COMMUNICATION REGARDING EMIR REFIT AND THE RELEVANT ESMA Q&As

The CSSF informs market participants of the following amendments and clarifications related to Regulation (EU) No 648/2012 (hereafter “EMIR”).

On 28 May 2019, Regulation (EU) 2019/834 (hereafter “EMIR REFIT”) was published in the Official Journal of the EU. The regulation amends EMIR and will enter into force 20 days following its publication, on 17 June 2019.

In addition, on 28 May 2019, the European Securities and Markets Authority (ESMA) also published the EMIR REFIT Questions and Answers (Q&As) to clarify, in particular, the clearing obligation for financial counterparties (FC) and non-financial counterparties (NFC) and the procedure for notification when a counterparty either exceeds or ceases to exceed the clearing thresholds or chooses not to calculate its positions against the clearing threshold.

1. Clearing notification requirements for market participants

Upon the entry into force of EMIR REFIT, FC and NFC can choose whether they calculate their aggregate month-end average position for the previous 12 months (clearing threshold) or not.

As a reminder, the clearing thresholds are defined in Article 11 of Commission Delegated Regulation (EU) No 149/2013 and are as follows:

   a) EUR 1 billion in gross notional value for Over the Counter (OTC)\(^1\) credit derivative contracts;
   b) EUR 1 billion in gross notional value for OTC equity derivative contracts;
   c) EUR 3 billion in gross notional value for OTC interest rate derivative contracts;
   d) EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts;
   e) EUR 3 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for under points (a) to (d).

Depending on whether market participants choose to calculate their clearing threshold or not, notifications have to be submitted to the CSSF (as well as to ESMA) as follows:

   a) calculation of the clearing threshold (on a group level basis):

      - FC clearing obligation notification: a new notification from an FC which relates to FC exceeding or ceasing to exceed the relevant clearing thresholds in accordance with Article 4a of EMIR shall be made to the CSSF. When FC choose to calculate their aggregate month-end average position for the previous 12 months and the calculation determines that they exceed any of the clearing thresholds, the requirement to clear OTC derivative products enters into force for all asset classes as foreseen under Article 4a(1) of EMIR. With regard to the calculation, FC need to include all OTC derivative contracts they enter into or novate, in accordance with Article 4a(3) of EMIR.

\(^1\) In accordance with Article 2(7) of EMIR, “OTC derivative’ or ‘OTC derivative contract’ means a derivative contract the execution of which does not take place on a regulated market within the meaning of Article 4(1)(14) of Directive 2004/39/EC or on a third-country market considered to be equivalent to a regulated market in accordance with Article 2a [of EMIR].
- **NFC clearing obligation notification**: an (amended) notification from an NFC which relates to NFC exceeding or ceasing to exceed the relevant clearing thresholds in accordance with Article 10 of EMIR shall be submitted to the CSSF. When NFC choose to calculate their aggregate month-end average position for the previous 12 months and the calculation determines that they reach the clearing thresholds in any of the asset classes, the requirement to clear OTC derivative products enters into force for this asset class only. With regard to the calculation, NFC only need to include the OTC derivative contracts which are not objectively measurable as reducing risks, in accordance with Article 10(3) of EMIR.

b) **no calculation of the clearing threshold**

- **FC clearing obligation notification**: a new notification from FC choosing not to calculate their positions against the clearing thresholds (Article 4a of EMIR) shall be submitted to the CSSF.

- **NFC clearing obligation notification**: a new notification from NFC choosing not to calculate their positions against the clearing thresholds (Article 10 of EMIR) shall be submitted to the CSSF.

When counterparties choose not to calculate their aggregate month-end average position for the previous 12 months, the requirement to clear OTC derivative products enters into force for all asset classes.

**Frequency of notification requirements**

With regard to point a), the calculation has to be performed on a yearly basis and the CSSF shall be informed upon entry into force of EMIR REFIT and in case of changes regarding the clearing obligation status of the group. In case the calculation determines that the clearing threshold is no longer reached, such notification shall be made to the CSSF at any time and shall include relevant proof.

With regard to point b), where no calculation is performed, the notification shall be made only once upon entry into force of EMIR REFIT and in case of changes to the group, i.e. new counterparties are established in Luxembourg.

Similar notifications have to be submitted to ESMA in accordance with the EMIR REFIT Q&As OTC Question 2.

**2. Reporting obligations**

The new Article 9(1) of EMIR determines that historic transactions (outstanding on or after 16 August 2012 and terminated/matured before 11 February 2014) do no longer have to be reported.

In addition, a new notification which relates to a request for a reporting exemption for certain intragroup derivative contracts with an NFC (Article 9(1) of EMIR) shall be made to the CSSF. In order to facilitate this notification, the CSSF is developing a new standalone form available for entities established in Luxembourg. This new standalone form will be published in due course.

In accordance with the new Article 9(1a) of EMIR, FC shall be solely responsible, and legally liable, for reporting, on behalf of both counterparties, the details of OTC derivative contracts concluded with an NFC that does not meet the conditions referred to in the second subparagraph of Article 10(1) of EMIR, as well as for ensuring the correctness of the reported details.

In order to assist market participants to prepare their notifications ahead of the entry into force of EMIR REFIT, the CSSF has published draft versions of the forms setting out the information which market participants will need to submit to the CSSF.


Luxembourg, 14 June 2019