Background

The EU’s Regulation on OTC derivatives, central counterparties and trade repositories, also known as the European Market Infrastructure Regulation (EMIR), is part of a coordinated global regulatory effort to increase the stability of the financial system in general, and the over-the-counter (OTC) derivatives market in particular.

This initiative followed the onset of the financial crisis in 2008, when the near-collapse of Bear Sterns in March 2008, the default of Lehman Brothers on 15 September 2008 and the bail-out of AIG the following day together highlighted shortcomings in the functioning of the European OTC derivatives market.

Summary

EMIR formally entered into force on 16 August 2012 and introduced requirements aimed at (i) improving the transparency of OTC derivatives markets and (ii) reducing the risks associated with those markets.

It ensures European implementation of the Pittsburgh 2009 G20 commitments and requires that:

▪ OTC derivatives which meet certain requirements are subject to a clearing obligation
risk mitigation techniques must be applied in respect of all OTC derivatives that are not centrally cleared

all derivatives transactions must be reported to trade repositories (TRs), and

organisational conduct of business and prudential standards must be met by both TRs and CCPs.

Key EMIR provisions include:

- reporting obligation for derivatives contracts
- requirements for TRs – EU-based TRs need to be authorised, and third country (non-EU) based TRs which are doing business in the EU need to be recognised by the European Securities and Markets Authority (ESMA), for counterparties to use them for their EMIR reporting requirements.

Once registered, TRs will be supervised by ESMA in order to ensure that they comply on an on-going basis with all EMIR requirements, and that EU national competent authorities are able to access the data and details of derivative contracts

- clearing obligation for OTC derivatives and risk mitigation techniques for non-cleared OTC derivatives, including non-financial counterparties (NFC) obligations
- requirements for clearing houses/ CCPs – EMIR introduces a harmonised set of organisational, business conduct and prudential requirements for clearing service providers. Firms wanting to offer CCP services in the EU must seek authorisation under EMIR. National securities regulators are responsible for the authorisation of EU-based CCPs. CCPs based outside the EU who want to offer clearing services within the EU, need to be recognised by ESMA.

EMIR contains exemptions for trades by certain counterparties. It does not apply to European central banks, public bodies charged with or intervening in the management of public debt or the Bank for International Settlements. The European Commission has been empowered by EMIR to adopt delegated acts to amend the list of exempt entities. On 12 July 2013, the European Commission adopted such an act in a form of a Delegated Regulation to include the central banks and debt management offices of Japan and the United States in the list of exempt entities, in line with the Report adopted by the European Commission on 22 March 2013. The Delegated Regulation was subsequently published in the Official Journal in October 2013. Also, on 02 March 2017, the European Commission adopted a Delegated Regulation expanding the list of exempted entities under EMIR to include central banks and public bodies charged with or intervening in the management of the public debt from Australia, Canada, Hong Kong, Mexico, Singapore, and Switzerland in line with a Report on the international treatment of central banks and public entities managing public debt with regard to OTC derivatives transactions. The Delegated Regulation was published in the Official Journal in June 2017.

Application

- **12 February 2014**: the reporting obligation applies – details of all classes of derivative contract (both OTC and exchange traded derivatives) must be reported to recognised TRs

- clearing obligation:
  - G4 Currency interest rate swaps (IRS):
    - **Category 1**: clearing members – 21 June 2016
      - Effective start of frontloading for financial counterparties (FCs) only – 21 February 2016
• **Category 2**: FCs and alternative investment funds (AIFs) that are non-financial counterparties above the clearing threshold (NFC+), which are not included in Category 1 – 21 December 2016
  - Effective start of frontloading for FCs only – 21 May 2016
• **Category 3**: FCs and AIFs that are NFC+ which are not included in Categories 1 or 2 – 21 June 2019
• **Category 4**: NFC – 21 December 2018

➢ **EEA Currency IRS:**
  - **Category 1**: clearing members of relevant CCPs – 09 February 2017
    - Effective start of frontloading – 09 October 2016
  - **Category 2**: FCs and AIFs which are NFC+ with more than EUR8bn aggregate month-end three month average notional amount of uncleared trades – 09 August 2017
    - Effective start of frontloading for FCs only – 09 October 2016
  - **Category 3**: FCs and AIFs which are NFC+ which are not included in Categories 1 or 2 – 21 June 2019
  - **Category 4**: Other NFC+ which do not fall into Categories 1, 2 or 3 – 09 August 2019

➢ **Credit default swaps (CDS):**
  - **Category 1**: clearing members of CCPs – 09 February 2017
    - Effective start of frontloading for FCs only – 09 October 2016
  - **Category 2**: FCs and AIFs which are NFC+ with more that EUR 8bn aggregate month-end three month average notional amount of uncleared trades – 09 August 2017
    - Effective start of frontloading for FCs only – 09 October 2016
  - **Category 3**: FCs and AIFs which are NFC+ which do not fall in Category 1 or 2 – 21 June 2019
  - **Category 4**: Other NFC+ which do not fall into Categories 1, 2 or 3 – 09 May 2019

  - **04 February 2017**: Phase 1 application of initial and variation margin (AANA for March, April, May 2016 above EUR 3 trillion)
  - **01 March 2017**: Phase 2 application of variation margin (everyone else)
  - **1 September 2017 to 1 September 2020**: Phase 2 application of initial margin (depending on AANA for March, April, May in the relevant year).

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1 The *Delegated Regulation* delaying the clearing obligation start date for Category 3 counterparties until 21 June 2019 for G4 currency IRS, European index CDS and EEA currency IRS entered into force on 19 May 2017.

2 Ibid.

3 Ibid.
**EMIR Review**

In accordance with Article 85(1) EMIR, the European Commission launched a review of the legislation on 21 May 2015 by publishing a questionnaire. The purpose of the public consultation was to obtain feedback from stakeholders on their experiences in the implementation of EMIR, and provide the European Commission with guidance in preparing a final report. The review closed on 13 August 2015, and the European Commission published a final report on 23 November 2016. The final report became part of a process that had led to some targeted amendments of EMIR.

ESMA provided its input to the EMIR Review in the following reports:

- **EMIR Review Report no.1** – Review on the use of OTC derivatives by non-financial counterparties
- **EMIR Review Report no.2** – Review on the efficiency of margining requirements to limit procyclicality
- **EMIR Review Report no.3** – Review on the segregation and portability requirements
- **EMIR Review Report no.4** – ESMA input as part of the Commission consultation on the EMIR Review

On 30 January 2017, ESMA wrote a letter to the European Commission to ask it to consider a number of issues relating to its supervisory and sanctioning powers under EMIR, in the context of the ongoing review.

**EMIR REFIT**

A Regulation amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (EMIR REFIT) was published in the Official Journal of the EU on 28 May 2019.

The EMIR REFIT entered into force 20 days following its publication ie on 17 June 2019.
**Where are we in the process?**

### Table 1: Key stages in development of Level 1 text and EMIR REFIT

<table>
<thead>
<tr>
<th>Documents</th>
<th>Date</th>
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<tbody>
<tr>
<td><strong>Level 1 Text</strong></td>
<td></td>
</tr>
<tr>
<td>Commission proposal</td>
<td>15 September 2010</td>
</tr>
<tr>
<td>European Parliament report</td>
<td>07 June 2011</td>
</tr>
<tr>
<td>Political Agreement</td>
<td>09 February 2012</td>
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<tr>
<td>European Parliament adoption (Corrigendum)</td>
<td>29 March 2012</td>
</tr>
<tr>
<td>European Council adoption</td>
<td>04 July 2012</td>
</tr>
<tr>
<td>Publication in OJ</td>
<td>27 July 2012</td>
</tr>
<tr>
<td>Entry into force</td>
<td>16 August 2012</td>
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<tr>
<td><strong>EMIR REFIT</strong></td>
<td></td>
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<tr>
<td>Commission proposal and Annex</td>
<td>04 May 2017</td>
</tr>
<tr>
<td>European Council General Approach</td>
<td>11 December 2017</td>
</tr>
<tr>
<td>European Parliament Amendments</td>
<td>12 June 2018</td>
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<td>European Parliament First Reading</td>
<td>18 April 2019</td>
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<tr>
<td>Publication in OJ</td>
<td>28 May 2019</td>
</tr>
<tr>
<td>Entry into force</td>
<td>17 June 2019</td>
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### Table 2: Development of Level 2 / Level 3 measures

<table>
<thead>
<tr>
<th>Paper</th>
<th>Published</th>
<th>Closed</th>
<th>Outcome</th>
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</thead>
<tbody>
<tr>
<td><strong>Final Report:</strong> Draft regulatory technical standards (RTS) on the clearing obligation for G4 currency IRS</td>
<td>Oct. 2014</td>
<td>N/A</td>
<td>Revised Opinion (March 2015)</td>
</tr>
<tr>
<td>CP: Draft RTS on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP</td>
<td>April 2014</td>
<td>July 2014</td>
<td>Final draft RTS (March 2016)</td>
</tr>
<tr>
<td>Second consultation on the draft RTS on risk mitigation techniques for OTC derivative contracts not cleared by CCP under EMIR</td>
<td>June 2015</td>
<td>July 2015</td>
<td>Amendments and Annexes (July 2016)</td>
</tr>
</tbody>
</table>

\(^4\) On 04 February 2015, ESMA published a Feedback Statement to the CP on the clearing obligation for FX NDF and decided not to apply the EMIR clearing requirement to FX NDF at this stage.
| CP: **Indirect clearing arrangements under EMIR and MiFIR** | Nov. 2015 | Dec. 2015 | **Final Report** (26 May 2016) |
| CP: **Draft technical standards on access to data and aggregation and comparison of data across TR under Article 81 of EMIR** | Dec. 2015 | Feb. 2016 | **Final Report** (April 2016) |
| CP: **Draft technical standards on data to be made publicly available by TRs under Article 81 of EMIR** | Dec. 2016 | Feb. 2017 | **Final Report** (July 2017) |
| CP: **Draft RTS Amending Delegated Regulation (EU) 2016/2251 on risk mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) EMIR in the context of the simple, transparent and standardised (STS) securitisations under Securitisation Regulation (EU) 2017/2402** | May 2018 | June 2018 | **Final Draft RTS** (December 2018) |
| CP: **Clearing obligation under EMIR (No 6)** | July 2018 | Aug. 2018 | **Final Report** (September 2018) |
| **Final Report: EMIR RTS on the novation of contracts for which the clearing obligation has not yet taken effect** | Nov. 2018 | N/A | - |
| **Final report: EMIR RTS on the novation of bilateral contracts not subject to bilateral margins** | Nov. 2018 | N/A | - |
| CP: **Guidelines on periodic information and notification of material changes to be submitted to ESMA by Trade Repositories** | May 2019 | Aug. 2019 |  |
Annex

**Level 1**

2. *Commission Delegated Regulation amending EMIR with regard to the list of exempted entities* (June 2017)
3. *Commission Delegated Regulation on the extension of the transitional periods related to own funds requirements for exposures to central counterparties set out in CRR and EMIR* (June 2017)
4. *Regulation (EU) 2019/834 amending EMIR as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories* (May 2019)

**Adopted Level 2 measures**

1. **Delegated Acts**
   a) *Rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority (ESMA)* (March 2014)
   b) *Fees charged by the ESMA to trade repositories* (July 2013)

2. **Regulatory Technical Standards (RTS)**
   a) *Risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty* (October 2016) and *Correcting Regulation* (January 2017)
   b) *Clearing obligation (EEA currency IRS), Corrigendum* (June 2016) and *Amending Regulation* (March 2017)
   c) *Clearing obligation (CDS)* (March 2016) and *Amending Regulation* (March 2017)
   d) *Clearing obligation (G4 IRS)* (August 2015) and *Amending Regulation* (March 2017)
   e) *Direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations* (February 2014)
   f) *Colleges for central counterparties* (May 2013)
   g) *Capital requirements for CCPs* (December 2012)
   h) *Requirements for CCPs* (December 2012) and *Amending Regulation* (April 2016)
   i) *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* (December 2012)
   j) *Minimum details of the data to be reported to trade repositories* (December 2012) and *Amending Regulation* (October 2016)
   k) *Details of the application for registration as a trade repository* (December 2012) and *Amending Regulation* (December 2018)
   l) *Data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data* (December 2012), *Amending Regulation* (June 2017) and *Amending Regulation* (December 2018)

3. **Implementing Technical Standards**
   a) *Hypothetical capital of a central counterparty according to EMIR* (May 2014)
b) Format of the records to be maintained by central counterparties (December 2012)

c) Minimum details of the data to be reported to trade repositories (December 2012) and Amending Regulation (October 2016)

d) Details of the application for registration as a trade repository (December 2012)

**Adopted Level 3 measures**

2. Guidelines on CCP conflict of interest management (April 2019)
3. Guidelines on transfer of data between Trade Repositories (April 2018)
4. Guidelines for position calculation by Trade Repositories under EMIR (March 2018)
5. Practical guidance for the recognition of third country CCPs by ESMA (March 2016)
6. Guidelines and recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of CCPs (September 2014)
7. Guidelines and recommendations for establishing consistent, efficient and effective assessment of interoperability arrangements (June 2013)
8. Guidelines and recommendations regarding written agreements between members of CCP colleges (June 2013)
9. Practical guidance for the registration of Trade Repositories by ESMA (April 2013)

**Equivalence Decisions and Cooperation Arrangements for the regulatory regimes for CCPs (Article 25(6) EMIR)**

1. Australia
   - EC Equivalence Decision (October 2014)
   - Memorandum of Understanding (November 2014)
2. Brazil
   - Memorandum of Understanding (February 2017)
3. Canada
   - EC Equivalence Decision (November 2015)
   - Memoranda of Understanding: Alberta, Manitoba, Ontario and Quebec (January 2016)
4. Dubai
   - Memorandum of Understanding (February 2017)
5. Hong Kong
   - EC Equivalence Decision (October 2014)
   - Memorandum of Understanding (December 2014)
6. India
   - Memorandum of Understanding (February 2017)
7. Japan
   - EC Equivalence Decision (October 2014)
• Memorandum of Cooperation (February 2015)
• Memorandum of Understanding (February 2017)

8. Mexico
• EC Equivalence Decision (November 2015)
• Memorandum of Understanding (January 2016)

9. Republic of Korea
• EC Equivalence Decision (November 2015)
• Memorandum of Understanding (March 2016)

10. Singapore
• EC Equivalence Decision (October 2014)
• Memorandum of Understanding (February 2015)

11. South Africa
• EC Equivalence Decision (November 2015)
• Memorandum of Understanding (November 2015)

12. Switzerland
• EC Equivalence Decision (November 2015)
• Memorandum of Understanding (January 2016)

13. UAE
• Memorandum of Understanding (February 2017)

14. US
• EC Equivalence Decision (March 2016)
• Memorandum of Understanding (June 2016)

Equivalence Decisions – Recognition of legal, supervisory and enforcement arrangements (Article 13(2) EMIR)

1. US – Implementing Decision (October 2017)
2. Japan – Implementing Decision (April 2019)

EMIR Brexit UK Statutory Instruments

1. The Central Counterparties (Amendment and Transitional Provision) (EU Exit) Regulations 2018 (November 2018)
2. Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018 (December 2018)
3. The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (February 2019)