

## Group Briefing

February 2019

# EMIR Update: Small financial counterparties – ESMA statement regarding clearing and trading obligations

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Europe Women in Business Law Awards

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

ESMA has acknowledged potential difficulties that small financial counterparties will face if EMIR Refit (the proposal to amend EMIR), which will exempt them from the clearing obligation, is not in force by 21 June 2019 (the deadline for certain small financial counterparties to start clearing and trading some of their over-the-counter (OTC) derivative contracts on trading venues). In a recent statement, it has encouraged regulatory forbearance.

### EMIR REFIT

On 4 May 2017, the European Commission published its proposals to reform EMIR (known as 'EMIR Refit'). See our briefings on EMIR Refit [here](#) and [here](#).

### CLEARING AND TRADING OBLIGATIONS FOR SMALL FINANCIAL COUNTERPARTIES

One proposal made by the Commission in EMIR Refit was to introduce clearing thresholds for certain small financial counterparties on the basis that central clearing is not economically viable for them in light of their low activity volumes (although these small financial counterparties would still be subject to EMIR's margin requirements). The clearing threshold for the small financial counterparties exemption under EMIR Refit to apply is €1 billion in gross notional value for credit and equity

derivatives contracts, and €3 billion for interest rate, foreign exchange, commodity and other OTC derivative contracts.

EMIR Refit is not yet finalised, so the above clearing thresholds do not yet apply. EMIR already provides that the commencement date for the clearing obligation for Category 3 financial counterparties is 21 June 2019 for the interest rate and credit derivative classes subject to the clearing obligation. Category 3 financial counterparties are those whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives is equal to or below €8 billion, subject to certain conditions. The MiFIR trading obligation for derivatives for those financial counterparties' OTC derivative contracts would also apply from the same date.

If EMIR Refit does not come into

force before 21 June 2019, certain small financial counterparties whose derivative positions are below the EMIR Refit clearing thresholds would need to start complying with the EMIR clearing and MiFIR trading obligations until EMIR Refit comes into force, at which stage they will be exempt from that obligation.

On 31 January 2019, ESMA issued a [public statement](#) in respect of this issue (and also the backloading requirement discussed in further detail below). It noted the possible timing gap, and while neither ESMA nor national competent authorities (NCAs) have power to dis-apply legislation such as EMIR or delay the onset of its obligations, ESMA expects NCAs not to prioritise their supervisory actions towards the clearing obligation to be imposed on affected small financial counterparties who will

subsequently be outside the scope of the clearing obligation once EMIR Refit comes into force, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of this framework in a proportionate manner.

### BACKLOADING REQUIREMENT FOR REPORTING ENTITIES

ESMA's [public statement](#) also covered the backloading requirement. Under its EMIR Refit proposal, the Commission proposed the removal of “backloading” (the obligation to report historic data on derivatives that were outstanding on or after 16 August 2012 and which terminated before the EMIR reporting start date of 12 February 2014).

In light of a high number of reconciliation failures, and the “limited usefulness” of the data obtained by way of the backloading obligation,

ESMA confirmed its expectation that NCAs again apply a proportionate and risk-based supervisory approach, which might involve not prioritising counterparties’ reporting of backloaded transactions

### CENTRAL BANK STATEMENT

On 4 February 2019, the Central Bank of Ireland [confirmed](#) that it would apply its risk-based supervisory powers in the manner suggested in ESMA’s statement.

### UPDATE ON EMIR REFIT

On 5 February 2019, the EU Council Presidency and European Parliament reached a preliminary agreement in respect of the proposed EMIR Refit text, signalling that while the exact timing for EMIR Refit coming into force is not yet known, significant progress has been made at EU level.

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