

PUBLIC STATEMENT

EMIR implementation considerations regarding the clearing and trading obligations for small financial counterparties and the backloading requirement with respect to the reporting obligation

The European Securities and Markets Authority (ESMA) is aware of challenges that certain small financial counterparties would face to prepare for the 21 June 2019 deadline to start CCP clearing and trading on trading venues some of their OTC derivative contracts, as well as challenges that reporting counterparties would face regarding the backloading requirement by 12 February 2019.

Clearing and trading obligations for small financial counterparties

Under Regulation (EU) No 648/2012 (EMIR), the clearing obligation start date for counterparties in Category 3 — financial counterparties that are below €8 billion in aggregate month-end average of outstanding gross notional amount of non-cleared derivatives at group level that meet certain criteria — is on 21 June 2019, for the interest rate and credit derivative classes subject to the clearing obligation.

The European Commission's proposal to amend EMIR, published on 4 May 2017 (Refit), creates a new category of financial counterparties whose derivative positions are below the clearing thresholds¹ and that will be exempted from the clearing obligation, the so-called small financial counterparties. The two positions adopted respectively by the European Parliament and the Council on the Refit proposal, also support the creation of a small financial counterparties category and to exempt this new category of counterparties from the clearing obligation.

Given that the Refit negotiations have not been finalised, it is yet not known when the resulting text is expected to start applying, potentially after the phase-in for Category 3 counterparties expires. There could therefore be a timing gap during which small financial counterparties, whose derivative positions are below the clearing thresholds, would need to have clearing arrangements in place and start clearing their derivative contracts, before they are once again no longer required to do so once Refit comes into force.

¹ The clearing thresholds have been defined by asset class and set under Article 11 of Commission Delegated Regulation (EU) No 149/2013.

Furthermore, MiFIR exempts financial counterparties, temporarily exempted under EMIR from the clearing obligation, from the trading obligation for derivatives. With the expiration of the current Category 3 clearing obligation phase-in under EMIR, the relevant counterparties would hence also be subject to the trading obligation under MiFIR for those OTC derivative contracts.

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 difficulties that certain small financial counterparties whose derivative positions are below the clearing thresholds would face to prepare for the 21 June 2019 deadline to start clearing with CCPs, and trading on trading venues some of their OTC derivative contracts, in the eventuality that the amendments introduced in Refit are not applicable by then. In this respect, ESMA expects competent authorities not to prioritise their supervisory actions towards financial counterparties whose positions are expected to be below the clearing thresholds when Refit enters into force, 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.

Backloading requirement for reporting entities

ESMA and national competent authorities have been made aware of material operational challenges for reporting entities in complying with the requirements for reporting of derivatives that were outstanding on or after 16 August 2012 and terminated before the EMIR reporting start date, 12 February 2014. The process is commonly referred to as backloading.

ESMA noted in the 2015 EMIR Review Report No. 4² that taking into account the amendment of the technical standards on reporting, ESMA is concerned about the particularly high number of reconciliation failures concerning the derivatives subject to backloading and, therefore, the limited usefulness of such data. Therefore, ESMA recommended that the backloading requirement should be waived.

To meet regulatory needs and to reduce the substantial and costly adjustments that reporting entities need to make to comply with the backloading requirement, the Refit proposals remove the backloading requirement from Article 9 of EMIR.

The Commission, following the endorsement of ESMA's draft implementing technical standards, previously extended the deadline for the completion of backloading from 12 February 2017 to 12 February 2019 as part of the Commission Implementing Regulation (EU)

² EMIR Review Report no.4 13 August 2015 ESMA/2015/1254
https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-1254_-_emir_review_report_no.4_on_other_issues.pdf

2017/105³. The extension was in line with ESMA's previous recommendation and it was expected that Refit would have come into force by the extended date. However, at this stage it is unclear whether these amendments would enter into force before 12 February 2019.

As explained above in this statement, 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 some of its obligations.

Nevertheless, in light of the above-mentioned difficulties, market concerns and legislative developments, ESMA expects competent authorities to apply their risk-based supervisory powers in their day-to-day enforcement of EMIR in a proportionate manner. This may include not prioritising counterparties' reporting of backloaded transactions in their day-to-day supervision and enforcement of EMIR.

³ Commission Implementing Regulation (EU) 2017/105 of 19 October 2016 amending Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories