

Regulatory News Alert

EMIR implementation considerations

1 February 2019

On 31 January 2019, the European Securities and Markets Authority (ESMA) published a statement confirming its awareness of the **challenges faced by small financial counterparties** to implement and comply with certain EMIR obligations becoming applicable in 2019.

More specifically, ESMA acknowledges the difficulties related to complying with the **clearing and trading obligation for counterparties in Category 3** under Regulation (EU) No 648/2012 (EMIR), starting as of **21 June 2019** and comprising OTC interest rate and credit derivative contracts in its scope, as well as with the backloading requirement, applicable as of **12 February 2019**.

Pursuant to feedback from counterparties after the first publication of EMIR, the European Commission (EC) proposed an amendment to EMIR, published on 4 May 2017 under the name **Refit**. This amendment creates a new category of financial counterparties whose derivative positions are below the clearing thresholds – the so-called **small financial counterparties**. The Refit proposal furthermore foresees to **exempt this new category from the clearing obligation under EMIR**. As the trading obligation for derivatives under MiFIR is related to the EMIR clearing obligation, the exemption would directly apply to this obligation too.

In addition, Refit includes substantial facilitations regarding the requirements for reporting derivatives that were outstanding on or after 16 August 2012 and terminated before the EMIR reporting start date, 12 February 2014. The process referred to as **backloading** would enter into application as of 12 February 2019. However, under the current Refit draft the **backloading requirement would be removed completely** from Article 9 of EMIR.

By recognizing compliance with these requirements as challenging, ESMA addresses the **potential timing gap** between the applicability of the above-mentioned requirements and the finalization of the Refit negotiations, which would formally remove them. Yet, as from a legal perspective, neither ESMA nor competent authorities possess any formal power to dis-apply or delay a directly applicable EU legal text, **counterparties would be required to adhere to them** – even if only for a short period of time.

Nevertheless, **ESMA expects competent authorities not to prioritize their supervisory actions towards small financial counterparties**, and to generally apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in a proportionate manner. This may as well include **not prioritizing counterparties' reporting of backloaded transactions** in their supervision and enforcement of EMIR.



How can Deloitte help?

Since its entry into force, we have been helping our clients comply with EMIR provisions by providing assistance on activities ranging from strategic considerations to the full implementation of its requirements.

Deloitte Luxembourg EMIR Services can help your organization analyze the current gaps with regulatory health checks, propose remediation plans, and define the appropriate governance framework (contracts, risk management, and control).

Deloitte Luxembourg can help you in your reporting with its reporting facility for EMIR, MIFIR and upcoming SFTR.

With our RegWatch Kaleidoscope service, Deloitte helps you stay on top of regulatory news and prepare your organization to address future regulatory developments.

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