant EBA the additional task to set up a central validation function for the elements and general aspects of pro-forma models, and changes thereto, used or to be used by a subset of financial and non-financial counterparties as part of the risk-mitigation techniques used on their portfolios of non-centrally cleared OTC derivatives. Consequently, in accordance with Article 11(12a) of the Regulation as amended, EBA would be able to charge annual fees, per pro-forma model, to those financial and non-financial counterparties using the pro-forma models validated by EBA. In accordance with the text of the political agreement, the fees would need to be proportionate to the monthly average outstanding notional amount of non-centrally cleared OTC derivatives over the last 12 months of the counterparties concerned using the pro-forma models validated by EBA and would need to be assigned to cover all costs incurred by EBA for the performance of its tasks in relation to the validation of pro-forma models. EBA would charge fees based on a Regulation on fees to be adopted by the Commission in the form of a delegated act.

This provisional mandate focuses on the technical aspects of the Regulation on fees, including specifying further the method for the determination of the amount of the fees and the modalities

of the payment of the fees. In providing its advice EBA should build on its own experience, as well as of ESMA in setting supervisory fees for financial institutions at Union level.

1.2 Principles that EBA should take into account

On the working approach, EBA is invited to take account of the following principles:

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Regulation. It should be simple and avoid as much as possible financial, administrative or procedural burdens for counterparties.
- When preparing its advice, EBA should seek coherence within the regulatory framework of the Union, and achieve full consistency with the existing delegated regulations on fees from the European Supervisory Authorities, also in light of the recent harmonisation of certain aspects of ESMA's fees (see for example: Commission Delegated Regulation (EU) 2024/1704 – fees from trade repositories⁷).
- In accordance with the Regulation of the European Parliament and the Council establishing a European Banking Authority (the "**EBA Regulation**")⁸, EBA should not feel confined in its reflection to elements that it considers should be addressed by the possible delegated act but, if it finds it appropriate, it may indicate guidelines and recommendations which, in its view, could be appropriate to accompany the delegated act to better ensure its effectiveness.
- EBA will determine its own working methods depending on the content of the provisions being dealt with. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by the various expert groups.
- In accordance with the EBA Regulation, EBA should, where relevant, involve the European Securities and Markets Authority or the Single Supervisory Mechanism in order to ensure cross-sectoral consistency.
- In accordance with the EBA Regulation, EBA is invited to widely consult market participants in an open and transparent manner and take into account the resulting opinions in its advice. EBA should provide a detailed feedback statement on the consultation, specifying when consultations took place, how many responses were received and from whom, as well as the main arguments for and against the issues raised. This feedback statement should be annexed to its technical advice. The technical advice should justify EBA's choices *vis-à-vis* the main arguments raised during the consultation.
- EBA is invited to justify its advice by providing a quantitative and qualitative cost-benefit analysis of all the options considered and proposed. EBA should provide the Commission with a description of the problem, the objectives of the technical advice, possible options for consideration and a comparison of the main arguments for and against the considered options. The cost-benefit analysis should justify EBA's choices

⁷ [Delegated regulation - EU - 2024/1704 - EN - EUR-Lex \(europa.eu\)](#)

⁸ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), OJ L 331, 15.12.2010, p. 12–47.

vis-à-vis the main considered options and should provide a justification for the amount of fees proposed in the technical advice.

- EBA's technical advice should not take the form of a legal text. However, EBA should provide the Commission with a clear and structured ("articulated") text, accompanied by sufficient and detailed explanations. Furthermore, the technical advice should be presented in an easily understandable language respecting current terminology in the Union.
- EBA should provide comprehensive technical analysis on the subject matters described in section 3 below, where these are covered by the delegated powers included in:
 - o the relevant provision of the Regulation as amended;
 - o the corresponding recitals; or
 - o the relevant Commission's request included in this mandate.
- EBA should address to the Commission any question to clarify the text of the Regulation or the relevant Regulatory Technical Standard it considers of relevance to the preparation of its technical advice.

2 Procedure

The Commission is requesting EBA's technical advice for the preparation of a possible delegated act to be adopted pursuant to the Regulation as amended and in particular regarding the questions referred to in section 3 of this mandate.

The mandate takes into account EMIR (Article 82), the EBA Regulation, the 290 Communication and the Framework Agreement.

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate will not prejudice the Commission's final decision.

In accordance with established practice, the Commission may continue to consult experts appointed by the Member States in the preparation of delegated acts relating to the Regulation as amended.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts the delegated act, it will notify it simultaneously to the European Parliament and the Council.

3 EBA is invited to provide technical advice on the following issues

The Regulation as amended would empower the Commission to adopt a delegated act on the fees to be charged to financial and non-financial counterparties requiring the validation of pro-forma models, specifying further the method for the determination of the amount of the fees and the modalities of the payment of the fees.

EBA is invited to provide technical advice to assist the Commission in formulating a possible delegated act on such fees. EBA shall determine the annual fee to be charged, per pro-forma model, to financial counterparties and non-financial counterparties referred to in Article 10 of

EMIR using those models validated by EBA under the first subparagraph of Article 11(12a) of the Regulation as amended. The fee shall be proportionate to the monthly average outstanding notional amount of non-centrally cleared OTC derivatives over the last 12 months of the counterparties concerned using the pro-forma models validated by EBA and shall be assigned to cover all costs incurred by EBA for the performance of its tasks in relation to the validation of pro-forma models.

4. Indicative timetable

This mandate takes into consideration that EBA requires sufficient time to prepare its technical advice and that the Commission needs to adopt the amended delegated act according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 82 of the EMIR that allows the European Parliament and the Council to object to a delegated act within a period of 3 months, extendible by 3 further months at the initiative of the European Parliament or of the Council. The delegated act will only enter into force if neither European Parliament nor the Council have objected on expiry of that period or if both institutions have informed the Commission of their intention not to raise objections.

It is of utmost importance to start the work on this issue as soon as possible. The deadline set to EBA to deliver the technical advice is therefore Q2 2025.