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# Final EMIR REFIT Regulation

By: Michael Beaton

## Final EMIR REFIT Regulation

On 14 May 2019, the Council of the EU published a [press release](#) announcing that it had adopted at first reading the proposed [Regulation](#) to amend EMIR (the EMIR Refit).

Fundamentally, the EU considered that no major overhaul of EMIR was necessary.<sup>1</sup> Nonetheless, a number of amendments were implemented via the REFIT process, as set out below.

### “Financial Counterparty” (“FC”) and “Non-Financial Counterparty” (“NFC”) Definitions

The EU concluded that the definition of “Financial Counterparty” needed to be amended.<sup>2</sup> UCITS or AIFs set up exclusively for the purposes of employee share purchase plans are now exempted from the definition (as they are not considered to pose any kind of systemic risk).<sup>3</sup> More specifically, the definition of “Financial Counterparty” has changed in the following way:<sup>4</sup>

Entity within definition of “Financial Counterparty”?	‘Original’ EMIR	EMIR REFIT
Investment firm	Yes	Yes
Credit institution	Yes	Yes
Insurance undertaking	Yes	Yes
Assurance undertaking	Yes	No
Reinsurance undertaking	Yes	Yes
UCITS and Manco	Yes	Yes
Employee share purchase UCITS	Yes	No

Institution for occupational retirement provision	Yes	Yes
AIFMD Authorised AIF + AIFMD Authorised AIFM	Yes	Yes
AIFMD Authorised AIF + Non-AIFMD Authorised AIFM	No	Yes
Non-AIFMD Authorised AIF + AIFMD Authorised AIFM	Yes	Yes
Non-AIFMD Authorised AIF + Non-AIFMD Authorised AIFM	No	No
EU Employee share purchase AIF or AIFM	Yes	No
EU Securitisation SPV AIF	Yes	No
Central Securities Depository	No	Yes

Under the EMIR REFIT amendments, “Financial Counterparties” and “Non-Financial Counterparties” are effectively split between those that DO calculate their month-end average positions (“MEAP”) in OTC derivatives positions against the clearing threshold at least annually and those that DO NOT.

“Financial Counterparties” which DO calculate month-end positions are referred to as “Small Financial Counterparties”. Whilst they must continue to exchange collateral, they only become subject to the clearing obligation if they exceed the clearing threshold. However, if a Small Financial Counterparty exceeds ANY ONE OR MORE classes of OTC derivative (as calculated on a consolidated basis) it becomes subject to the clearing obligation with respect to ALL classes of OTC derivative.<sup>5</sup> In contrast, Non-financial Counterparties which calculate month-end positions are only subject to the clearing obligation with respect to clearing thresholds that are ACTUALLY breached – they are not automatically subject to the clearing obligation with respect to all classes of OTC derivative. However, they must still exchange collateral if ANY clearing threshold is exceeded. The position is summarised in more detail in the table below:

Questions	FC		NFC	
	Calc	No Calc	Calc	No Calc
Automatically subject to clearing obligation?	No	Yes	No	Yes
Subject to clearing obligation if MEAP exceeds ANY clearing threshold?	Yes	N/A	Yes	N/A
Subject to clearing only if MEAP exceeds ALL clearing thresholds?	No	N/A	No	N/A
MEAP calculations performed on a consolidated basis?	Yes <sup>6</sup>	N/A	Yes <sup>7</sup>	N/A

Requirement to notify ESMA if not calculating?	N/A	Yes	N/A	Yes <sup>8</sup>
Requirement to notify ESMA if clearing threshold(s) exceeded?	Yes <sup>9</sup>	N/A	Yes <sup>10</sup>	N/A
Establish clearing arrangements within 4 months?	Yes <sup>11</sup>	Yes <sup>12</sup>	Yes <sup>13</sup>	Yes <sup>14</sup>
Clear with respect to ALL classes of OTC Derivative?	Yes	Yes	No	Yes
Clear only with respect to classes of OTC Derivative for which clearing threshold exceeded?	No	No	Yes <sup>15</sup>	No
Subject to clearing obligation unless can demonstrate 12-month MEAP below the clearing thresholds?	Yes	Yes	Yes	Yes
Fund MEAP calculated on a 'stand-alone' basis?	Yes	Yes	N/A	N/A
Required to collateralise non-cleared OTC Derivatives?	Yes	Yes	Yes*	Yes

\*Only if any of the clearing threshold are exceeded.

## Reporting

A number of changes have been made to EMIR reporting arrangements, as set out below.

### Backloading

'Backloading' is the requirement under EMIR to report historical trades executed between 16 August 2012 (the date on which EMIR came into force) and 12 February 2014 (the day the EMIR reporting obligation took effect) by 12 February 2019. In its impact assessment, the Commission considered the backloading requirement as 'virtually impossible to fulfil' and of little use. As such, under the EMIR REFIT, it will be removed.<sup>16</sup>

### Intra-group transactions

Intragroup transactions involving an NFC do not need to be reported, provided that:<sup>17</sup>

1. both parties are fully part of the same group;
2. both parties are subject to "appropriate centralised risk evaluation, measurement and control procedures"; and
3. the parent undertaking is NOT an FC.<sup>18</sup>

Any entity wishing to use the intra-group exemption must notify its regulator.<sup>19</sup>

### Single-sided reporting

Under the EMIR REFIT amendments, with respect to transactions entered into between FCs and NFCs:

1. the FC is “solely responsible, and legally liable, for reporting” on behalf of its counterparty;
2. the NFC must provide the FC with all information which the FC “cannot reasonably be expected to possess” in order that it can report the transaction; and
3. the NFC can choose to report but, if it does, it will assume liability for the content and accuracy of that report.<sup>20</sup>

### UCITS and AIFs

UCITS management companies must report on behalf of their UCITS<sup>21</sup>. AIFMs must report on behalf of their AIFs.<sup>22</sup> The entity that is responsible for managing an “Institution for Occupational Retirement Provision” (an “IORP”) which does not have its own legal personality becomes responsible for reporting on behalf of the IORP.<sup>23</sup>

### Third Country Entity Reporting

There is no obligation to report a transaction between an NFC and a third country entity (“TCE”) if the TCE:<sup>24</sup>

1. would qualify as an FC if it were established in the EU;
2. is subject to a reporting regime which is regarded as equivalent to that in the EU; and
3. has reported the trade to a TR which is subject to a legally binding and enforceable obligation to grant EU regulators “direct and immediate” access to the data.<sup>25</sup>

### Delegated Reporting

Delegation of trade reporting remains possible.

## Clearing

The changes which have been implemented to the EMIR clearing regime are set out below:

### Clearing Services

Clearing services must be offered on “fair, reasonable, non-discriminatory and transparent commercial terms” (“FRANDT”). However, providers of clearing services are not obliged to contract with other market participants and can continue to determine their own risk appetite<sup>26</sup> The EU Commission will determine what “FRANDT” means.<sup>27</sup>

### Clearing Obligation

There have been some modifications to the set of transactions that will be subject to the clearing obligation. Broadly, these are due to the separation between FCs and NFCs which calculate MEAP, and those which do not. The changes are summarised in the table below:

Transacting Entities Subject to the Clearing Obligation	
‘Original’ EMIR	EMIR REFIT
FC to FC	FC** to FC**
	FC*** to FC***

FC to NFC+	FC** to NFC+
	<del>FC*** to NFC+</del>
NFC+ to NFC+	NFC+ to NFC+
FC to TCE	FC** to TCE
	<del>FC*** to TCE</del>
NFC+ to TCE	NFC+ to TCE
TCE* to TCE*	TCE* to TCE*

\* If the trade has a “direct, substantial and foreseeable” effect within the EU or is necessary to prevent evasion of EMIR

\*\* Party NOT calculating month-end positions OR calculating month-end positions and exceeding the clearing threshold

\*\*\* Party calculating month-end positions but NOT exceeding the clearing threshold

### Suspension of the Clearing Obligation

In “exceptional circumstances”<sup>28</sup>, ESMA can request that the EU Commission<sup>29</sup> suspend the clearing obligation<sup>30</sup> with respect to both a class of OTC derivative and/or a type of counterparty<sup>31</sup>. There is also reference to the clearing obligation being “abolished” in the recitals to the EMIR REFIT regulation, but this is not picked up elsewhere in the main body of the regulation.<sup>32</sup> More specifically, the clearing obligation can be suspended if:

1. the criteria under which a class of OTC derivative became subject to clearing is no longer met, for example, if:
  - a. It were unsuitable for mandatory clearing,<sup>33</sup> or
  - b. There was a material change to the clearing criteria; or
2. a CCP ceases to offer clearing services for a class of OTC derivative and no alternative exists; or
3. it is necessary in order to avoid “serious threat to financial stability” within the EU or the orderly functioning of EU financial markets.<sup>34</sup>

ESMA can also request that the suspension of the EMIR clearing obligation be accompanied by a suspension of the MIFIR trading obligation.<sup>35</sup> The initial suspension is valid for 3 months and can be extended by a further three 3-month periods.

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## Pension Schemes

A further 2-year exemption from the clearing obligation is to be granted to pension schemes. It will commence on the date on which the EMIR REFIT regulation comes into force.<sup>36</sup> The EU Commission can grant a further two 1-year extensions if necessary.<sup>37</sup> The Commission will also set up an expert group to monitor the industry's efforts<sup>38</sup> to solve the 'pension problem' and will report annually as to whether viable technical solutions have been identified.<sup>39</sup>

ESMA will report annually (until the pension exemption expires) as to whether CCPs, clearing members and pension schemes have employed "appropriate" effort to solve the 'pension problem'.<sup>40</sup> The EU Commission expects them to use "best efforts" to do so.<sup>41</sup>

## Frontloading

'Frontloading' is the requirement to clear transactions with a minimum maturity which have been executed in the period between:

- (a) the point at which ESMA is notified that a CCP has been authorised to clear a certain class of derivative; and
- (b) the date from which the clearing obligation with respect to that class of derivative actually takes effect.

The EU regards this as creating "legal uncertainty and operational complications, while providing limited benefits". As such, the requirement has been removed.<sup>42</sup>

## Trade Repositories (TRs)

### Access to TR Data

Authorities in third countries can acquire direct access to EU trade repository data provided that:

1. TRs in the third country are duly authorised and effectively supervised;
2. guarantees of confidentiality exist which are equivalent to EU requirements; and
3. EU authorities have direct access to the third country TR data.<sup>43</sup>

More generally, TRs are to grant access to their data on reasonable commercial terms.<sup>44</sup> In particular, TRs should provide TR data to entities which are not obliged to report (or which have delegated their reporting obligation).<sup>45</sup>

Beyond the question of access to TR data:

1. the fines levied on TRs for breach of regulations will increase<sup>46</sup> by up to ten-fold;<sup>47</sup>
2. a simplified registration procedure is to be established for TRs that are already registered under the Securities Financing Transaction Regulation;<sup>48</sup>
3. further harmonisation of reporting standards across regulations is to be implemented;<sup>49</sup> and
4. TRs are to develop a 'switching' service.<sup>50</sup>

## Other Matters

### Initial Margin Models

Initial margin models must be validated by regulators.<sup>51</sup> CCPs must provide their clients with IM simulation tools and details of the way in which their initial margin models operate.<sup>52</sup>

### Physically Settled FX Forwards/Swaps

Variation margin with respect to physically settled FX forwards and physically settled FX swaps should only be exchanged by the “most systemic counterparties”.<sup>53</sup>

### Trade Compression

Within 18 months of the entry into force of the EMIR Refit, ESMA and the ESRB will assess whether trade compression trades are to be exempt from the clearing obligation.<sup>54</sup>

### Portability and Leapfrog Payments

Member State law (i.e. insolvency law) must not prevent porting of cleared trades or the making of ‘leapfrog payments’.<sup>55</sup>

## Entry into Force

The Regulation will enter into force 20 days after it is published in the Official Journal of the EU, except as specified otherwise in the table below.

Article	Description	Entry into Force
38(6)	CCP IM Simulation Tools	6 months after EMIR Refit takes effect
38(7)	Information on IM models	6 months after EMIR Refit takes effect
39(11)	Portability and ‘Leapfrog’ payments	6 months after EMIR Refit takes effect
9(1a) to 9(1d)	Single-sided reporting; UCITS, AIF and pension scheme reporting	12 months after EMIR Refit takes effect
4(3a)	FRANDT requirement	24 months after EMIR Refit takes effect
78(9)	TR procedures	24 months after EMIR Refit takes effect

### Notes:

<sup>1</sup> Recital 4

<sup>2</sup> Recital 5

<sup>3</sup> Recital 6

<sup>4</sup> Article 1(1) of EMIR Refit, amended Article 2(8) of EMIR

<sup>5</sup> Recital 7



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- <sup>6</sup> Article 4a(3)
  - <sup>7</sup> But see the slightly different calculating methodology in Article 10(3) of EMIR
  - <sup>8</sup> Article 10(1)
  - <sup>9</sup> Article 4a(1)
  - <sup>10</sup> Article 10(1)
  - <sup>11</sup> Article 4a(1)
  - <sup>12</sup> Article 4a(1)
  - <sup>13</sup> Article 10(1)
  - <sup>14</sup> Article 10(1)
  - <sup>15</sup> Recital 8
  - <sup>16</sup> Recital 15, Article 9(1)
  - <sup>17</sup> Recital 16; New Article 9(1)
  - <sup>18</sup> New Article 9(1)
  - <sup>19</sup> New Article 9(1)
  - <sup>20</sup> New Article 9(1a)
  - <sup>21</sup> Recital 19, New Article 9(1b)
  - <sup>22</sup> Recital 19, New Article 9(1c)
  - <sup>23</sup> New Article 9(1d)
  - <sup>24</sup> New Article 9(1f)
  - <sup>25</sup> New Article 9(1a)
  - <sup>26</sup> Recital 11; new Article 4(3a)
  - <sup>27</sup> New Article 4(3a)
  - <sup>28</sup> Recital 13
  - <sup>29</sup> Article 6a(2)
  - <sup>30</sup> Recital 33
  - <sup>31</sup> Article 6a(1)
  - <sup>32</sup> Recital 13
  - <sup>33</sup> Article 6a(8)
  - <sup>34</sup> Recital 13; Article 6a(1)
  - <sup>35</sup> Recital 14; Article 6a(1)
  - <sup>36</sup> Recital 31; Article 89(1)
  - <sup>37</sup> Recital 30; Article 85(2)
  - <sup>38</sup> Article 85(2)
  - <sup>39</sup> Article 85(2)
  - <sup>40</sup> Article 85(2)
  - <sup>41</sup> Article 85(2)
  - <sup>42</sup> Recital 10, Article 4(b)
  - <sup>43</sup> Recital 26; Article 76a
  - <sup>44</sup> Recital 28
  - <sup>45</sup> Article 80(5a)
  - <sup>46</sup> Recital 25
  - <sup>47</sup> Article 65(2)
  - <sup>48</sup> Recital 27; Article 56(1)
  - <sup>49</sup> Recital 28
  - <sup>50</sup> Recital 29
  - <sup>51</sup> Recital 20; Article 11(15)
  - <sup>52</sup> Recital 23; Article 38(6); Article 38(7)
  - <sup>53</sup> Recital 21
  - <sup>54</sup> Recital 22; Article 85(3)
  - <sup>55</sup> Recital 24; Article 39(11)

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