

6 June 2019

Circular on Regulation (EU) No 2019/834 - the European Market Infrastructure Regulation ('EMIR') Regulatory Fitness Programme ('Refit')

This circular is being addressed to all market participants, particularly entities who enter into derivative¹ contracts which fall within the scope of EMIR, *inter alia* financial and non-financial counterparties as defined in Article 2 of EMIR.

This circular should be read in conjunction with Regulation (EU) N° 648/2012 (['EMIR'](#)), its Delegated Regulations and previous circulars issued by the Authority.

Background

The Authority would like to inform market participants that on 28 May 2019, the EU Official Journal published Regulation (EU) N° 2019/834 (['EMIR Refit'](#)), which enters into force on 17 June 2019.

EMIR Refit will bring about changes in relation to the reporting requirements, the clearing obligation, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories.

¹ 'derivative' or 'derivative contract' means a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2014/65/EU;

Amendments to EMIR

1. Amendments to the definition of Financial Counterparties

EMIR Refit widens the definition of 'Financial Counterparty' ('FC') to include all financial counterparties that are systemically important for the financial system. The definition will be expanded to capture EU Alternative Investment Firms ('AIFs') and, where relevant, their EU Alternative Investment Fund Managers ('AIFMs'), together with AIFs with an authorised or registered AIFM (as present in the original definition). Central Securities Depositories (CSDs) authorised under Regulation (EU) 909/2014 relating to Central Securities Depositories (CSDR), will also fall within scope of the definition. On the other hand, **Securitisation Special Purpose Entities ('SSPEs') and AIFs specifically set up** for the purpose of employee share purchase plans will be excluded from the definition.

2. Small Financial Counterparty

Financial Counterparties whose trading activity in OTC derivatives is not considered as having a systemic risk and would not be considered for central clearing, will be commonly referred to as **Small Financial Counterparties ('SFCs')**. Although these SFCs will be exempt from the clearing obligation, they would still be subject to the risk mitigation obligations, including the marginal requirements.

In accordance with the EMIR Refit, the categorisation of FCs or SFCs will only need to be made once a year. The calculation will be based on the aggregate month-end average position of all OTC derivative contracts (speculative or hedging) entered into by the FC, for the preceding twelve months. Accordingly, the European Securities and Markets Authority ('ESMA') expects the initial calculation to be made on 17 June 2019, the day EMIR Refit enters into force.

Following the calculation, FCs not exceeding any of the below thresholds will be considered as SFCs and will be exempt from the clearing obligation. However, FCs exceeding the clearing threshold for at least one asset class, will become subject to the clearing obligation for in-scope derivative transactions across all asset classes.

The clearing thresholds which SFCs should not exceed in order to benefit from a clearing exemption under EMIR Refit shall be:

- €1 billion in gross notional value for OTC credit derivatives contracts;
- €1 billion in gross notional value for OTC equity derivatives contracts;
- €3 billion in gross notional value for OTC interest rate derivative contracts;
- €3 billion in gross notional value for OTC foreign exchange derivative contracts;
- €3 billion in gross notional value for OTC commodity and other OTC derivative contracts.

3. Clearing obligations for Non-Financial Counterparty

Non-Financial Counterparties ('NFCs') will be subject to a calculation similar to that of SFCs. Under EMIR, NFCs exceeding the clearing threshold for one asset class would currently become subject to clearing in respect of in-scope derivative transactions for all asset class. In accordance with EMIR Refit however, NFCs exceeding the clearing threshold for one asset class will only be subject to clearing obligations for that particular asset class, while still subject to requirements in relation to exchange collateral for uncleared OTC derivative contracts in the other asset classes.

4. Responsibility for the Reporting Obligation

EMIR Refit determines which counterparty will be responsible for reporting the derivative transaction as follows:-

– FC transactions with NFC-

Under EMIR Refit, FCs will be responsible for reporting on behalf of both counterparties (accordingly, an NFC+ or NFC- opting to report will continue to be responsible and liable for reporting).

– NFC- transactions with third country FC

NFC- will not be required to report transactions when entering into OTC derivatives with third country counterparties which, had they been established in the EU, would qualify as FCs (provided that the third country reporting regime has been deemed equivalent and the third country FC has reported these transactions).

– *NFC- with already set up reporting arrangements*

NFC- with already set up reporting arrangements can opt to continue reporting their OTC derivatives entered into with an FC. In this respect, they should communicate their decision with the FC prior to entering any new OTC contract.

– *NFCs and intra-group transactions*

EMIR Refit provides that intragroup transactions involving at least one NFC will be exempt from the reporting obligation (irrespective of their place of establishment). For this exemption to be availed of however, both counterparties must be part of the same group, furthermore their parent undertaking cannot be an FC.

– *OTC Derivative Contracts entered into by a UCITS*

EMIR Refit specifies that the management company of a UCITS shall be responsible and legally liable for reporting OTC derivative contracts on behalf of that UCITS.

– *OTC Derivative Contracts entered into by an AIF*

Similarly, the AIFM shall be responsible and legally liable for reporting OTC derivative contracts on behalf of that AIF.

– *OTC Derivative Contracts entered into by an Institution for Occupational Retirement Provision ('IORP') without legal personality*

Accordingly, the authorised entity responsible for the management of the IORP shall be responsible and liable for its reporting.

5. Frontloading

EMIR Refit will remove the 'Frontloading obligation' present in the current EMIR. The Frontloading obligation required all OTC derivative contracts entered into before the coming into force of the clearing obligation, to be centrally cleared.

*6. Fair, Reasonable, Non-**Discriminatory and Transparent commercial terms ('FRANDT')***

EMIR Refit requires clearing members and clients providing clearing services (directly or indirectly) to provide services under FRANDT requirements. In this regard, further details will be outlined in

Commission Delegated Act(s), which the Commission is empowered to adopt in accordance with Article 82 of EMIR.

FRANDT specify requirements that facilitate clearing services on a fair and non-discriminatory basis, as well as risk control criteria for the clearing member or client related to the clearing services offered. Accordingly, EMIR Refit specifies the conditions which FRANDT requirements would be based upon, in particular fairness and transparency requirements on fees, and reasonable commercial terms to ensure unbiased and rational contractual agreements.

7. Power to suspend the clearing obligation

Under EMIR Refit, ESMA may request the Commission to suspend the clearing obligation. In this respect, the commission has the power to suspend the clearing obligation for a period of three months from the date of application of that suspension. This suspension may be extended for a successive period of three months up to a total of no more than twelve months.

8. Pension Schemes

The transitional period during which pension scheme arrangements were exempted from the clearing obligation expired on 16 August 2018. In this regard, EMIR Refit will extend this period for a further two years. Furthermore, the Commission may if considered necessary, thereafter issue a further two extensions, extending the transitional period for another one year.

9. Risk Mitigation

EMIR Refit, targets the harmonisation of rules on risk-mitigation techniques in order to avoid inconsistencies across the European Union. The Commission will be empowered to adopt regulatory technical standards ('RTS') **developed by ESMA or the European Banking Authority ('EBA'), with regard to supervisory procedures ensuring initial and ongoing validation of the risk management procedures that require the timely, accurate and appropriately segregated exchange of collateral.**

10. *FX Transactions*

EMIR Refit tackles the need for international regulatory convergence and the need for NFCs and SFCs to reduce the risks associated with their currency risk exposures. The new Regulation sets out special risk-management procedures for physically settled foreign exchange ('FX') forwards and physically settled FX swaps. EMIR Refit provides that the mandatory exchange of variation margin on (physically settled) FX forwards and FX swaps should be limited to transactions between the counterparties most susceptible to systemic risk (i.e. credit institutions and investment firms).

Next Steps

The majority of provisions under EMIR Refit will come into force on 17 June 2019. Nonetheless, in order to allow counterparties appropriate time for preparation, the application dates for the below requirements have been delayed:

| Requirement | Application Date |
|---|----------------------------------|
| Obligation on CCPs to provide simulation tools and information on the initial margin models to clearing members. | 18 December 2019 |
| NFC- Delegation of reporting to FCs AIF delegation of reporting to AIFM UCITS delegation of reporting to UCITS management company | 18 June 2020 |
| Validation of risk mitigation procedures | Depends on the RTS |
| Validation of risk mitigation procedures | + 12 months (Depends on the RTS) |
| FRANDT | + 24 months |

Contacts

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