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EMIR: Frequently Asked Questions

Regulation No 648/2012 (EMIR) of 4th of July 2012 lays down clearing and reporting requirements for over-the-counter (OTC) derivative contracts and uniform requirements for the performance of activities of central counterparties and trade repositories.

The publication of EMIR in the Official Journal of the EU on 27 July 2012, L201/1 has triggered some questions, essentially on (1) the timing of implementation, (2) the scope the requirements and (3) the position of third country CCPs and trade repositories. These FAQs are designed to provide clarity on these three topics from the perspective of the Commission services, although only the Court of Justice of the EU can give an authoritative interpretation of Union legislation.

This web page will be updated as needed. If you wish to submit further questions, please use the functional mailbox: 'Markt-G2@ec.europa.eu'. We will publish answers to any questions related to the regulatory and implementing technical standards only after the adoption of these standards by the Commission.

I. TIMING

1. When do the obligations under EMIR take effect?

EMIR was adopted on 4 July and entered into force on 16 August 2012. As with any other EU Regulation, its provisions are directly applicable (i.e. legally binding in all Member States without transposition into national law) as from the day of entry into force. However, the obligations under the provisions of EMIR that need to be specified further via regulatory and/or implementing technical standards will take effect once the necessary technical standards take effect.

2. When will the technical standards enter into force?

The technical standards were submitted by the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) at the end of September 2012. The Commission should endorse them by 30 December 2012 unless it decides to amend or reject them. However, the technical standards will not become effective immediately. After adoption of the standards by the Commission, the European Parliament and Council have a period of 3 months to exercise their right of scrutiny (this period may be extended by 3 months at the initiative of the European Parliament or the Council). This period will be reduced to 1 month from the date of notification if the Commission adopts the technical standards as submitted by ESMA or EBA without amendment (with a possibility to extend this period by 1 month at the initiative of the European Parliament or the Council). The standards will be published in the *Official Journal of the European Union* immediately after the receipt of 'non-objection' from the

European Parliament and Council and will then enter into force on the twentieth day following that of their publication (unless otherwise stated).

If the standards are adopted with no amendments, the majority of technical standards under EMIR would enter into force in the 1st quarter of 2013. However, this will not be the case for the technical standards related to margin and capital for non-centrally cleared trades (Article 11(3) and 11(4)), because further international coordination is necessary on this topic before EU rules can be developed. The technical standards specifying the contracts that have a direct, substantial and foreseeable effect within the Union are also still under review.

3. When will the clearing obligation take effect?

Before the clearing obligation procedure can begin, central counterparties (CCPs) must be authorised - or recognised in case of a CCP from a third country - to clear under the new EMIR regime (see question on authorisation/recognition). This step is necessary to ensure that the CCPs used to comply with the clearing obligation are safe and sound (see EMIR Article 5(1)).

Once a CCP has been authorised under EMIR to clear a certain class of OTC derivatives, ESMA will, within six months, determine whether the classes of OTC derivatives that the CCP is able to clear should be subject to the clearing obligation and, if so, will specify the date of entry into force of such obligation, including any phase-in (EMIR Article 5(2)).

However, in order to expedite the assessment of products for the clearing obligation, national authorities must notify ESMA of any existing clearing services for OTC derivatives in their jurisdictions within one month of entry into force of the technical standards defining the relevant details to be included in the notification, in accordance with EMIR (Article 89(5)). In this context, ESMA will be in a position to start its assessment of products within the first quarter of 2013 and the first clearing obligation could enter into force very soon after the first authorisations/recognitions of CCPs under EMIR.

4. When do CCPs need to apply for authorization or recognition under EMIR?

CCPs that are currently providing clearing services in the EU need to apply for authorisation or recognition under EMIR within six months after the entry into force of the relevant technical standards[1] (see EMIR Article 89(3)).

To ensure that CCPs already active in the EU can continue to provide services during this transitional period, they may continue to operate, subject to any applicable national regimes, until they have been authorised under EMIR (see Article 89(4)).

As a result, EU clearing members active on those CCPs may continue to use their services during the transitional period.

[1] Under Articles 16, 26, 29, 34, 41, 42, 44, 45, 47.

5. When do CCPs need to comply with the requirements defined under Title IV and V of EMIR?

CCPs remain subject to the rules of their national regime only until a decision has been made on their authorisation under EMIR. Therefore they must begin to comply with the requirements set up under Title IV and V and relevant technical standards as of the date that they are authorised under EMIR (Article 89(4)).

6. When do the obligations related to risk-mitigation techniques for OTC derivative contracts not cleared by a CCP enter into force?

EMIR (Article 11(3)) requires counterparties to have in place procedures for "the timely, accurate and appropriate segregated exchange of collateral" for non-centrally cleared "OTC derivative contracts that are entered into on or after 16 August 2012". This rule is applicable from the entry into force of the Regulation.

The precise level and exact type of collateral to be exchanged will be specified by further regulatory technical standards which will be by drafted jointly by the ESMA, EBA and EIOPA and adopted by the Commission next year (see question I.2).

Before those technical standards enter into force, counterparties have the freedom to apply their own rules on collateral in accordance with the conditions laid down in Article 11(3). As soon as the technical standards enter into force however, counterparties will have to change their rules to the extent necessary in order to comply with the standards. The technical standards will apply to relevant contracts concluded as of the date that they enter into force.

With respect to the operational risk mitigation techniques of timely confirmation, portfolio reconciliation, portfolio compression, contract valuation and dispute resolution the relevant dates of application are as indicated in the draft technical standards developed by ESMA.

7. When will the reporting obligation take effect?

The date by which derivative contracts are to be reported will be specified in the relevant technical standards mandated under Article 9(6)(b) of EMIR. Reporting obligations for credit and interest rate derivative contracts are expected to commence from 1 July 2013 at the earliest. The reporting of derivative contracts in all other asset classes is expected to commence from 1 January 2014 at the earliest.

8. Do derivative contracts terminated before the entry into force of the reporting obligation, but which were outstanding (or entered) on or after 16 August 2012, need to be reported under EMIR?

Yes. EMIR (Article 9(1)) applies the reporting obligation to derivative contracts which: (a) were entered into before 16 August 2012 and remain outstanding on that date; and (b) are entered into on or after 16 August 2012. The technical standard specifying the date of entry into force of the

reporting obligation also specify a phase-in period for contracts entered into before the reporting obligation begins, providing for a longer period for those trades to be reported.

9. When do trade repositories (TRs) need to be registered under EMIR?

A trade repository that is currently authorised or registered in its Member State of establishment to collect and maintain the records of derivatives, must apply for registration within six months of the date of entry into force of the relevant technical standards[2] (see EMIR Article 89(6)).

To ensure that TRs active in the EU may continue to provide services during the transitional period, they remain subject to existing national regimes until they have been registered with ESMA in accordance with EMIR (see Article 89(7)).

II. SCOPE

1. Are energy spot transactions within the scope of EMIR?

Energy spot transactions are not financial instruments under MiFID and are therefore not within the scope of EMIR. Energy derivatives are, however, covered by EMIR.

2. Are foreign-exchange derivatives in the scope of EMIR?

Yes; EMIR applies to all types of derivative contracts as defined in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC (MIFID).

The applicability of the clearing obligation to foreign exchange derivatives will be assessed by ESMA in accordance with the clearing obligation procedure, taking into account the specificities of the product in accordance with Article 5(4) of EMIR in combination with Recital 19.

For non-cleared foreign-exchange OTC derivative contracts, the appropriate margin requirements applicable to these contracts will be specified by the above-mentioned technical standards on margining requirements to be drafted next year (Article 11(15)).

Foreign exchange derivative contracts are further subject to the reporting obligation of EMIR Article 9.

3. With regard to the reporting obligation, who is legally accountable when the reporting of the details of the derivative contract is delegated to a third party?

If a counterparty (or a CCP) subject to the reporting obligation delegates the reporting of the details of the derivative contract to a third party in accordance with EMIR Article 9(1), it remains legally responsible for the reporting obligation.

[2] Under Articles 9, 56, 81.

The original counterparty (or CCP) is responsible for ensuring that the third-party to whom it has delegated the reporting of the derivative contract does so accurately.

4. May delegation of reporting be assigned to a third party or CCP, including non-EU based third parties or CCPs?

Yes. There are no specific rules on third parties reporting on behalf of counterparties, provided that the reporting rules under EMIR are complied with, and without prejudice to the counterparty's ultimate liability for meeting the reporting obligation.

5. Do counterparties and/or CCPs need to agree on the report's contents before submitting it to TRs?

Yes, and so do any other entities reporting on their behalf. EMIR Article 9(1) also provides that 'counterparties and CCPs shall ensure that the details of their derivative contracts are reported without duplication'.

6. Are the details of a contract the same as the contract terms?

No. Market participants must report all details regarding derivative contracts they have entered into to trade repositories, but this does not mean that they will have to send copies of each derivative contract including all terms (and conditions). The details should, however, encompass all elements related to the derivative trade that are relevant for regulatory purposes under EMIR, with particular emphasis on measurement and mitigation of systemic risk. The details to be reported will be specified in the regulatory technical standards to be adopted by the Commission on the basis of article 9(5).

7. How will affiliates or subsidiaries of entities listed under EMIR Article 81(3) access trade repository data to fulfil their respective responsibilities and mandates?

EMIR (Article 81(3)) provides a list of entities to which trade repositories shall make the necessary information available in order to enable them to fulfil their respective responsibilities and mandates.

The respective responsibilities and mandates of these entities may differ depending on the Member State in question. For that reason, the technical standard specifying the details of the information to be accessed (to be adopted by the Commission on the basis of article 81(3)) will follow a 'functional approach'. In some Member States, depending on the existing national regulatory/supervisory regime, certain functions may also be exercised by affiliates or subsidiaries of entities listed under EMIR Article 81(3). A trade repository shall make the necessary information available to the affiliates or subsidiaries of entities listed under EMIR Article 81(3) in order to enable them to fulfil their respective responsibilities and mandates, provided these entities access trade repositories data via their parent entity and in line with the functional approach defined in the technical standard.

8. When can counterparties start applying for the intragroup exemptions?

The intragroup exemptions are exemptions to the clearing obligation and margin requirements and therefore cannot be applicable before the date of application of the clearing obligation or risk mitigation techniques.

Counterparties may start applying for this exemption when the technical standards relevant to the intragroup exemptions enter into force. ESMA and the national authorities are still developing the most appropriate process for applications.

In accordance with the procedures set out in Article 11 (7) and (9), non-financial counterparties may benefit from the exemption from margin requirements as of the date of notification of their exemption to their competent authority. This exemption should remain valid unless the competent authority considers that the conditions to benefit from this exemption are not met, within a period of three months after the notification.

9. Are intragroup transactions excluded from the calculation of the clearing threshold?

No, EMIR only excludes OTC derivatives that are directly related to the commercial activity or treasury financing activity of non-financial counterparties from the calculation of the clearing threshold. Therefore, if non-financial counterparties conclude intragroup transactions that do not fall within the hedging definition, as specified in draft technical standards to be adopted by the Commission on the basis of article 10(4), those transactions would be counted for the purpose of the clearing threshold.

10. Are Special Purpose Vehicles (SPVs) covered as non-financials?

There is no common definition of SPVs. If SPVs do not fall under the definition of financial counterparty (see EMIR Article 2(8)), they are by default a non-financial counterparty.

11. Are pool structures subject to the clearing and risk mitigation obligations?

Indirectly yes, because the investment funds whose assets are pooled in a portfolio are subject to EMIR obligations. A pool structure has no legal personality of its own, but the legal counterparty to the OTC derivative contract will need to fulfil the relevant EMIR provisions arising from that.

12. Does EMIR allow CCPs to offer omnibus segregation only?

No. Article 39 (2) and (3) of EMIR provides that CCPs should offer individual client segregation and omnibus client segregation. CCPs authorized under EMIR must offer these two types of segregation as a minimum.

13. What are the requirements for financial counterparties and non-financial counterparties in respect of timely confirmations?

In accordance with EMIR Article 11(1), "*financial counterparties and non-financial counterparties that enter into an OTC derivative contract not cleared by a CCP, shall ensure, exercising due diligence, that appropriate procedures and arrangements are in place to measure, monitor and mitigate operational risk and counterparty credit risk*", including the "*timely confirmation, where available, by electronic means, of the terms of the relevant OTC derivative contract*".

The Regulatory Technical Standards on risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (adopted pursuant to Article 11(14) of EMIR), as adopted by the Commission on December 19 2012 (*Commission Delegated Regulation of 19.12.2012, supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP*) further specify the timelines for confirmation that those procedures and arrangements should be designed to achieve.

Article 12 of Chapter VIII of the aforementioned Delegated Regulation provides that firms should have procedures in place that will allow them to confirm trades within specific timelines that range from 1 to 7 days depending on the derivative class and the date when the trade was concluded.

The requirements set out in Article 12 of Chapter VIII of the Delegated Regulation should be read in conjunction with Article 11(1) of EMIR. They do not introduce hard deadlines to be complied with case-by-case. If a firm has appropriate procedures and arrangements in place, but nevertheless does not achieve the deadline for legitimate reasons, this should be reported to its competent authority. The competent authority should examine the procedures and arrangements of the firm in respect of its obligations under Article 11(1) of EMIR and determine whether the firm has made sufficient efforts to achieve the deadlines.

14. What does the concept of 'undertaking' in the definition of 'non-financial counterparty' cover?

For the purpose of the application of EMIR, "non-financial counterparty" means an undertaking established in the Union other than the entities referred to in points (1) and (8). However, the concept "undertaking" is not defined in EMIR.

According to EMIR legal regime, undertaking could mean an 'entity operating in one or more economic sectors'. It also appears from the references to 'commercial activities' and 'normal business activity' that the qualification of an entity as 'undertaking' for EMIR purposes would depend on the nature of the activities carried out but that entity rather than on the nature of the entity itself.

Moreover, the Court of Justice has also consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed[3]. Therefore, the qualification of a specific entity as an undertaking depends entirely on the nature of its activities. As regards the concept of "economic activity", the Court has considered that any activity consisting in offering goods and services on a market is an economic activity, regardless of the entity's legal status and the way in which it is financed. Non-profit entities are also considered "undertakings" if they offer goods and services in the market. Individuals carrying out an economic activity are also considered to be undertakings, provided they offer goods and services in the market.

However, the exercise of public authority or powers would not be considered as an economic activity. In this respect, where authorities emanating from the State act in their capacity as public authorities they would not be considered undertakings.

According to the above, the term "undertaking" would be addressed to activities instead of entities. Against this background, the term "undertaking" would include entities, regardless of their legal status, performing economic activities in the market.

As regards the requirement to be established in the Union for an undertaking to qualify as a "non-financial counterparty", the Court of Justice has interpreted the concept of "establishment" in accordance with Article 49(2) TFEU as *'the actual pursuit of an economic activity through a fixed establishment in (another) Member State for an indefinite period of time'*[4]. In this context, it is worth noting that the concept of undertaking is broader than that of 'companies or firms' and thus, not restricted to entities with legal personality or with for-profit-making (Article 54 TFEU).

15. Are municipalities subject to EMIR requirements?

EMIR applies to financial and non-financial counterparties and trading venues where so provided, unless they specifically fall outside the scope of application of EMIR on the basis of paragraphs 4 or 5 of Article 1 of EMIR.

"Municipalities" as such is not a concept used in EMIR. However, municipalities that could be considered as Union public bodies charged or intervening in the management of the public debt would fall outside the scope of application of EMIR on the basis of Article 1(4)(a) of EMIR. Moreover, municipalities which fulfil all the conditions of "public sector entities" within the meaning of Article 1(5)(b) of EMIR would only be subject to the reporting obligation pursuant to Article 9 of EMIR.

Municipalities which are not charged or do not intervene in the management of public debt, and which cannot be considered as "public sector entities" within the meaning of letter (b) of paragraph 5 of Article 1 of EMIR, are to be considered as "non-financial counterparties" provided they are undertakings in the

[3] Case C-41/90 *Höfner and Elser* [1991] ECR I-1979.
[4] Case C-221/89 Factortame.

sense that they carry out economic activities in the market. In that case, they would fall within the scope of application of EMIR.

III. THIRD COUNTRY CCP/TRADE REPOSITORY

1. When does a third country CCP have to apply for recognition under EMIR?

There are currently several third country CCPs providing clearing services in one or more Member State. In some Member States those CCPs may have to be formally recognised in order to do so, in others they may operate without any formal recognition. In either case the third country CCP that provides clearing services in a Member State in accordance with the national law of that Member State must apply for recognition under EMIR within six months after the entry into force of the relevant technical standards[5] (see EMIR Article 89(3)).

To ensure that CCPs active in the EU can continue to provide services during the transitional period, they will remain subject to existing national regimes until they have been recognized under EMIR (see Article 89(4)).

As a result, EU clearing members active on those CCPs may continue using their services if they continue to have the right to provide services under the applicable national law.

2. When does a third country TR have to apply for recognition under EMIR?

TRs that are currently providing services in the EU need to apply for recognition under EMIR within six months after the entry into force of the relevant technical standards[6] (see EMIR Article 89(6)).

To ensure that TRs active in the EU can continue to provide services during the transitional period, they remain subject to existing national regimes until they have been recognised under EMIR (see Article 89(7)).

3 Do third country's CCPs providing services outside of the EU need to be recognized under EMIR to provide services to EU branches located in that third country?

Article 25(1) provides that "*a CCP established in a third country may provide services to clearing members or trading venues established in the Union only where that CCP is recognized by ESMA*".

[5] Under Articles 16, 26, 29, 34, 41, 42, 44, 45, 47.

[6] Under Articles 9, 56, 81.

Third-country branches of EU clearing members are considered to be established in the EU. Therefore, the relevant third country CCPs need to be recognized under EMIR in order to provide services to those branches.

On the contrary, third country CCPs do not need to be recognized under EMIR to provide services to subsidiaries of EU firms incorporated in such third-country.

This recognition requirement applies to all types of CCPs. It covers CCPs providing clearing services for OTC derivatives, as well as CCPs providing clearing services for exchange traded derivatives and securities transactions.

IV. EU CCPs

Are non-EU clearing members of EU CCPs providing services to clients subject to the segregation requirements in Article 39?

Under Article 39(5), clearing members must offer their clients, at least, the choice between omnibus client segregation and individual client segregation and inform them of the costs and level of protection associated with each option. The references to clearing members in Article 39 are not limited to EU clearing members, so all clearing members of EU CCPs are required to comply. Similarly, the references to clients in Article 39 are not limited to EU clients. CCPs are expected to require all clearing members to comply with the relevant EMIR provisions through their rules.

In the case that a third country insolvency regime applicable to a clearing member could limit the protection afforded by omnibus client segregation or individual client segregation, in the manner set out in Articles 39 and 48, it is anticipated that the clearing member would offer its clients any available alternative possibilities that ensure that the protections afforded by omnibus client segregation and individual client segregation are not limited in a default scenario. Such limitations may include, for example, the pooling of client accounts in a bankruptcy estate, exposing clients to the losses of others. Alternative possibilities may include clearing solutions provided by an affiliate or other clearing member of the CCP.

When, notwithstanding the alternatives offered, the client chooses to use the third country clearing member and risks remain due to the third country insolvency regime, the clearing member must disclose those risks in full to the client at the outset of the relationship, in accordance with both Articles 39(5) and 39(7).

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