

PUBLIC STATEMENT

MiFIR implementation considerations regarding the trading obligation following the entry into force of EMIR Refit

The European Securities and Markets Authority (ESMA) is aware of the misalignment between the scope of counterparties subject to the EMIR clearing obligation (CO) and those subject to the derivatives trading obligation (DTO) under Regulation (EU) No 600/2014 ("MiFIR") since the entry into force of Regulation (EU) 2019/834 ("EMIR Refit") on 17 June 2019, and of the possible implementation challenges that this misalignment creates for counterparties exempted from the CO. In addition, EMIR Refit also modifies the application date of the clearing obligation for some counterparties; this statement clarifies the application date of the trading obligation for those counterparties.

Clearing and trading obligations for small financial counterparties and non-financial counterparties

EMIR Refit provides for an exemption from the clearing obligation for small financial counterparties (FC-). In addition, EMIR Refit also amends the mechanism to determine the obligations of non-financial counterparties above the clearing threshold (NFC+): NFC+ are now only subject to the clearing obligation in the asset class for which they exceed the clearing threshold.

Under MiFIR, the scope of counterparties subject to the DTO is defined with cross-references to the definition of financial and non-financial counterparties under EMIR. Since MiFIR was not amended by EMIR Refit, following the entry into force of EMIR Refit on 17 June 2019 there is a misalignment in the scope of counterparties: small financial counterparties (and potentially some non-financial counterparties) would be subject to the trading obligation while being exempted from the clearing obligation.

EMIR Refit envisages a report¹ that the Commission shall submit to the European Parliament and to the Council by 18 December 2020 (on the basis of an ESMA report) assessing the necessity and appropriateness of aligning the trading obligation for derivatives under MiFIR with changes made under EMIR Refit to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation.

¹ Article 1(24)(c) and (d) of EMIR Refit

Based on this report, the changes in the scope of counterparties subject to the CO may be replicated in MiFIR for the DTO. ESMA is currently collecting supporting evidence to better analyse the necessity of a perfect alignment of the scope of counterparties subject to the clearing and trading obligations.

Meanwhile, there remains a timing gap during which counterparties exempted from the EMIR clearing obligation, are subject to the MiFIR derivatives trading obligation, before they may be exempted if amendments to MiFIR are made.

From a legal perspective, neither ESMA nor competent authorities possess any formal power to dis-apply a directly applicable EU legal text or even delay the start of some of its obligations. Therefore, any change to the application of the EU rules would need to be implemented through EU legislation.

ESMA nonetheless acknowledges the potential implementation issue that small financial counterparties and non-financial counterparties, not subject to the clearing obligation, may face with regards to the trading obligation, pending the conclusions of the Commission's report on the need for an alignment in the scope of counterparties subject to both obligations.

In this respect, ESMA expects competent authorities not to prioritise their supervisory actions in relation to the MiFIR DTO towards counterparties who are not subject to the EMIR CO, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner.

Date of application of the trading obligation for financial counterparties which are in Category 3 and subject to the CO

As per EMIR Refit, financial counterparties in Category 3 that are above the clearing thresholds on the day Refit enters into force, or that choose not to conduct the calculation, will need to clear contracts entered into or novated more than four months following their notification to ESMA and the relevant NCAs². For those counterparties, the date of application of the CO initially defined in the respective Delegation Regulations³ is therefore no longer relevant⁴.

The dates of application of the DTO in Delegated Regulation (EU) 2017/2417 are set using cross references to the Delegated Regulations on the CO, which should now be read in conjunction with EMIR Refit as described above.

² This notification is referred to in Article 4a(1)(a) of EMIR (as amended by Refit). The timing of when to notify ESMA and the relevant NCAs was addressed in a statement published on March 2019, while further clarifications on this process or when the clearing obligation starts to apply for counterparties in Category 3 are provided in the Q&As on the implementation of EMIR. Both documents are available on ESMA's website:

<https://www.esma.europa.eu/document/public-statement-refit-implementation-co-regime-fcs-and-nfcs>

https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf

³ Delegated Regulation (EU) 2015/2205 for interest rate derivatives and of Delegated Regulation (EU) 2016/592 for credit derivatives

⁴ See OTC Question 25 of the ESMA Q&A on EMIR

As a result, for financial counterparties in Category 3 which are subject to the CO, the date of application of the DTO should be the same as the new date of application of the CO as amended by EMIR Refit. This date of application should hence be four months following the above-mentioned notification, rather than 21 June 2019.

This interpretation is consistent with Recital 5 of the Delegated Regulation on the DTO which explains that "*Given the link between the clearing obligation and the trading obligation, the trading obligation for each category of counterparty should only take effect once the clearing obligation for that category has already taken effect.*"