

C L I F F O R D
C H A N C E



EMIR REFIT
AN OVERVIEW

APRIL 2019



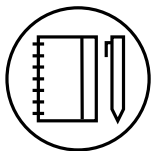
INTRODUCTION

The EU co-legislators have agreed targeted amendments to EMIR addressing issues identified in the Commission's initial review of EMIR. The EMIR Refit amendments aim to simplify and take a more proportionate approach to certain existing requirements, particularly for smaller firms. However, EMIR Refit will also require in-scope entities to revisit decisions on categorization and may also require changes in the information that they obtain from counterparties and the documents that they have in place with those counterparties.

In parallel, the co-legislators have also agreed amendments to the provisions in EMIR relating to CCP supervision, including the recognition regime for third country CCPs.

KEY CHANGES

EMIR Refit makes a broad range of amendments to existing EMIR requirements, including in relation to counterparty classification, clearing, margin and reporting requirements. At the time of writing, the final text of EMIR Refit has not yet been published in the Official Journal. Therefore, our summary of the key changes under EMIR Refit is based on the agreed text that was formally approved by the European Parliament in April 2019.



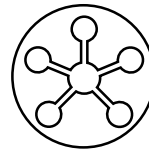
ENTITY SCOPE

Definition of “financial counterparty”

EMIR Refit amends the definition of financial counterparty (FC) as it relates to alternative investment funds (AIFs) and their managers. An AIF will be an FC either if it is managed by an AIFM authorised or registered under AIFMD (which is the position today) or if it is established in the EU regardless of the location or status of its manager.

This will have an impact on the categorization of EU AIFs as well as non-EU funds which will need to determine whether or not they would have been an FC if they had been established in the EU. EU firms dealing with EU and non-EU funds may also need to review their counterparty classification checks to confirm that they are correctly categorizing these entities.

Securitisation special purpose entities (SSPEs) are specifically excluded from the definition of FC (in line with AIFMD, which excludes SSPEs from its scope). There are also exclusions for central securities depositories and funds that serve share purchase plans.



CLEARING OBLIGATION

Changes to the clearing mandate

EMIR Refit creates a new category of “small FC”, based on similar clearing thresholds to the existing NFC clearing thresholds. An FC will only be subject to the clearing obligation where it exceeds the clearing threshold in any asset class (and if it exceeds the threshold in one asset class it will be subject to the clearing obligation in all asset classes).

An FC that is subject to the clearing obligation on the date of entry into force of the EMIR Refit will need to continue clearing until it can demonstrate to its competent authority that its aggregate month-end position does not exceed the clearing threshold.

The clearing mandate for NFCs is also amended so that an NFC will only be subject to the clearing obligation in asset classes for which it exceeds the clearing threshold (although an NFC which exceeds the clearing threshold in any asset class should still be subject to the margin obligations in all asset classes).

As a result, firms may need to obtain further information from both FC and NFC counterparties to establish whether they are or remain subject to the clearing obligation (and, in relation to NFCs, for which asset classes).

The changes to the clearing mandates apply from the date on which EMIR Refit enters into force. This may pose practical challenges for FCs and NFCs, as ESMA has indicated these entities would need to calculate their aggregate month-end average position on the day EMIR Refit enters into force, based on data from the previous 12 months.



Removal of the frontloading obligation for clearing

EMIR Refit removes the frontloading obligation for clearing, so a contract is required to be cleared where it is entered into or novated on or after the date from which the clearing obligation takes effect. Firms will no longer be required to clear contracts they entered into after a CCP was notified as clearing the contracts but before the clearing obligation takes effect for those contracts.

Provision of clearing services on fair, reasonable, non-discriminatory and transparent terms (FRANDT)

Clearing members and clients that provide clearing services are required to provide those services on fair, reasonable, non-discriminatory and transparent terms. The Commission will adopt a delegated act specifying further what is meant by fair, reasonable, non-discriminatory and transparent, including requirements regarding transparency of fees and contract terms. There were concerns that this was intended to require clearing members and clients to provide clearing services to all clients on the same terms, but the text now makes it clear that there is no obligation for a clearing member or client to provide clearing services to all clients on the same basis.

Power for ESMA and the Commission to suspend the clearing and derivatives trading obligations

ESMA will have the power to request the Commission to temporarily suspend the clearing obligation for specific classes of OTC derivative or for specific counterparty types. If the Commission decides to suspend the clearing obligation, it may also suspend the mandatory trading obligation under MiFIR.



REPORTING OBLIGATION

FCs to report on behalf of NFC-counterparties

FCs will be solely responsible and legally liable for reporting on behalf of both counterparties where they enter into a contract with an NFC-. The NFC will be responsible for providing accurate data to the FC to enable it to report. This is likely to have an impact on any delegated reporting arrangements FCs have in place with NFC counterparties, as well as on arrangements with NFC counterparties where there is no delegated reporting arrangement currently in place.

Technical standards

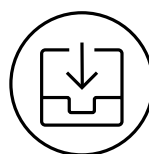
ESMA will prepare further implementing technical standards (ITS) on the data and format for the information to be reported. ESMA is required to submit these draft ITS to the Commission by 12 months after entry into force of EMIR Refit.

Reporting intragroup transactions with NFCs

Intragroup transactions where at least one counterparty is an NFC will be exempt from the reporting obligation (counterparties will have to notify their competent authority that they intend to rely on the exemption).

Removal of backloading

The backloading obligation (for reporting of transactions entered into prior to 12 February 2014) is removed.



OTHER AMENDMENTS

Amendments to Article 39 EMIR

Article 39 EMIR will be amended to provide that “*Member States’ national insolvency laws shall not prevent a CCP from acting in accordance with Article 48(5) to (7) with regard to the assets and positions recorded in accounts referred to in paragraphs 2 to 5 of this Article*”.

Article 39(7) currently requires clearing members to make public disclosure of the levels of protection and the costs associated with the different levels of segregation that they provide. It may therefore be necessary to update these disclosures to reflect the revised Article 39.

Margin requirements

Regulators will need to implement new supervisory procedures to ensure initial and ongoing validation of firms’ risk management procedures for the exchange of collateral under Article 11(3) EMIR.

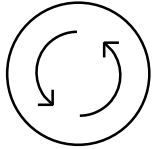
CCPs will also need to provide clearing members with an initial margin simulation tool and with information on the initial margin models employed by the CCP.

Trade repository data reconciliation and access

Trade repositories will need to establish policies and procedures for reconciliation and transfer of data between trade repositories. The Commission will also have powers to allow third country supervisory authorities direct access to trade repository data.

Exemption from clearing for Pension Scheme Arrangements (PSAs)

EMIR Refit extends the exemption for PSAs from the clearing obligation for a further two years after entry into force (and retrospectively addresses the gap between the expiry of the exemption under EMIR and entry into force of Refit), which may be extended twice by a further period of 1 year each time.



TIMING

EMIR Refit has not yet been published in the Official Journal. Therefore, timing remains uncertain. However, ESMA has indicated that EMIR Refit could enter into force as early as the end of May 2019, pointing towards publication in the Official Journal any time from early May. The EMIR Refit amendments have staggered application dates, as summarised below.

Amendments	Application date
PSA exemption	Retroactive application from 17 August 2018
Amended FC definition	In force date
Changes to clearing mandates for FCs and NFCs	In force date
Removal of the frontloading obligation for clearing	In force date
Powers to suspend the derivatives clearing and trading obligations	In force date
Exemption from reporting for intragroup transactions where one counterparty is an NFC	In force date
Reporting backloading requirement removed	In force date
CCP margin transparency requirements	6 months after in force date
Article 39 amendments	6 months after in force date
FCs responsible for reporting on behalf of NFC-counterparties	12 months after in force date
FRANDT requirements	24 months after in force date
Trade repository data reconciliation requirements and access provisions	24 months after in force date

EMIR 2.2 and changes to CCP supervision

Alongside the EMIR Refit amendments, the EU co-legislators have also agreed amendments to the provisions of EMIR relating to CCP supervision (these amendments are referred to as EMIR 2.2). The amendments aim to strengthen the supervision of CCPs in order to take into account the growing size, complexity and cross-border dimension of clearing in Europe. EMIR 2.2 will establish a CCP supervisory committee within ESMA, which will bring together supervisory authorities from relevant Member States as well as central banks responsible for the EU currencies cleared by CCPs.

In particular, EMIR 2.2 will change the existing system for recognition of non-EU CCPs, distinguishing between non-systemically important CCPs which will continue to be subject to the current regime, and systemically important CCPs ("Tier 2" CCPs) which will be subject to stricter rules (including compliance with prudential requirements and additional requirements imposed by relevant EU central banks). A non-EU CCP may also be required to establish a presence in the EU if ESMA and the Commission decide (as a measure of last resort) that the CCP is so systemically important that it cannot be appropriately supervised under the recognition regime.



CONTACTS



CAROLINE DAWSON
Senior Associate
London

T +44 20 7006 4355
E caroline.dawson
@cliffordchance.com



LAURA DOUGLAS
Senior Associate
London

T +44 20 7006 1113
E laura.douglas
@cliffordchance.com



WILLIAM WINTERTON
Partner
London

T +44 20 7006 4386
E will.winterton
@cliffordchance.com



PAGET DARE BRYAN
Partner
London

T +44 20 7006 2461
E paget.darebryan
@cliffordchance.com



JEREMY WALTER
Partner
London

T +44 20 7006 8892
E jeremy.walter
@cliffordchance.com



MARC BENZLER
Partner
Frankfurt

T +49 69 7199 3304
E marc.benzler
@cliffordchance.com



FRÉDÉRIK LACROIX
Partner
Paris

T +33 1 4405 5241
E frederick.lacroix
@cliffordchance.com



STEVE JACOBY
Partner
Luxembourg

T +352 48 50 50 219
E steve.jacoby
@cliffordchance.com



MARIA LUISA ALONSO
Counsel
Madrid

T +34 91 590 7541
E marialuisa.alonso
@cliffordchance.com



SARAH LEWIS
Associate
Amsterdam

T +31 20 711 9630
E sarah.lewis
@cliffordchance.com



ANNA BIAŁA
Counsel
Warsaw

T +48 22429 9692
E anna.biala
@cliffordchance.com



LOUNIA CZUPPER
Partner
Brussels

T +32 2 533 5987
E lounia.czupper
@cliffordchance.com



LUCIO BONAVITACOLA
Partner
Milan

T +39 02 8063 4238
E lucio.bonavitacola
@cliffordchance.com



LENG-FONG LAI
Co-Managing Partner
Tokyo

T +81 3 6632 6625
E leng-fong.lai
@cliffordchance.com



KIMI LIU
Senior Associate
Beijing

T +86 10 6535 2263
E kimi.liu
@cliffordchance.com



FRANCIS EDWARDS
Partner
Hong Kong

T +852 2826 3453
E francis.edwards
@cliffordchance.com



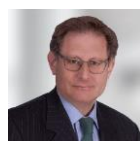
PAUL LANDLESS
Partner
Singapore

T +65 6410 2235
E paul.landless
@cliffordchance.com



LENA NG
Partner
Singapore

T +65 6410 2215
E lena.ng
@cliffordchance.com



DAVID FELSENTHAL
Partner
New York

T +1 212 878 3452
E david.felsenthal
@cliffordchance.com



GARETH OLD
Partner
New York

T +1 212 878 8539
E gareth.old
@cliffordchance.com

CLIFFORD CHANCE

OUR INTERNATIONAL NETWORK 32 OFFICES IN 21 COUNTRIES



Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2019

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.