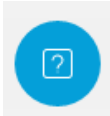
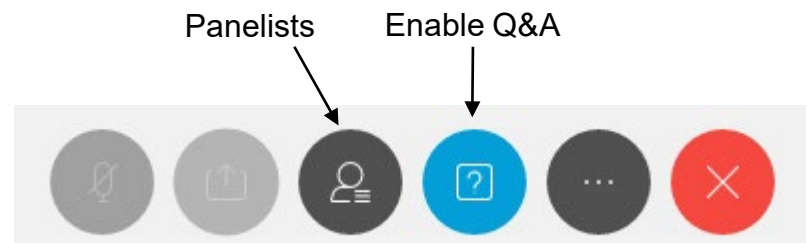
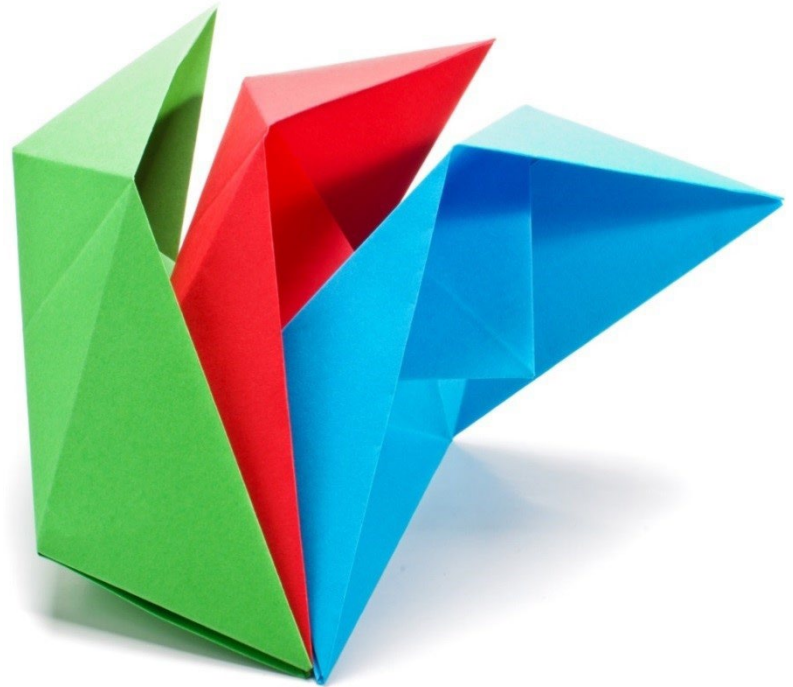


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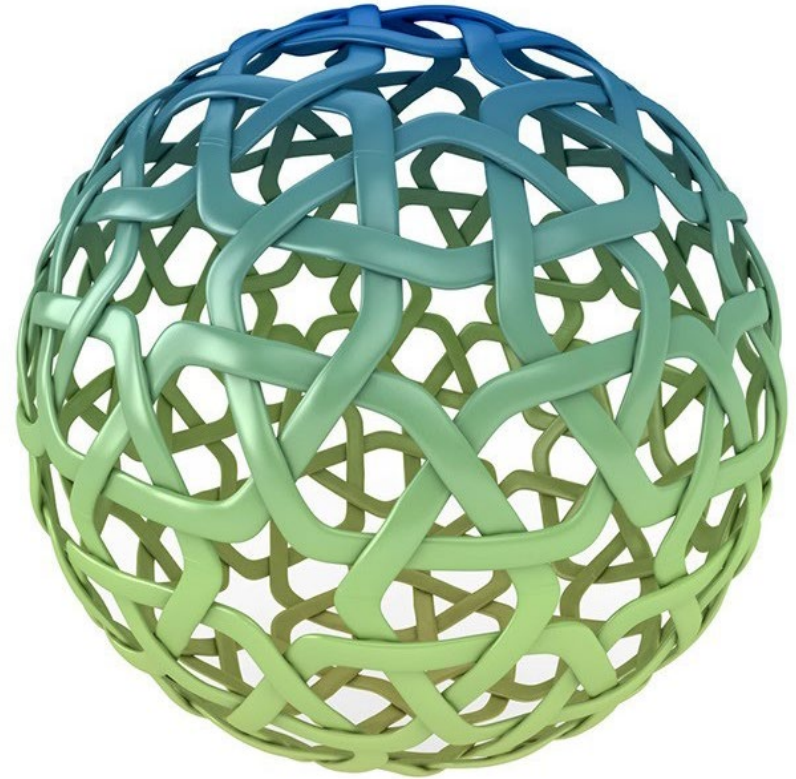


Fog in Channel: the EMIR edition

Bob Penn and Emma Dwyer

9 July 2020

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Brexit and EMIR: *UK approach*

What is UK EMIR? Key legislation – Level 1



Level 1: Five main SIs to onshore EU EMIR and existing associated UK regulations:

- **“EMIR SI” (final):** Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment) (EU Exit) Regulations 2019 - **Focus:** Counterparty classification and obligations
 - **“CCP SI” (final):** Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 – **Focus:** Recognition of third country CCPs
 - **“TR SI” (final):** Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018 – **Focus:** Registration of trade repositories
 - **“EMIR Refit 2.1 SI” (final):** Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment) (EU Exit) (No. 2) Regulations 2019 – **Focus:** Changes to existing SIs required as a result of EMIR Refit 2.1
 - **“EMIR 2.2 SI” (final):** The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2020 – **Focus:** Recognition of third country CCPs
- **Note:** Relevance of other SIs (i) miscellaneous SIs make changes to the above SIs and EMIR; and (ii) **“Equivalence SI” (final)** provides for various exemption directions and equivalence determinations in an EMIR context

What is UK EMIR? Level 2 and transitional relief



Level 2: Under EUWA, HMT can delegate powers to UK regulators to amend Level 2 technical standards (**BTS**)

- See: The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018
- Changes made by “EU Exit Instruments”
- “Near final” rules and BTS published 28 February 2019 (see BoE/PRA Policy Statement PS5/19 and FCA Policy Statement PS19/5)
- Subsequent “final” rules published in March and April 2019
- Additional consultation published by PRA/BoE in July 2019
- Awaiting further amendments in EMIR context to reflect implementation period

UK transitional relief subject to certain exceptions:

- FCA “final” directions in March 2019
- Joint PRA/BoE consultation in July 2019 updated ‘near final’ directions
- On 30 April 2020, FCA and PRA/BoE confirmed the extension of temporary transitional relief so it will be available for 15 months after the end of the implementation period (31 March 2022)
- Limited use in EMIR context

Inflight legislation?

UK EMIR: Breakdown of obligations

UK EMIR obligation type	Relevant UK regulator	Relevant UK legislation	Inflight provisions?	Transitional relief available?
Reporting	BoE and FCA (FCA lead) – see FCA PS 19/5	EMIR SI / EMIR Refit 2.1 SI FCA final BTS instruments published in March and April 2019	Yes – RTS relating to new EMIR Refit 2.1 reporting provisions may not be onshored	No
Clearing	BoE and FCA – see FCA PS 19/5 and BoE/PRA PS 5/19	EMIR SI / EMIR Refit 2.1 SI FCA final BTS instrument published in March 2019; BoE final BTS instrument published in March 2019	Yes – Status of EMIR Refit 2.1 provisions relating to FRANDT (applicable June 2021) unclear; Any changes made relating to current consultation on exemption for post-trade risk reduction services will likely not be onshored	No but note (i) any changes that apply as a result of a change to the covered bond exemption for clearing will apply from 31 March 2022; and (ii) transitional arrangements for non-UK CCPs
Risk mitigation (excluding margin)	BoE and FCA (FCA lead)- see FCA PS 19/5	EMIR SI / EMIR Refit 2.1 SI FCA final BTS instrument published in March 2019	N/A	No
Margin	PRA and FCA (PRA lead) – see BoE/PRA PS 5/19 and CP 18/19	EMIR SI / EMIR Refit 2.1 SI PRA final BTS instrument published in April 2019 and draft instrument published in July 2019	Yes- Status of Phase 5 (and 6) IM unclear; Status of EMIR Refit 2.1 changes relating to IM models (to be made by RTS) unclear; Equity options?	Unclear if June 2020 date in UK margin RTS (and date relating to credit quality assessments issued by an ECAI in Article 6(1)(c) of the margin RTS) intended to be revised further; No relief for changes as a result of definition of OTC derivatives
Intragroup exemptions for margin and clearing	FCA	EMIR SI	N/A	Existing exemptions grandfathered
CCPs	BoE – see BoE/PRA PS 5/19	EMIR SI (authorisation) / CCP SI and EMIR 2.2 SI (recognition of third country CCPs) BoE final BTS instrument published in March 2019	Yes – Status of EMIR 2.2 RTS relating to tiering and comparable compliance unclear	Yes - Transitional arrangements for non-UK CCPs
Trade Repositories (TRs)	FCA - see FCA PS 19/5	EMIR SI (recognition of third country TRs) / TR SI (registration of UK TRs) FCA final BTS instruments published in March and April 2019	N/A	No transitional arrangements for non-UK TRs but possibility for UK affiliates of EU TRs currently registered under EMIR to apply for deemed registration in the UK

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Brexit and EMIR: *EU27 approach*

EU27 preparations

EMIR obligation type	Relevant EU legislation	Transitional relief available?
Reporting	EMIR and related technical standards	No
Clearing	EMIR and related technical standards	No – Note that RTS to avoid triggering clearing requirements on novation of bilateral contracts have fallen away
Risk mitigation (excluding margin)	EMIR and related technical standards	No
Margin	EMIR and related technical standards	No – Note that RTS to avoid triggering margin requirements on novation of bilateral contracts have fallen away
Intragroup exemptions	EMIR and related technical standards	No
CCPs	EMIR and related technical standards	No – Note that temporary and conditional equivalence decision for UK CCPs has fallen away
TRs	EMIR and related technical standards	No



Brexit and EMIR: Counterparty scope and practical impact

Practical impact: Regime application – UK bank perspective

Counterparty A	Counterparty B	Pre-Brexit regime application to UK bank	Post-Brexit regime application to UK bank
UK bank	UK bank	EMIR	UK EMIR
UK bank, EU branch	UK bank, EU branch	EMIR	UK EMIR and EMIR*
UK bank	EU bank	EMIR	UK EMIR [and EMIR**]
UK bank	Third country (non-EU) bank	EMIR [and any relevant third country regime**]	UK EMIR [and any relevant third country regime**]

* Direct, substantial and foreseeable effect

** Indirect application to UK bank

Practical impact: Regime application – EU bank perspective

Counterparty A	Counterparty B	Pre-Brexit regime application to EU bank	Post-Brexit regime application to EU bank
EU bank	EU bank	EMIR	EMIR
EU bank, UK branch	EU bank, UK branch	EMIR	EMIR and UK EMIR*
EU bank	UK bank	EMIR	EMIR [and UK EMIR**]
EU bank	Third country (non-UK) bank	EMIR [and any relevant third country regime**]	EMIR [and any relevant third country regime**]

* Direct, substantial and foreseeable effect

** Indirect application to EU bank

Issues: Brexit and counterparty classification



OWN categorisation

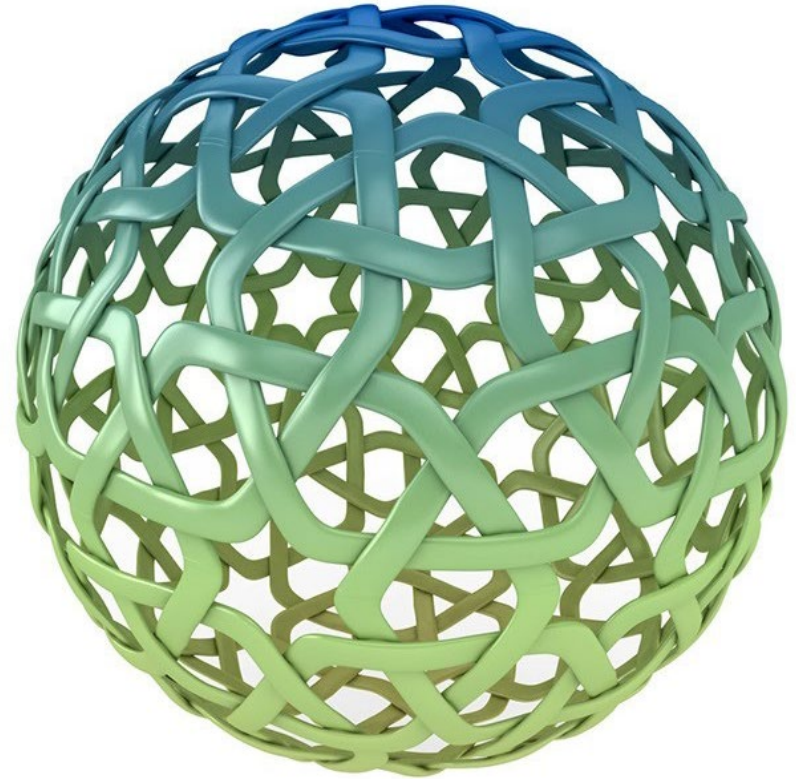
- Reclassify entities under UK EMIR and EMIR

Counterparty classification

- Consider whether existing representations or communications as to counterparty categorisation can be relied upon under UK EMIR and EMIR – Are new confirmations as to UK EMIR and EMIR categorisation required from existing counterparties? Client outreach?

Action points

- Update policies, procedures and documentation to provide for counterparty classification under UK EMIR and EMIR
- Ensure procedures in place to ensure any appropriate calculations and notifications under UK EMIR are made relating to the clearing threshold and EMIR policies are also amended as relevant
- Assess impact on UK EMIR and EMIR clearing, reporting and risk mitigation obligations (see further below)



Brexit and EMIR: *Transaction scope and practical impact*

Outstanding Issues: Definition of OTC Derivatives

UK issues:

- EU regulated markets are no longer “regulated markets”
- EU regulated markets are not “equivalent third country markets” as have not been declared equivalent under Art 2a UK EMIR
- Therefore, derivatives traded on EU regulated markets will be regarded as “OTC derivatives” under UK EMIR rather than “derivatives” as previously
- No broad UK transitional relief is available

Consequences under UK EMIR include:

- (a) consideration of the obligations that apply to those contracts; and
- (b) impact on contracts which count towards the clearing threshold and, consequently, whether some entities are categorised as NFC+/NFC- or FC/SFC

EU perspective:

- Same issues and consequences under EMIR
- No EU transitional relief

Actions:

- Assess impact and monitor equivalence decisions

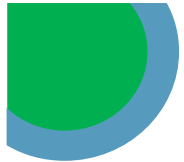


Transaction scope: Impact



Reporting = All “derivatives”; But note mandatory reporting distinction between OTC and ETD

“Derivatives” are financial instruments as set out in points (4) to (10) of Section C of Annex I to MiFID



Clearing = Certain classes (namely certain interest rate transactions and index CDS) of “OTC derivatives”

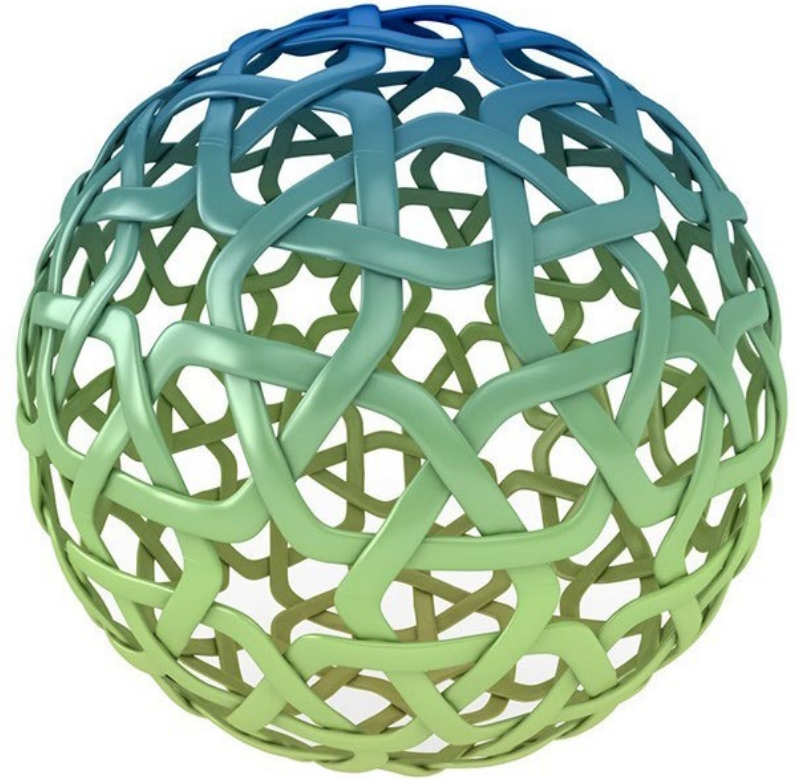
“OTC derivatives” are “derivatives” the execution of which does not take place on a regulated market or third country equivalent regulated market



Risk mitigation (including margin) = “OTC derivatives” which are not cleared by a CCP



Counterparty status is determined by the “clearing threshold” = “OTC derivatives” count towards the clearing threshold and can therefore impact counterparty status (NFC+/NFC- and FC/SFC)



Brexit and EMIR: *Reporting*

Issues: Brexit and reporting – TR recognition



- **No UK or EU transitional relief for any changes to the reporting obligation arising as a result of Brexit**
- **Which TR is being used? Must report to a registered or recognised TR under the relevant regime**

UK EMIR - No transitional recognition for non-UK TRs (other than UK affiliates of EU TRs registered under EMIR for 3 years)

- EU TRs no longer registered and would need to apply for recognition under UK EMIR as third country TRs
- Absent EU TR recognition, UK counterparties cannot comply with reporting obligation by reporting to a EU TR and may need to make new arrangements

EMIR - No transitional relief for recognition of UK TRs

- UK TRs no longer registered and would need to apply for recognition under EMIR as third country TRs – Note: Some UK TRs have set up EU affiliates
- Absent UK TR recognition, EU counterparties cannot comply with reporting obligation by reporting to a UK TR and may need to make new arrangements

Issues: Brexit and reporting – Impact of relevant reporting regime



- **Which reporting regime is relevant? Must report under the correct regime**

- Only UK counterparties are required to report under UK EMIR
- Only EU counterparties are required to report under EMIR
- UK counterparties are no longer required to report under EMIR

- **Delegated reporting (EU clients)** - If entity provides services to EU clients using a UK TR = new arrangements with EU TR required or terminate delegated reporting service

- **Delegated reporting (UK clients)** - If entity provides services to UK clients using a EU TR = new arrangements with UK TR required or terminate delegated reporting service AND amend documentation for UK regime

- **Mandatory reporting** – UK FC no longer required to report on behalf of EU NFC-; EU FC no longer required to report on behalf of UK NFC- (subject to Article 13 equivalence) – ISDA/FIA MRRRA automatic transition?

- **Legacy contracts** – If the TR will change as a result of Brexit, data to be ported to new TR. Requirement to provide data on existing contracts to current TR?

Other issues: Brexit and reporting #1



- Which transactions must be reported? All “derivatives” under each regime must be reported

- Change to scope of definition of “derivatives” – impact?
- Mandatory reporting only applies to OTC not ETD (as defined in EMIR) – impact?
 - Depends on Article 2a equivalence
 - Note MRRA opt-out

- Can reporting be made without breaching local law disclosure requirements?

- Narrowing of confidentiality waiver – Article 9(4)
- Consider revising language

Other issues: Brexit and reporting #2

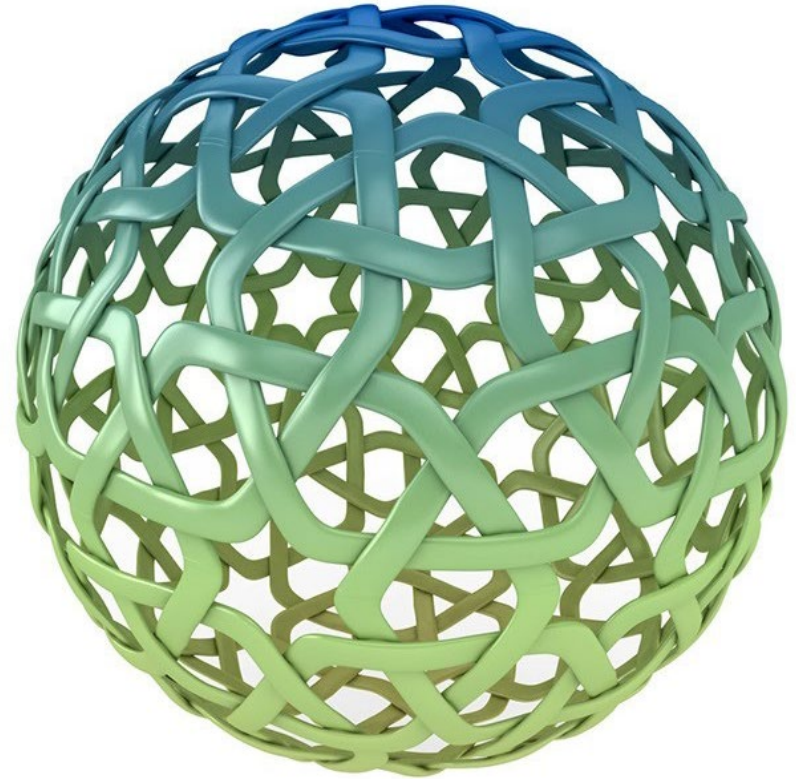


- How will operations be affected?

- Operational changeover – Friday 1 January is a bank holiday so changeover at weekend but over New Year period – issues?
- Assess impact on Level 2 reporting fields
- Suspension of the reporting obligation possible under UK EMIR (Note: Not EU EMIR) – Policies/systems to manage this?
- Update policies and procedures on reporting

- Will UK and EU reporting continue to be aligned?

- RTS/ITS relating to new EMIR Refit 2.1 reporting changes will likely not be onshored based on current timings – Monitor alignment with EU
- Monitor Article 13 equivalence



Brexit and EMIR: *Clearing*

Issues: Brexit and clearing – UK perspective



No UK transitional relief is available (except for the covered bond exemption) BUT note impact given relief for non-UK CCPs

Entities subject to the UK clearing obligation must clear via an authorised or recognised CCP

Action points

- Assess which entities and transactions are subject to the UK clearing obligation (Note: Direct, substantial and foreseeable effect)
- Which CCP is being used? UK counterparties must ensure that they clear through a UK authorised or recognised CCP to comply with the UK clearing obligation
 - Non-UK CCPs no longer authorised or recognised and would need to apply for recognition or temporary deemed recognition under UK EMIR
 - Applies to all non-UK CCPs (EU and non-EU)
 - Transitional recognition for non-UK CCPs (for at least 3 years)
- Review existing clearing documentation to ensure alignment with UK regime
- Negotiation of clearing documentation if new CCP to be used
- Establish policies and procedures for UK EMIR clearing

Issues: Brexit and clearing – EU perspective



No EU transitional relief is available

- Note that RTS to avoid triggering clearing requirements on novation of bilateral contracts have fallen away

Action points

- Assess which entities and transactions are subject to the EU clearing obligation (Note: Direct, substantial and foreseeable effect)
- Which CCP is being used? EU counterparties must ensure that they clear through a EU authorised or recognised CCP to comply with the EU clearing obligation
 - UK CCPs no longer authorised or recognised and would need to apply for recognition under EMIR
 - Previous EU temporary recognition for UK CCPs in a “no deal” context has fallen away
 - Equivalence for UK regulatory framework for CCPs?
 - Note new EMIR 2.2 requirements for recognition of third country CCPs
- Negotiation/review of clearing documentation if new CCP to be used
- Update policies and procedures for EMIR clearing
- Pension Scheme Clearing Exemption – Not available for trades between UK pension scheme arrangements and EU counterparties

Issues: Brexit and clearing – Continued alignment?



- **Will UK and EU clearing continue to be aligned?**
 - Status of EMIR Refit 2.1 provisions relating to FRANDT (applicable June 2021) unclear
 - Any changes made relating to proposals on exemption for post-trade risk reduction services, pension scheme exemption and alignment with trading obligation unclear
 - Monitor Article 13 equivalence

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Brexit and EMIR: *Risk mitigation*

Issues: Brexit and risk mitigation



- Assess which entities and counterparty pairs are subject to the UK and EU risk mitigation requirements (Note: Direct, substantial and foreseeable effect)

-Assess impact of rules from UK and EU perspective

-Monitor Article 13 equivalence

-Documentation impact:

- Amendments to agreements to reflect portfolio reconciliation and dispute resolution requirements under UK EMIR
- Establish UK EMIR policies and procedures
- Update EMIR margin policies and procedures

Issues: Brexit and margin – UK transitional?

UK perspective

- Transitional relief for margin requirements not covered by general UK transitional relief
- Instead, covered specifically in the EU Exit Instrument relating to the margin RTS
- In “no deal” context, UK transitional relief was available from exit day until 30 June 2020 (Note: Article 6(1)(c) of margin RTS which was one year from exit day)
- Awaiting confirmation in respect of whether transitional relief for margin requirements as set out in the EU Exit Instrument will be extended
- Any changes that apply as a result of the change to the definition of "OTC derivatives" will apply from IP completion day
- EU Exit Instrument is expected to be updated to reflect draft RTS set out in the ESMA Final Report on EMIR RTS on various amendments to the bilateral margin requirements in view of the international framework (dated 4 May 2020)



Issues: Brexit and margin – UK perspective #1



-Assess which entities and counterparty pairs are subject to the UK margin requirements (Notes: (i) Direct, substantial and foreseeable effect; (ii) Consider impact on contracts with non-EU third countries)

-Assess impact of rules from UK perspective

-Monitor Article 13 equivalence

-Differences to EMIR include (subject to changes which may be made by revised EU Exit Instrument):

- Eligible collateral (debt securities; covered bonds; UCITS)
- Initial margin cash accounts
- CCPs authorized as credit institutions
- Credit quality assessment
- UCITS/AIFs thresholds
- Note: EUR thresholds/amounts continue to be denominated in EUR (no change to GBP)
- Approval for IM models/validation of risk management procedures for margin – Will UK follow EU?

Issues: Brexit and margin – UK perspective #2



- **Exemptions:**

- Covered bond exemption – Consider jurisdiction of covered bond issuer
- Non-netting exemption – Expanded use?
- Single-stock equity options and index options – Permanent UK exemption from IM and VM – Will this position be maintained?
- Uncertainty relating to future phase-in of Phases 5 and 6 IM – Although expectation is that UK will follow other G20 jurisdictions
- Physically-settled FX forwards and swaps (VM exemption) – Aligned with EU? – See revised margin RTS

- **Documentation impact:**

- VM CSAs – Definition of “Covered Transactions” and “OTC derivatives” to be considered
- Impact on Eligible Collateral Schedules?
- IM documentation - Consider inclusion of UK in Regime Table
- Establish UK margin policies and procedures

Issues: Brexit and margin – EU transitional?



EU perspective

- No transitional relief
- Note that RTS to avoid triggering margin requirements on novation of bilateral contracts have fallen away

Issues: Brexit and margin – EU perspective #1



-Assess which entities and counterparty pairs are subject to the EU margin requirements (Notes: (i) Direct, substantial and foreseeable effect; (ii) Consider impact on contracts with non-UK third countries)

-Assess impact of rules from EU perspective

-Monitor Article 13 equivalence

-Differences to UK EMIR include:

- Eligible collateral (debt securities; covered bonds; UCITS)
- Initial margin cash accounts
- CCPs authorized as credit institutions
- Credit quality assessment
- UCITS/AIFs thresholds

Issues: Brexit and margin – EU perspective #2



Exemptions:

- Covered bond exemption – Consider jurisdiction of covered bond issuer
 - Single-stock equity options and index options – Exemption from IM and VM until 4 January 2021
 - Phases 5 and 6 IM – See revised margin RTS
 - Physically-settled FX forwards and swaps (VM exemption) – See revised margin RTS
-
- **Documentation impact:**
 - Impact on Eligible Collateral Schedules?
 - Update EMIR margin policies and procedures



Brexit and EMIR: Intragroup exemptions for margin and clearing

Intragroup exemptions - UK perspective



Existing exemptions

- Existing clearing and margin exemptions grandfathered
- Grandfathering time limited for cross-border pairs (to include UK vs EU) for 3 years post exit day subject to equivalence decision or regulator extension
- If an existing equivalence decision on margin applies (CFTC or Japan) = equivalence decision is onshored & existing exemption will continue

New exemptions

- UK EMIR anticipates process for new applications for cross-border intragroup exemptions
- Time limited for cross-border pairs for 3 years post exit day subject to equivalence decision or regulator extension

Considerations

- Monitor Article 13 equivalence
- To consider whether an intragroup exemption will also be available in any relevant third country jurisdiction

Intragroup exemptions - EU perspective



Existing exemptions

- Derogation from clearing for cross-border intragroup transactions until 21 December 2020
- Derogation from margin for cross-border intragroup transactions until January 2020 – Revised margin RTS extend to 21 December 2020
- No transitional relief/ grandfathering of existing UK vs EU exemptions as a result of Brexit
- If counterparty status changes as a result of Brexit, new applications are required - Process uncertain
- If an existing equivalence decision on margin applies (CFTC or Japan) = no change - the existing exemption will continue

Considerations

- ISDA advocacy on extension of derogations
- Monitor Article 13 equivalence
- To consider whether an exemption will also be available in any relevant third country jurisdiction
- Legacy trades?

Questions?

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