

21 November 2019

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

Clarification on the Classification of Collective Investment Schemes as Financial Counterparties

This circular is being addressed to all market participants, particularly collective investment schemes which enter into derivative¹ contracts falling within the scope of EMIR.

This circular should be read in conjunction with Regulation (EU) No 648/2012 ('EMIR'), Regulation (EU) No 2019/834 ('EMIR Refit'), its Delegated Regulations and previous circulars issued by the Authority.

Background

EMIR Refit came into force on 17 June 2019 and introduced a non-exhaustive list of changes to *inter alia* the reporting requirements, the clearing obligation and risk mitigation techniques for OTC derivative contracts not cleared by a central counterparty.

Of particular interest, the Regulation amends the definition of Financial Counterparties under EMIR, with the intention to include all entities having systemically importance to the financial system. In this respect, the Authority would like to provide further clarification on the definition of Financial Counterparties.

Clarification on the definition of Financial Counterparties

EMIR Refit expanded the definition of 'Financial Counterparty' ('FC') to capture, *inter alia*, all EU Alternative Investment Schemes ('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).

In this respect, Article 4 of Directive 2011/61/EU (Alternative Investment Fund Managers Directive, 'AIFMD') defines an AIF as 'collective investment undertaking, including investment compartments thereof, which: (i) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and (ii) does not require authorisation pursuant to Article 5 of Directive 2009/65/EC (Undertakings for Collective Investments in Transferable Securities, 'UCITS').

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;

The Authority would like to therefore clarify that all licensed collective investment undertakings, not falling under the definition of the UCITS directive, will fall under the definition of financial counterparties as per Article 2(8) of EMIR. Accordingly, AIFs falling within scope of the AIFMD and Professional Investor Funds ('PIFs') licenced by the MFSA, will be considered as financial counterparties.

Contacts

Should you have any queries on the above, please do not hesitate to contact Mr Nathan Fenech, Senior Manager, Securities and Markets Supervision (Nathan.Fenech@mfsa.mt) or Mr Luca Caruana, Analyst, Securities and Markets Supervision (Luca.Caruana@mfsa.mt) for any further clarifications.