

PUBLIC STATEMENT

Implementation of the new EMIR Refit regime for the clearing obligation for financial and non-financial counterparties

This statement is addressed to all financial and non-financial counterparties subject to Regulation (EU) No 648/2012 (EMIR). It provides guidance on when they need to determine whether they are subject to the clearing obligation under the new regime introduced by Refit¹, and equally when they need to notify ESMA and their relevant competent authority that they are indeed subject to the clearing obligation, i.e. on the day the Refit text enters into force.

The European Commission published the Refit proposal on 4 May 2017. Following a series of negotiations on the Refit text proposal, the Romanian presidency of the Council and the European Parliament reached a preliminary agreement on 5 February², and the Refit text as confirmed then by the Committee of Permanent Representatives in the European Union (COREPER) was published on 6 March³ (the published Refit text). Following these agreements and publication, and taking into account the standard process that legislative proposals follow until adoption, it is thus reasonable to expect that the final Refit text could be adopted and published in the Official Journal as early as May 2019 and thus could enter into force (depending on which date the final Refit text is published in the Official Journal) as early as end of May 2019, i.e. 20 days after its publication.

The published Refit text includes a new regime to determine when financial⁴ and non-financial counterparties⁵ are subject to the clearing obligation, depending on whether their positions exceed or not the clearing thresholds⁶. The clearing thresholds to be used to determine

¹ Proposal to amend Regulation (EU) No 648/2012 (EMIR).

² Link to the announcement: https://www.consilium.europa.eu/en/press/press-releases/2019/02/05/capital-markets-union-deal-on-updated-rules-for-financial-derivative-products-and-clearing/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Capital+markets+union%3a+deal+on+updated+rules+for+financial+derivative+products+and+clearing

³ Link to the text of EMIR Refit as confirmed by COREPER on 6 March 2019: https://www.consilium.europa.eu/register/en/content/out?typ=SET&i=ADV&RESULTSET=1&DOC_TITLE=&CONTENTS=&DOC_ID=6913%2F19&DOS_INTERINST=&DOC_SUBJECT=&DOC_SUBTYPE=&DOC_DATE=&document_date_from_date=&document_date_from_date_submit=&document_date_to_date=&document_date_to_date_submit=&MEET_DATE=&meeting_date_from_date=&meeting_date_from_date_submit=&meeting_date_to_date=&meeting_date_to_date_submit=&DOC_LANCD=EN&ROWSPP=25&NRROWS=500&ORDERBY=DOC_DATE%20DESC

⁴ It is also important to note that under the current EMIR phase-in implementation, financial counterparties in Category 3 are required to start clearing on 21 June 2019. ESMA published a statement on this aspect which is accessible at the following link: <https://www.esma.europa.eu/press-news/esma-news/esma-issues-statement-address-upcoming-emir-refit-implementation-issues>

⁵ ESMA published a statement on this aspect which is accessible at the following link: <https://www.esma.europa.eu/press-news/esma-news/esma-issues-clarifications-clearing-and-trading-obligations-ahead-21-december>

⁶ The clearing thresholds are defined under Article 11 of Commission Delegated Regulation (EU) No 149/2013:

- EUR 1 billion for credit derivative contracts

whether, according to their aggregate month-end average position for the previous 12 months, financial and non-financial counterparties are subject to the clearing obligation are defined by asset class and set in Commission Delegated Regulation (EU) No 149/2013.

Financial and non-financial counterparties can choose whether or not to conduct the calculation. When they choose not to, or where the result of that calculation exceeds the clearing thresholds, then these financial or non-financial counterparties are required to immediately notify ESMA and the relevant competent authority, and they will also become subject to the clearing obligation for the OTC derivative contracts entered into, or novated, from four months following that notification.

However, there are differences between the two regimes with respect to the scope of application of the clearing obligation and with respect to the calculation of the positions. With regards to the scope, when non-financial counterparties conduct the calculation, they are only subject to the clearing obligation for the OTC derivative contracts pertaining to those asset classes in respect of which the result of the calculation exceeds the clearing thresholds. With regards to the calculation, one important difference is that non-financial counterparties only need to include the OTC derivative contracts which are not objectively measurable as reducing risks, whereas financial counterparties need to include all OTC derivative contracts they enter into or novate, in accordance with Article 4a(3) and Article 10(3) respectively.

The published Refit text does not include a delayed implementation of this new regime, i.e. this new regime applies as soon as the Refit text enters into force. As a result, financial and non-financial counterparties taking positions in OTC derivative contracts and choosing to calculate their aggregate month-end average position for the previous 12 months would need to determine the results of that calculation on the day the Refit text enters into force. Those financial and non-financial counterparties are thus expected to collect all the necessary data and information for the calculation in the meantime, in order to be ready for the calculation when the Refit text enters into force, as early as end of May 2019. From that point on, financial and non-financial counterparties taking positions in OTC derivative contracts and choosing to calculate their aggregate month-end average position are required to conduct that calculation every 12 months.

This also means that all financial and non-financial counterparties taking positions in OTC derivative contracts and that do not calculate their aggregate month-end average position for the previous 12 months, or where the result of that calculation exceeds any of the clearing thresholds, whether previously subject to the clearing obligation or not, are required to immediately notify ESMA and their relevant competent authority on the day the Refit text enters into force.

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- EUR 1 billion for equity derivative contracts
 - EUR 3 billion for interest rate derivative contracts
 - EUR 3 billion for foreign exchange derivative contracts
 - EUR 3 billion for commodity derivative contracts and others