

23 November 2021

Circular on Updates to the Q&As on Regulation (EU) N° 648/2012 - the European Market Infrastructure Regulation ('EMIR' or the 'Regulation')

Introduction

This Circular is being addressed to all market participants, particularly entities who enter into derivative contracts and which fall within the scope of EMIR, namely, financial counterparties ('FCs') and non-financial counterparties ('NFCs') as defined under EMIR.

This Circular should be read in conjunction with the Regulation, its Delegated Regulations and previous Circulars issued by the Authority, as the case may be.

Overview

The Authority would like to inform market participants that the European Securities and Markets Authority ('ESMA') has updated the EMIR [Q&A Document](#). These changes relate mainly to an amendment in the hedging definition, an amendment in the calculation of positions for the clearing thresholds and the reporting of a change in LEI.

The purpose of the Q&A is to promote common supervisory approaches and practices in the application of EMIR. It provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of the Regulation. This document aims to ensure that the supervisory activities of the competent authorities under the Regulation are converging along the lines of the responses adopted by ESMA. It should also help investors and other market participants by providing clarity on reporting requirements.

Updates to the Q&A document¹

OTC Question 10

Article 10(3) of Regulation (EU) 648/2012 - Hedging definition

¹ In this section, sentences in **bold** reflect the amendments carried out to the Q&A Document

In order to determine whether they exceed the clearing thresholds, non-financial shall include all OTC derivative contracts “which are not objectively measurable as reducing risks directly relating to that commercial activity or treasury financing activity” of itself or of its group.

(d) Can non-financial counterparties (NFCs) whose core activity is to buy, sell or own financial instruments, benefit from the hedging exemption when using OTC derivative contracts to hedge certain risks, for example risks arising from the potential indirect impact on the value of assets the NFC buys, sells or owns resulting from the fluctuations of interest rates, inflation rates, foreign exchange rates or credit risk?

OTC Answer 10

(d) *Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation

Yes. The hedging exemption set out in Article 10(3) EMIR applies to all non-financial counterparties, irrespective of what their core activity is. The list of financial counterparties in Article 2(8) EMIR is a closed list. It does not allow for the treatment of non-financial counterparties as financial counterparties for certain EMIR provisions, such as Article 10(3). That provision itself does not distinguish which non-financial counterparty is allowed to use the hedging exemption depending on that counterparty's specific activity

OTC Question 3

Articles 4a and 10 of EMIR, as amended by Regulation 2019/834 – Calculation of positions for the clearing thresholds

(h) When a financial counterparty calculates its positions for the purpose of the clearing threshold determination in accordance with Article 4a(3) of EMIR, should it include in the calculation the OTC derivative contracts that are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity entered into by the non-financial counterparties that are part of the same group?

OTC Answer 3

(h) *Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation

Yes. Article 4a(3), unlike Article 10(3) EMIR, does not provide for a hedging exemption. The hedging exemption in Article 10(3) EMIR is meant to avoid impediments for non-financial counterparties to appropriately mitigate their commercial risks, but it is not meant to be applied when it comes to determining whether a financial counterparty should

be subject to the obligation to clear centrally. Article 10(3) EMIR only refers to "non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs," and not to financial entities within that group. Non-financial counterparties belonging to a group are not affected by the way the financial counterparties belonging to the same group calculate the threshold.

TR Question 40

- (a) How are TRs expected to treat situations where the counterparty identified in a derivative, reported to them a change in LEI due to a merger, acquisition or other corporate restructuring event or where the identifier of the counterparty has to be updated from BIC (or other code) to LEI because the entity has obtained the LEI? How are counterparties expected to notify the change to their relevant TR?

TR Answer 40

(a) (3) ~~Each of the counterparties to the derivatives, where any of the merged entities is identified, is informed of the modification by the TR to which they report.~~ TR(s) should inform the relevant reporting counterparties, report submitting entities, entities responsible for reporting (to the extent that they are participants to the TR) as well as third parties which have been granted access to information under Article 78(7) of Regulation (EU) No 648/2012, as applicable, involved in the derivatives contracts concerned by the LEI change.

Contacts

Should you have any queries on the above, please do not hesitate to contact the Authority's EMIR team on EMIR@mfsa.mt for any further clarifications.