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EMIR Refit (EMIR REVIEW)

Updated in February 2023

EMIR, which is the European translation of the G20 leaders' commitment made during the 2009 Pittsburgh Summit to enhance transparency on the derivatives market and mitigate the current risk generated by those transactions, has entered into force in August 2012. In accordance with Article 85 of EMIR, the European Commission was requested to review and prepare a general report on EMIR for submission to the European Parliament and the Council. Based on several assessments covering different topics (impact of EMIR on the use of OTC derivatives, efficiency of the margin requirements, application of the clearing obligation, access of CCPs to trading venues, access of CCPs to central bank liquidity facility, ...), the purpose of such review was to determine if the framework stemming from EMIR has proven to allow achieving the objectives of the regulation and if some adjustments was to be made.

In parallel the European Commission has established in 2012 the Regulatory Fitness and Performance programme (known as REFIT) aiming to make EU law simpler and to reduce the costs and burden of a regulation while still achieving intended benefits.

The review of EMIR has been undertaken under the REFIT programme.

Since at the time of the analysis not all the EMIR key measures were in place and some came recently into operation (e.g. the mandatory clearing, the bilateral exchange of margins for non-cleared contracts), the review has not been exhaustive. Thus, the Commission stated that no fundamental change should be made but proposed amendments in specific areas coming under the overall REFIT programme.

To be reminded, EMIR is built on three main pillars:

- 1. RISK MITIGATION** for OTC derivatives contracts:
 - The clearing obligation for all products considered sufficiently standardised.
 - For uncleared transactions, the rules have been strengthened to mitigate the counterparty risk (by setting an obligation of bilateral exchange of initial margin and variation margin) and the operational risk.
- 2. TRANSPARENCY** by setting an obligation of reporting to a Derivatives Trade Repository.
- 3. INFRASTRUCTURE**
 - More stringent requirements for clearing houses.
 - Establishment of a European legal framework for Trade Repositories.

1. Overview

a. Key aspects of the Regulation

- **Clearing obligation**

Under EMIR a contract is to be cleared if the product is subject to the mandatory clearing and if both parties to the contract are equally subject to the same obligation. With regards to parties, those concerned are financial counterparties (FCs) and a sub-set of non-financial counterparties (NFCs) - the ones qualified NFC+. Still under EMIR a NFC becomes a NFC+ when it holds positions above at least one of the 5 thresholds that each applies to a specific assets class. EMIR Refit makes two proposals in relation to parties.

RISK MITIGATION

FC TO BECOME FC+ OR FC-

The European Commission (EC) took into consideration the burden EMIR imposed to small financial counterparties due to the mandatory clearing and the difficulties they faced when trying to build a clearing set-up (be a client of a clearing member or a client of a client of a clearing member).

Thus, EMIR Refit introduces a distinction within FCs between FC+ and FC-. A FC+ will be fully submitted to the clearing (irrespective of the asset classes), whereas a FC- will never be. Practically the FC- category should correspond the EMIR Category 3 for which the start of the clearing requirement was postponed until 21/06/2019. However, the calculation still needs to be done. Even more since the rules to be used are not the same as in EMIR. Indeed, the period to be considered is the previous 12 months whereas it was the months of January, February and March 2016 in EMIR. In addition, the calculation is per asset class, using the same thresholds as the ones decided for the NFC+/NFC- classification in EMIR, instead of a single threshold. Finally, it should be kept in mind that a financial counterparty that does not make the exercise will be qualified FC+.

NFC+

Whereas in EMIR a NFC+ was submitted to the clearing obligation for all the products subject to mandatory clearing even if the NFC exceeds only one threshold (and even for a class of assets not concerned by the clearing, e.g. commodities), the clearing requirement in EMIR Refit will only apply to the assets class(es) for which the threshold has been exceeded. The position to be compared to the thresholds will be determined in the same way as for FCs (i.e. the Aggregate Average Notional Amount). Important to note, a NFC that doesn't determine its qualification will be considered as a NFC+ exceeding all the thresholds.

IN BRIEF:

FC

NFC

May calculate, every 12 months, its aggregate month-end average position for the previous 12 months

In calculating the positions referred to in paragraph 1, the financial counterparty shall include all OTC derivative contracts entered into by that financial counterparty or entered into by other entities within the group to which that financial counterparty belongs.

Except for UCITS and AIFs where the calculation is to be done at the level of the fund. In the case the management company manages several UCITS/AIF it shall be able to demonstrate to the relevant competent authority that the calculation of positions at the fund level does not lead to: (i) a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; and (ii) a circumvention of the clearing obligation.

The calculation is made per asset classes like for NFCs

In calculating the positions referred to in paragraph 1, the NFC shall include all the OTC derivative contracts entered into by the NFC or by other NFCs within the group to which the NFC belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the NFC or of that group.

The calculation is made per asset classes

For NFC+, the clearing obligation is limited to the class(es) for which the threshold has been exceeded

Per default a NFC is a NFC+, moreover it becomes submitted to the mandatory clearing for all classes of assets

FC+

FC-

NFC+

NFC-

- **Access to clearing (FRANDT)**

RISK MITIGATION

The EC wants to ease the access to clearing for counterparties that have no direct access to CCPs either by promoting the indirect clearing or by limiting the cases where a clearing member may not onboard a new client. Therefore, EMIR Refit requires clearing members and clients providing clearing services to do it under Fair, Reasonable And Non-Discriminatory and Transparent (FRANDT) commercial terms. This requirement applies to OTC derivatives contracts. The level 2 (delegated act 2021/1456) has brought clarity and precision on those terms.

Published on the 8th of September 2021 and entered into force the day after, the text confirms the scope of application (the provision of clearing services in the Union when they relate to OTC derivative contracts subject to the clearing obligation). Therefore, this does not include equity cash clearing, listed derivatives or contracts that are voluntarily cleared. The fact that the obligation applies when the service is provided in the Union answers the question of territoriality.

- **FX Forwards**

RISK MITIGATION

According to EMIR, there should be exchange of variation margins for physically-settled FX Forwards as of the entry into application of MIFID2/MIFIR on the 3rd of January 2018. But the variation margin exchange obligation validated internationally was translated in different ways from one region to another. Whereas the European Union enshrined it in the law, the USA instead opted for guidelines enacted by regulators (same approach applied in Asia). The European authorities have been alerted by the industry of what constituted an unlevel playing field situation, but too late for the EC to amend accordingly its EMIR Refit proposal. Eventually this topic is mentioned only in a recital but covers both FX forwards and FW swaps and leaves room for a potential extension to other types of contracts (in particular equities options) by stating that “*International convergence should also be ensured with regard to risk-management procedures for other classes of derivatives*”.

The point has been finally addressed in the delegated regulation 2021/236. The Variation margins requirement for FX forwards and FX swaps physically settled now applies only for contracts between two institutions (investment firm or a credit institution). Otherwise, counterparties may decide to not exchange VM but this needs to be in the contractual provision.

- **Reporting to a Trade Repository**

TRANSPARENCY

EMIR Refit proposes several measures to lighten the reporting:

- For transactions between a FC and a NFC- the FC will be responsible and legally liable for reporting on behalf of the two parties; thus it remains a double side reporting with NFC- responsible to provide the FC with the data needed (LEI and classification)
- Intragroup transactions involving at least one NFC will be exempted but only if the parent company is a not a financial counterparty
- Reporting for listed derivatives, required both by EMIR and MIFIR, will have to be assessed by 18 months after the entry into force

In addition, EMIR Refit required ESMA to work on specifications with regards to the reporting format (use of international identifiers, frequency of the reporting, ...).

- **Pension Scheme Arrangements (PSA)**

RISK MITIGATION

Under EMIR, Pension Scheme Arrangements benefited from a 3 years exemption from the clearing obligation since there was no technical solution developed by CCPs for the transfer of non-cash collateral as variation margins. The same assessment has been done in the light of EMIR's review. Thus, EMIR Refit included a new extension of the temporary exemption.

It should be noted that the first period has ended in August 2018 (3 years after the entry into force of EMIR) while the second one started only at the entry into force of EMIR Refit leaving the industry with a several months intermediary period during which the obligation should apply. Therefore, ESMA published a letter where it officially announced that it did not expect regulators to focus their oversight primarily on pension scheme arrangements considering that the exemption would be renewed as part of EMIR Refit.

Under EMIR Refit, ESMA must provide the European Commission (EC) with an annual report on both the existence of viable technical solutions and the use of derivatives by pension schemes, the consequences of a clearing obligation, ... The regulator's findings are used by the EC to rule on a possible extension of the exemption.

- **Scope of financial counterparties**

EMIR Refit changes slightly the definition of a Financial Counterparty. Now IORPs and CSDs are also in the scope. On the contrary Securitisation Special Purposes Entities (SSPEs) and Employee Share Purchase Plans (ESPP) are not qualified FC as well as UCITS when “set up exclusively for the purpose of serving one or more employee share purchase plans” and AIF when “set up exclusively for the purpose of serving one or more employee share purchase plans”, or AIF when being a “SSPE as referred to in Article 2(3)(g) of Directive 2011/61/EU”.

RISK MITIGATION

b. Others aspects

- **Asset Protection**

EMIR Refit brings clarity on the future of assets covering the positions held in a CCP in case of an insolvency of the CCP or of one of its members. EMIR Refit states clearly that those assets shall not be considered part of the insolvency estate.

INFRASTRUCTURE

- **Suspension of the clearing obligation**

There might be circumstances (other than a CCP’s resolution, which will be dealt via the Recovery & Resolution European regulation) where a clearing obligation should be removed or at least suspended. If it is already feasible, the current framework doesn’t allow a swift change. Indeed, the suspension had to follow the same process as the launch of the obligation and thus take several months, far away from one can expect in such emergency cases. EMIR Refit eases the process and thus shortens the delay.

RISK MITIGATION

- **Frontloading**

Frontloading is related to the clearing obligation. It requires entities to clear contracts entered or novated before the start of the clearing obligation if the remaining maturity was higher than the minimum remaining maturity (MRM). It should be noted that the original requirement has already been modified to limit its impact. EMIR Refit puts an end to this topic by removing any mention to a MRM.

RISK MITIGATION

- **Operational risk mitigation techniques for uncleared contracts**

The EC considered that this requirement has been applied differently across the EU and thus, asks ESMA to work on a procedure for a “a priori supervisory approval of the risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral, and of significant changes to the risk-management procedures”.

RISK MITIGATION

- **Backloading**

Backloading is related to the reporting obligation. It requires entities to report historic contracts (i.e. those open when EMIR entered into force but closed before the start of the reporting obligation). Initially set for 12 February 2017 (3 years after the implementation date of the reporting obligation), the deadline under EMIR for reporting these contracts was shifted to 12 February 2019. EMIR Refit removes this obligation.

TRANSPARENCY

- **CCPs**

EMIR Refit requires CCPs to provide their members with details on the initial margins Model they use and with tools to simulate the initial margins a clearing member will have to post.

TRANSPARENCY

- **Trade Repositories (TR)**

Several measures with regards to TR are included in the EMIR Refit proposal and cover a wide range of areas (from the registration process for an extension to an increase of the fines a TR may be imposed on, via the improvement of the quality of data as well as the availability of the latter)

INFRASTRUCTURE

c. Progress update and way forward:

- **EMIR Refit and MIFIR**

On the current misalignment between the trading obligation (MIFIR) and the clearing obligation (EMIR Refit), ESMA's view was to have an alignment between the two requirements; in other words a Financial Counterparty not submitted to the clearing obligation under EMIR (namely a FC-) will not be submitted to the trading obligation under MIFIR. Same for Non-financial Counterparties. ESMA was also seeking opinion on the trading obligation suspension. EMIR Refit provides for a swift suspension (in some very specific cases) of the clearing obligation. Thus came the question of a similar trading suspension. ESMA is envisaging a standalone suspension of the trading obligation. In its final report issued on the 7th of February 2020, ESMA has confirmed its initial proposals (alignment of MIFIR on EMIR and a stand-alone suspension mechanism for the Derivative Trading Obligation).

- **Non-cleared contracts**

The delegated regulation 2021/236 has amended the delegated regulation 2016/2251. Accordingly, the temporary exemption of **initial and variable margins** for **individual equity options and index options** is now valid until 04/01/2024, 3 years longer than in the 2019 version.

Following a requirement issued from EMIR Refit, EBA has consulted on the methodology for the validation of the initial margins models (IMMV). EMIR (648/2012) imposes, for contracts that are not subject to the clearing obligation by a CCP, the exchange of variation margins (VM) and initial margins (IM). The latter may be calculated using models meeting the requirements detailed in Delegated Regulation 2016/2251. EMIR Refit (2019/834) introduced the principle of competent authority validation of risk management procedures and mandated EBA to draft technical standards. It is in this context that EBA published its Consultation Paper. In its document, EBA proposed:

- To take into account the diversity of the actors concerned, the implementation of two procedures: a so-called standard that would apply to counterparties with a strong activity and a simplified one for the others
- For models already in use, a three-step increase in this mandatory validation: the first would concern the standard procedure while the other two would concern the counterparties eligible for the simplified procedure by distinguishing them according to their current status

Based on the consultation, EBA has submitted to the European Commission its draft standard (on the 4th of May 2022), which will result in a level 2 text.

- **Intragroup transactions involving a third country entity where no equivalence has been recognised between the European Union and the third country**

Due to the delegated regulation 2021/236 amending the delegated regulation 2016/2251, the temporary exemption of **initial and variable margins** for intra-group was extended until the 30/06/2022 (instead of 21/12/2020 in the 2019 version). On the 10/06/2022, the ESAs published a final report suggesting to amend the bilateral margin requirements for those intragroup contracts. The 3 bodies proposed to the EC a 3 more years extension of the temporary exemption but also to review the framework for intragroup exemptions in the context of the future revision of EMIR. Since the adoption of the delegated regulation (2022/7326), the new date is now officially the 30/06/2025.

The same extension has been granted for the **clearing** obligation. First the delegated regulation 2021/237 has introduced the 30/06/2022 date by amending the 3 delegated regulations relating to the clearing requirements (2015/2205 and 2016/1178 for interest rate derivatives and 2016/592 for credit default derivatives). The delegated act 2022/7175 has postponed the end of the exemption until the 30/06/2025.

- **Brexit**

The delegated regulations 2021/236 (non cleared contracts) and 2021/237 (cleared contracts) have addressed the question of transferring into the Union contracts originally concluded between a party of the Union of 27 and one in the UK. The text contains a legislative mechanism that allows new contracts (the relocated ones) to benefit from the same exemptions as the original contracts under EMIR (for example, the exemption of bilateral exchanges of initial margin).

- **Cleared contracts**

(Delegated regulation 2021/237) Following the withdrawal of the frontloading obligation (due to EMIR Refit), the references to the Minimum remaining maturity (MRM) are no longer useful and have therefore been removed from the three delegated texts.

ESMA is requested by EMIR Refit to periodically review the clearing thresholds and update them where necessary. Accordingly ESMA has issued a discussion paper which also contains analysis based on the data received. The paper covers both FC and NFC+.

The EC has followed ESMA's conclusions. The threshold for commodities is now 4 billions (2022/2310).

EC has eased the criteria for highly liquid collateral accepted by CCPs.

NEW!

- **Cleared contracts and Benchmark regulation**

The European Commission (EC) has adopted an amendment to the Delegated Regulation identifying interest rate derivatives subject to the EMIR clearing obligation (text 2015/2205 amended by 2017/751 and 2021/237). This development is due to the reform of the benchmarks (BMR 2016/1011) resulting in the abandonment of EONIA and LIBORs (GBP, USD and JPY) in favour of indices such as €STR, SONIA, SOFR or TONIA.

The EC therefore follows the recommendations made by ESMA in its final report published on the 18th of November 2021:

- Cessation of the clearing obligation for IRS relating to benchmarks destined to disappear;
- Introduction of the clearing obligation for certain new IRS. In order to do this, ESMA relied on the criteria established by EMIR (degree of normalization, volume and liquidity and the existence of information on price formation);
- The date of January 3, 2022 for the amendment of the clearing obligation (with the exception of SOFR), while recognizing that the legislative process may not allow for the coming into force of the new regulations in early January 2022.

Are therefore removed from the list of IRS subject to the clearing obligation, those referring to EONIA, LIBOR GBP, LIBOR JPY and LIBOR USD (for the latter, ESMA's position has changed in view of the acceleration of the transition to the new indices; see its Consultation Paper) and the SONIA (7D-3Y).

Added: €STR (7D-3Y), SOFR (7D-3Y) and SONIA (7D-50Y); the arrival of the SOFR goes hand in hand with the cessation of the bond on the USD LIBOR. As regards the TONA (Japanese index), the ESMA had concluded that the level of liquidity was not reached and therefore the clearing obligation could not apply at the moment.

The corresponding delegated act (2022/750) has been published in the EU OJ on the 17th of May 2022.

Following a consultation led during the summer 2022, ESMA has issued on the 1st of February 2023 its final report on the scope of derivatives that should become under the EMIR clearing obligation (CO) and the MIFIR trading obligation (DTO). As regards the clearing, ESMA proposed the below amendments (focused on Overnight Index Swaps – OIS):

NEW!

Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionalit y	Notional Type
OIS	FedFunds	USD	7D-3Y	Single currency	No	Constant or Variable
OIS	€STR	EUR	7D-3Y	Single currency	No	Constant or Variable
OIS	SONIA	GBP	7D-50Y	Single currency	No	Constant or Variable
OIS	SOFR	USD	7D-3Y	Single currency	No	Constant or Variable
OIS	SOFR	USD	7D-50Y	Single currency	No	Constant or Variable
OIS	TONA	JPY	7D-30Y	Single currency	No	Constant or Variable

Important: at this stage it is a proposal; now it has to be adopted by the EC and non objected by the EP or the Council. Thus it will not enter into force in the short term.

- **Pension Scheme Arrangements (PSA)**

While ESMA has so far been in favour of maintaining the temporary exemption, the European regulator, in its letter of 25 January 2022, opens the door to the implementation of the clearing obligation. The analysis conducted by the latter shows that there are technical solutions and that pension schemes are operationally ready. However, the introduction of a compensation obligation takes time to deploy. As a result, ESMA also suggests that the exemption be extended until June 19, 2023, this additional year to be used for compliance.

On the 9 June 2022, the EC has adopted a delegated act following ESMA's proposal. Having in mind that the text will unlikely enter into force before the 18th of June 2022 (last day of the current exemption), ESMA has also written, on the 16th June, to the national competent authorities (NCAs) requesting them to not prioritise their supervisory actions on this specific requirement. The related delegated act (2022/1671) has entered into force on the 1st of October 2022.

- **Reporting to Trade Repositories**

Following its consultation (March 2020) ESMA has published its final report on the 17th December 2020 on reporting requirements, procedures to reconcile and validate the data and access by the relevant authorities under EMIR REFIT. ESMA proposed a revision of certain aspects of reporting to the TRs in order to align the requirements in the EU with the global guidance on harmonisation of OTC derivatives data elements reported to TRs, as developed by the CPMI and IOSCO working group for the harmonisation of key OTC derivatives data elements (Harmonisation Group).

In June 2022, the EC has adopted several delegated acts stemming from the ESMA's final report:

- 3 relating to Trade Repositories as regards their application for registration or extension and the procedure for accessing details of derivatives as well as the technical and operational arrangements
- 1 specifying the procedures for the reconciliation of data between TRs and the procedures to be applied by the TR to verify the compliance by the reporting counterparty with the reporting requirements and to verify the completeness and correctness of the data reported.
- 2 on the reporting itself: minimum details of the data to be reported to TRs and the type of reports to be used, standards, formats, frequency and methods and arrangements for reporting

 NEW!

After the non objection period, the 6 texts have been published in the EU OJ on the 7th October 2022. They will entered into application depending on their topic. Articles related the new content of the reporting to Trade Repositories will apply on the 24 April 2024. The main delegated act on that are the 2022/1855 and 2022/1860.

- **Others**

On the 13th November 2020, ESMA issued its final report on post trade risk reduction (PTRR) services with regards to the clearing obligation and a potential clearing exemption. In April 2021, the EC published a report based on the ESMA's one. The Commission considers that, generally, certain OTC derivatives should only be exempted from the clearing obligation where the risks of granting an exemption are smaller than the risks of keeping the position as it is currently. However, the Commission believes that important open questions remain. Further quantitative assessment / analysis are needed for the Commission to make a more informed decision on any legislative change. Issues listed include considering how different types of PTRR could be defined more concretely, and the materiality of the risk of circumventing the clearing obligation. The EC considers that this topic could be part of the general EMIR assessment report that should be submitted to the Parliament and the Council by 18 June 2024.

- **Next step**

 NEW!

The review process continues with the publication by the EC on the 7th of december 2022 of a proposal. This draft is part of a set of measures to further develop the EU's Capital Markets Union (CMU). As regards clearing, it aims making EU clearing services more attractive and resilient (in particular in the aftermath of the Brexit).

Please also see our dedicated Fiches on EMIR and on EMIR 2.2

2. Reference text(s)

- [European Parliament - Presentation](#)
- [European Parliament - Procedure File](#)
- [European Commission proposal](#)
- [Final text \(2019/834\)](#)

- [2021/236 - non cleared contracts amending 2016/2251](#)
- [2021/237 - clearing amending 2015/2205 2016/592 and 2016/1178](#)
- [Alignment of MiFIR with the changes introduced by EMIR Refit](#)
- [Technical advices on FRANDT](#)
- [ESMA final report on PSA](#)
- [ESMA final report on PTRR](#)
- [ESMA final report on reporting to Trade Repositories](#)
- [ESMA DP on clearing thresholds](#)
- [EBA CP on IMMV](#)
- [ESMA letter on PSAs \(25/01/2022\)](#)
- [Impact of the Benchmark Regulation](#)
- [Delegated act related to the benchmark regulation \(2022/750\)](#)
- [2022 EC Review proposal](#)
- [ESMA guidelines for new reporting under EMIR \(as of 2024\)](#)

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