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Luxembourg Newsflash - 12 June 2019

EMIR Refit – Key Changes

On 28 May 2019, EMIR Refit, the Regulation (EU) 2019/834 of 20 May 2019 amending Regulation (EU) 648/2012, was published in the Official Journal of the European Union. The date of entry into force is 17 June 2019. The following contains a summary of the key changes, the aim of which is to eliminate disproportionate costs and burdens on smaller counterparties to derivative contracts and to simplify the rules, however without changing the substance of EMIR.

Financial counterparties (“FCs”) and non-financial counterparties (“NFCs”) should now assess whether they are ready.

New counterparty category: Small financial counterparty

One of the most significant amendments is the introduction of a new counterparty category, the small financial counterparty (“SFC”). SFCs are FCs with a limited trading volume in derivative instruments (below a certain threshold for over-the-counter (“OTC”) derivatives), such as certain investment funds or small banks. SFCs may choose not to clear their derivative contracts.

The relevant clearing thresholds will be similar to the clearing thresholds already existing for NFCs and will be set at:

- EUR 1 billion in gross notional value for OTC credit derivative contracts;
- EUR 1 billion in gross notional value for OTC equity derivative contracts;
- EUR 3 billion in gross notional value for OTC interest rate derivative contracts;
- EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts; and
- EUR 3 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for above.

Mandatory clearing for NFCs only in the asset classes concerned

Going forward NFCs will only be required to clear their OTC derivative transactions for the asset classes where the clearing threshold has actually been exceeded and no longer for all asset classes (as under the old regime). However SFCs exceeding the relevant clearing threshold in one asset class will need to clear their OTC derivative contracts for all their asset classes.

Calculation of clearing thresholds / key dates

EMIR Refit introduces a new regime for determining when FCs and NFCs are subject to the clearing obligation. They can choose whether or not to perform the clearing threshold calculation on an aggregate month-end average position for the previous 12 months. Where they decide to do so or where they choose to conduct the calculation and the relevant threshold is exceeded, the respective Luxembourg FC or NFC is required to notify ESMA and the CSSF, and to clear all OTC derivative contracts, novated or entered into, within four months. The initial calculation of positions will need to be performed by the date at which EMIR Refit enters into force, i.e. 17 June 2019 (for the previous 12 months, i.e. for the first year of the period starting 31 May 2018).

The market participants concerned should note that NFCs do not need to consider the OTC derivative contracts entered into for hedging purposes when calculating the clearing threshold, while FCs need to include all of their OTC derivative transactions, whether entered into for hedging or investment purposes.

Certain non-EU AIFs qualifying as FCs

With EMIR Refit being applicable non-EU AIFs managed by an authorised or registered AIFM under the AIFMD will qualify as FCs.

Reporting

Introduction of intragroup exemption for reporting

An exemption will be introduced for intragroup transactions involving an NFC (notification to the CSSF required), however only where both entities are included in the same consolidation, have established an appropriate risk management and where the parent entity is not an FC.

Introduction of single-sided reporting

Single-sided reporting is partially being introduced, namely for derivative transactions between an FC and an NFC below the clearing threshold, where only the FC will be responsible for carrying out the reporting on behalf of both counterparties.

Reporting for AIFs and UCITS

For OTC derivative transactions entered into by an AIF or UCITS its AIFM or management company will be responsible for carrying out the reporting.

No more backloading

Due to the fact that the reporting of historic contracts has proved to be difficult and resulted in a high reporting failure rate and poor quality of reported data, the requirement to report historic contracts has been removed. Hence no reporting will be required for derivative contracts which were entered into before 12 February 2014, provided those contracts are no longer outstanding.

Fair, reasonable and non-discriminatory access to clearing services

Clearing members and clients of clearing members providing clearing services should, according to EMIR Refit, be required to provide their clearing services under fair, reasonable, non-discriminatory and transparent commercial terms, in order to enable all counterparties to access clearing. However the question is how effective this will be, given that the fair access to clearing services will presumably not be a claimable right.

Please feel free to contact us for further guidance on this topic.

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