

ALLEN & OVERY

EMIR 3.0 Update

Damian Carolan, Partner
Paul Péporté, Partner
Nick Bradbury, Partner
Christian Kloepfer, Counsel
Emma Lancelott, Knowledge Counsel
6 March 2024



EMIR: A key regulation for the derivatives market

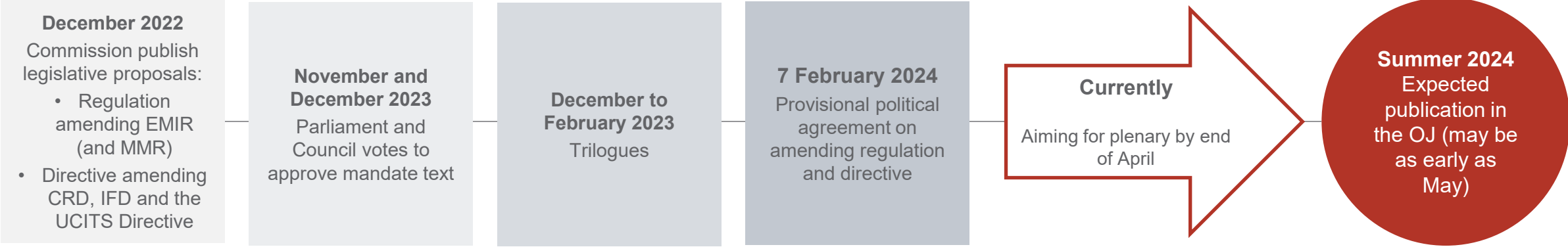


- EU Level 1 entered into force: **16 August 2012**
- EU Level 2 key requirements in force
- Binding and directly applicable in all EU member states
- Applies to “derivatives” as defined in (4)-(10) of Annex 1, Section C MiFID
- Key obligations introduced by EMIR for derivatives include:
 - **Clearing** through central counterparties (**CCPs**) of “eligible” OTC derivatives (certain interest rate swaps and index CDS only)
 - **Risk mitigation requirements** for OTC derivatives not subject to central counterparty clearing (including margin/collateral requirements)
 - **Reporting** of all derivatives (OTC and exchange-traded) concluded, modified or terminated to a registered/recognised trade repository no later than the working day following the relevant event
 - **Requirements for financial market infrastructure, namely CCPs and trade repositories themselves** – including that CCPs apply for authorisation by their competent authority (non-EU CCPs can apply to ESMA for recognition) and that trade repositories apply for registration with ESMA (non-EU trade repositories can apply to ESMA for recognition)



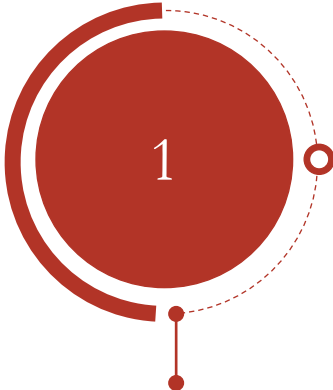
EMIR 3.0: Timing

The European Commission has proposed making amendments to EMIR to increase the resilience and attractiveness of EU CCPs, and with the aim of reducing reliance on third-country CCPs (such as those in the UK). Provisional political agreement on the amending regulation and directive was reached on 7 February 2024.

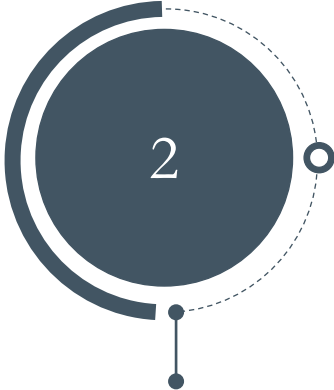


Plus: technical standards to follow as per prescribed timeframes

EMIR 3.0: Key objectives



Encouraging clearing in the EU and improving attractiveness of EU CCPs



Make EU CCPs more resilient by enhancing the existing supervisory framework



Strengthen EU strategic autonomy and safeguard financial stability by requiring clearing members and clients to hold directly or indirectly an active account at EU CCPs



New active account requirement

UK EMIR?

Post-Brexit position

- EMIR was on-shored in the UK post-Brexit
- Broadly, UK EMIR can be said to mirror EMIR (but there are some differences and we will see further differences post-EMIR 3.0 changes)

UK review of EMIR?

- HMT has confirmed that on-shored EMIR will be reviewed as part of “Tranche 3” of the UK government’s regulatory reform agenda
- Industry engagement has started but HMT has not committed to confirming to its expectations for 2024 (and realistically reform may take until 2025 and beyond given that Tranches 1 and 2 have overrun already)
- Many areas for review are likely to be similar to those in EU EMIR 3.0 and include:
 - Cross-border intragroup exemptions from margin and clearing
 - Exemptions from margin requirements for single-stock equity options and index options
 - CCP rulebook

UK reporting changes

- In 2023, the FCA made certain changes to the UK EMIR reporting regime to, amongst other things, bring it in line with global standards (as set by CPMI-IOSCO)
- There is significant alignment with similar changes brought in in the EU in respect of the EU EMIR reporting regime which go live at the end of April 2024
- Most of the UK reporting changes will come into force on 30 September 2024

EMIR 3.0 Update: Agenda

01 Counterparty classification

02 Clearing

- Impact on counterparties
- Impact on clearing members and clients providing clearing services
- Impact on CCPs

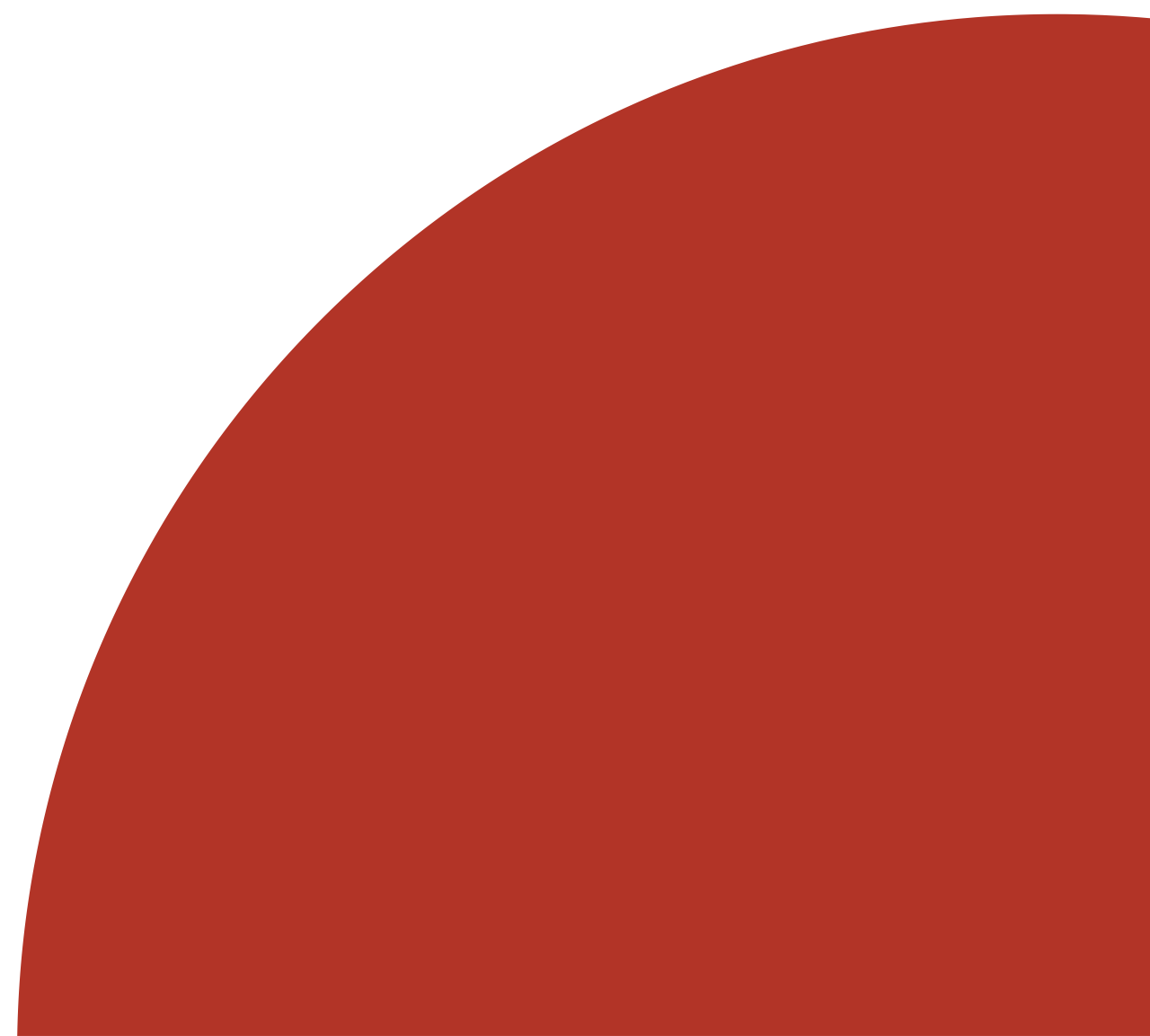
03 Equivalence and impact on intragroup exemptions for clearing and margin

04 Risk mitigation (including uncleared margin)

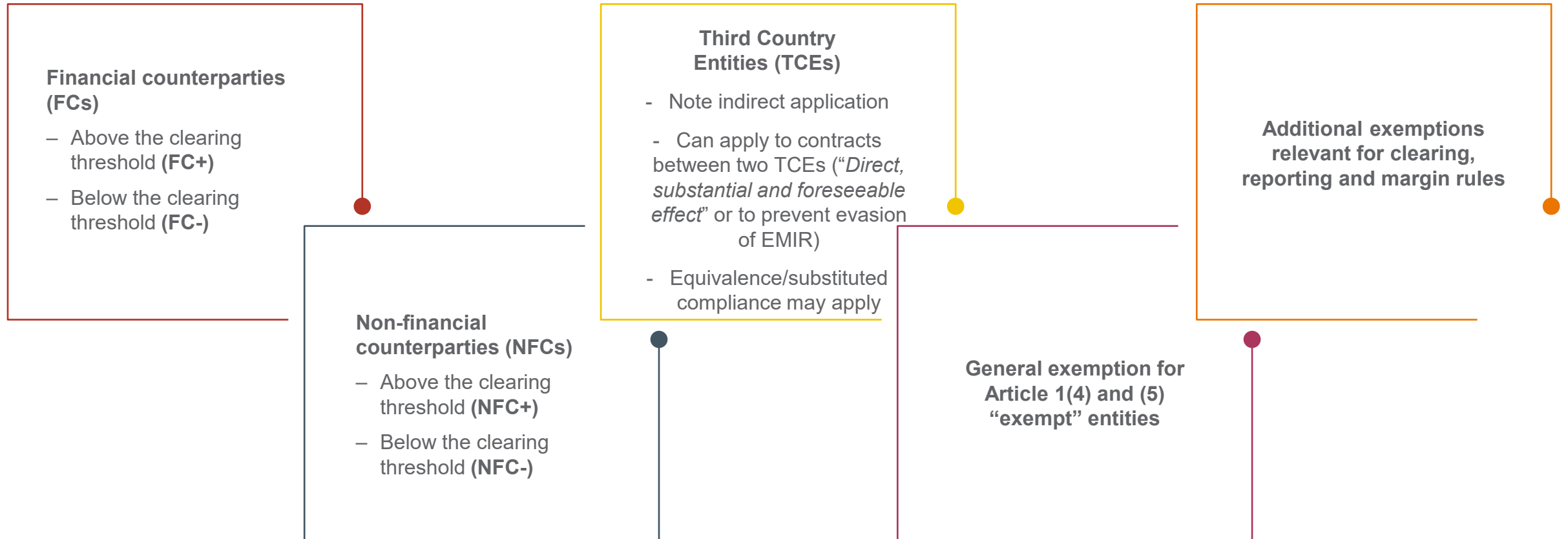
05 Reporting



Counterparty classification



EMIR applies to different types of counterparties in different ways depending on systemic importance



Application of different EMIR requirements to different entity types

01

Of relevance to **FCs, NFC+s and NFC-s**:

- Risk mitigation: Timely confirmation
- Risk mitigation: Portfolio reconciliation
- Risk mitigation: Portfolio compression
- Risk mitigation: Dispute resolution
- Reporting (subject to “mandatory reporting” requirements which include requiring FCs to report on behalf of NFC-s)

02

Of relevance to **FCs and NFC+s** only:

- Risk mitigation: Daily mark-to-market valuations (or mark-to-model where not available)
- Risk mitigation: Margin – Procedures for timely, accurate and appropriately segregated exchange of collateral (**comprised of variation margin (VM) and initial margin (IM)** – note that IM only applies to the most systemically important FCs and NFC+s)

03

Of relevance to **FC+s and NFC+s** only:

- Mandatory central counterparty clearing



Changes to NFC clearing threshold

Note: *NFC status impacts all EMIR obligations (not just clearing)*

Pre-EMIR 3.0 - Calculation of the “clearing threshold”:

- Calculated every 12 months based on the aggregate month-end average position for the previous 12 months
- **All OTC derivatives** to be taken into account (cleared and uncleared)
- NFCs are only required to clear an asset class if the clearing threshold is exceeded for that asset class
- “Clearing thresholds” are:
 - EUR 1 billion for each of credit and equity;
 - EUR 3 billion for each of interest rate and FX; and
 - EUR 4 billion commodity/other
- Hedging exemption available
- **Group test: Calculation must include all OTC derivatives contracts entered into by: (i) the NFC; and (ii) any other non-financial entities within the group**

Post-EMIR 3.0 – Calculation of the “clearing threshold:

- **Only OTC derivatives not cleared by an authorised or recognised CCP** to be taken into account
- **Removal of group test:** No requirement to include derivatives contracts entered into by other group entities in the clearing threshold calculation (although, note hedging exemption can still be applied at a group level)
- **RTS on value of clearing thresholds and hedging exemption (Clearing Threshold RTS)**
- **Review of clearing thresholds** every 2 years or earlier where “necessary”
- **Review of application of EMIR to NFCs** every 2 years
- **On timing**, the amended provisions will **not come into effect until the Clearing Threshold RTS have come into effect**
- **Practical impacts?**

Changes to FC clearing threshold

Note: FC status only impacts clearing

Pre-EMIR 3.0 - Calculation of the “clearing threshold”:

- Calculated every 12 months based on the aggregate month-end average position for the previous 12 months
- **All OTC derivatives** to be taken into account (cleared and uncleared)
- FCs are required to clear all asset classes if the clearing threshold is exceeded for any asset class
- “Clearing thresholds” are:
 - EUR 1 billion for each of credit and equity;
 - EUR 3 billion for each of interest rate and FX; and
 - EUR 4 billion commodity/other
- Hedging exemption not available
- **Group test: Calculation must include all OTC derivatives contracts entered into by: (i) the FC; and (ii) any other entity within the group**

Post-EMIR 3.0 – Calculation of the “clearing threshold:

- **Required to make two calculations:**
 - **“Uncleared” positions** - Only OTC derivatives not cleared by an authorised or recognised CCP
 - **Aggregate positions** - All OTC derivatives (cleared and uncleared)
- **Group test remains**
- **RTS on value of clearing thresholds (Clearing Threshold RTS)**
- **Review of clearing thresholds** every 2 years or earlier where “necessary”
- **On timing**, the amended provisions will **not come into effect until the Clearing Threshold RTS have come into effect**
- **Practical impacts?**

Clearing



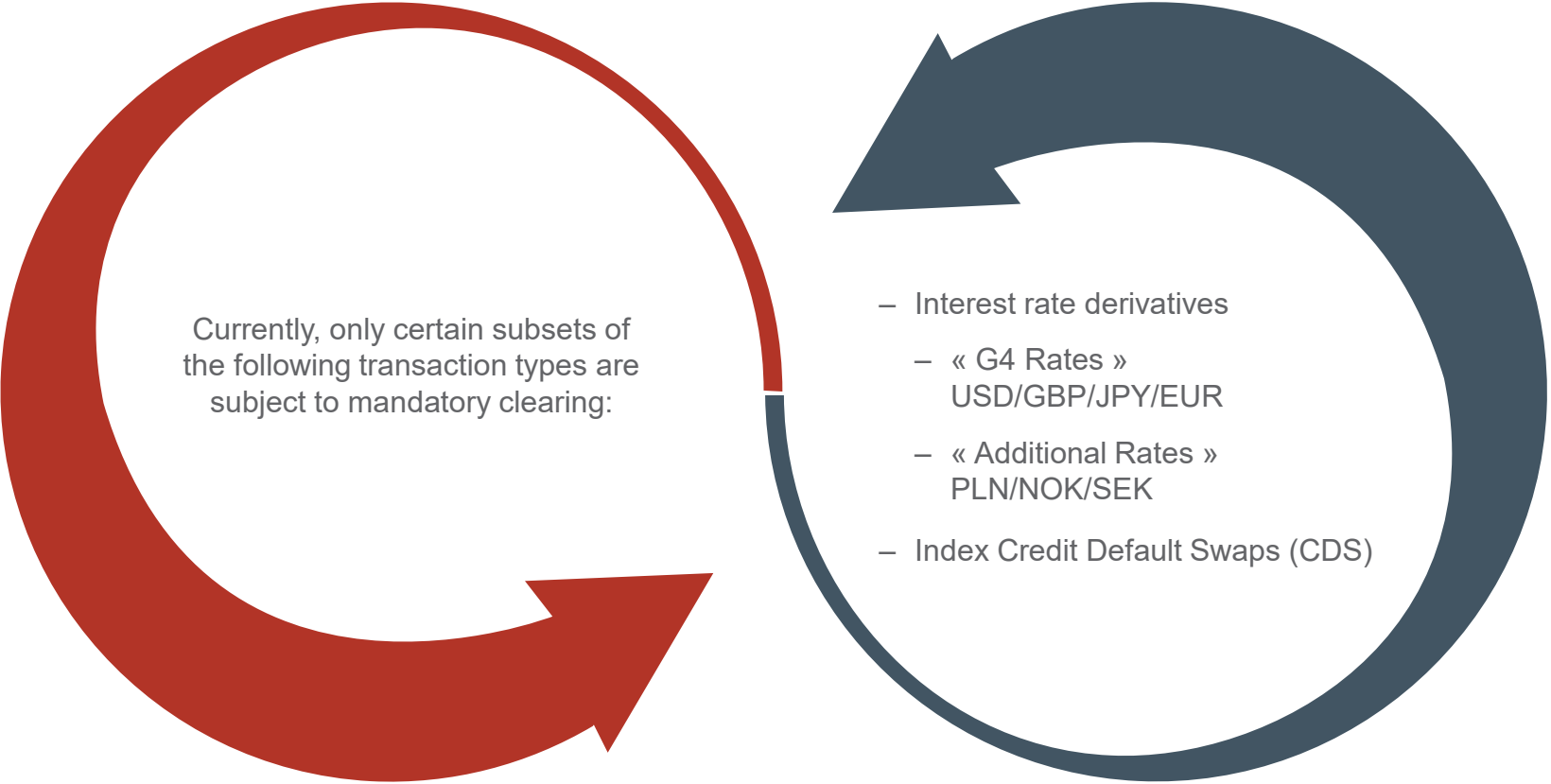
EMIR introduced a mandatory clearing obligation



- Only applies to certain counterparties and certain OTC derivative transaction types
- A trade is required to be cleared if it is:
 1. between:
 - a FC+ or NFC+ facing a FC+, NFC+ or a third country equivalent of a FC+ or NFC+; or
 - two third country FC+ or NFC+ equivalents, if the trade has “*direct, substantial and foreseeable effect*” or where application of the regulation is needed to prevent evasion,in each case, subject to equivalence;
 2. of a type specified to be subject to mandatory clearing;
 3. entered into on or after the mandatory clearing start date (now fully phased in); **and**
 4. not covered by an exemption (e.g. intragroup trades, STS securitisations, covered bond issuers)
- **NFC+s only required to clear asset classes in respect of which clearing threshold has been breached**
- **Clearing must take place via an authorised or recognised CCP – only authorised and recognised CCPs can provide clearing services in the EU**
- **Non-EU (i.e. recognised) CCPs are split into:**
 - (i) **Tier 1 CCPs** (e.g. LME Clear Limited); and
 - (ii) **Tier 2 CCPs** (e.g. LCH Limited)



Mandatory clearing only applies to certain standardised OTC derivatives contracts

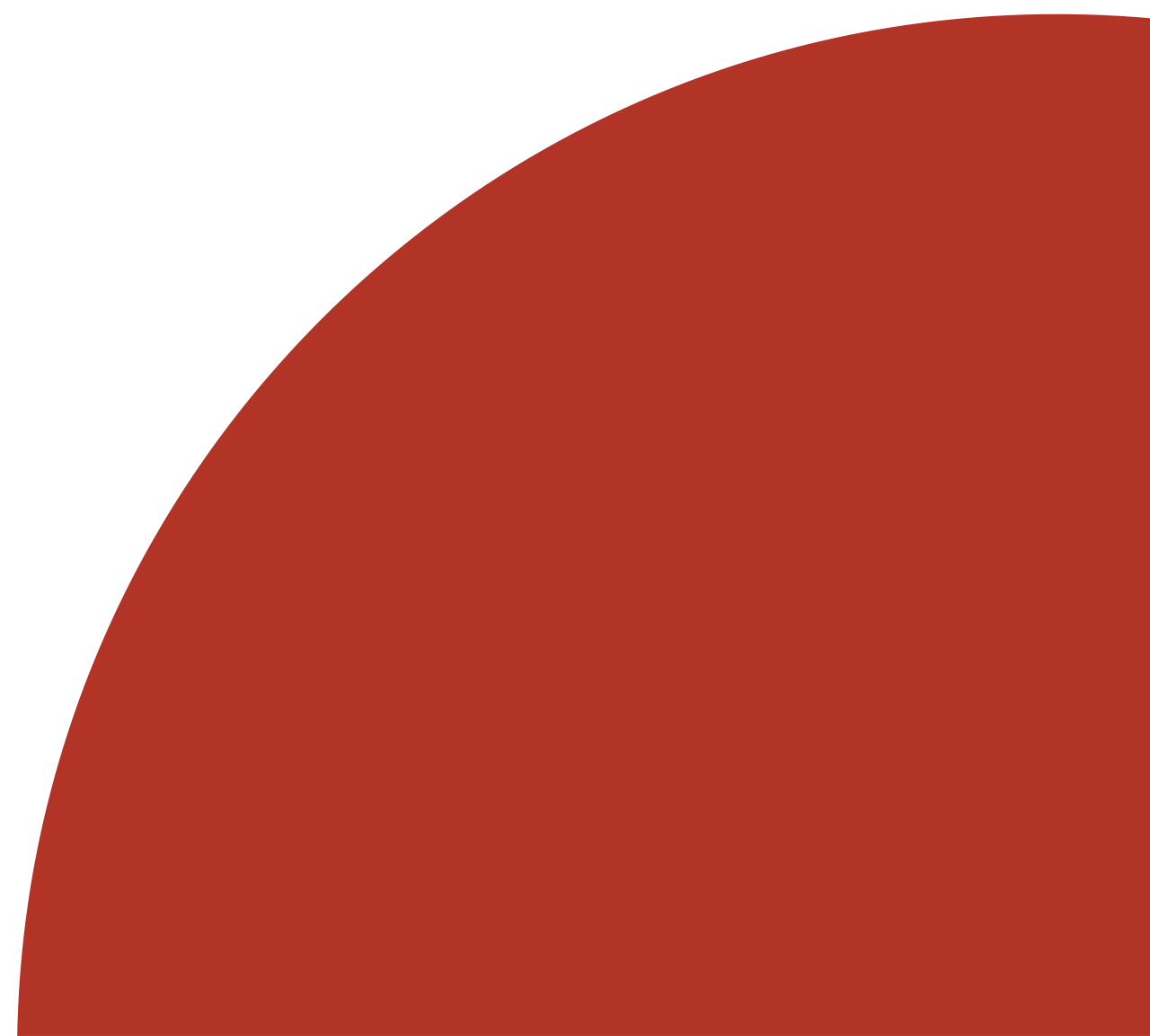


Currently, only certain subsets of the following transaction types are subject to mandatory clearing:

- Interest rate derivatives
 - « G4 Rates »
USD/GBP/JPY/EUR
 - « Additional Rates »
PLN/NOK/SEK
- Index Credit Default Swaps (CDS)

Clearing:

Impact for counterparties



EMIR 3.0 – Active account requirement



New obligation to clear a proportion of certain derivatives at EU CCPs



Application: FC+s and NFC+s subject to the clearing obligation



Limited to a certain proportion of certain derivatives



Aim to incentivise clearing of certain euro and zloty derivatives trades in the EU



Active account requirement: overview

Key features of the active account requirements and the related reporting requirement

Financial counterparties and non-financial counterparties

- subject to the clearing obligation
- exceeding the clearing thresholds in specified categories of derivatives
- in an individual category or in aggregate

shall hold for these categories at least one active account at an authorised CCP and

- shall clear a “representative” number of trades in this account (the “**representativeness requirement**”)
- shall notify ESMA and its relevant NCA
- shall establish such account within six months of being subject to the active account requirement

Plus...

- for **groups** subject to consolidated supervision, derivatives cleared by other entities in the group (except for intragroup transactions) need to be considered
- “**representativeness requirement**” shall not apply to counterparties with a notional clearing volume outstanding of **less than €6 bn** in specified categories of derivatives
- assessment as to whether the representativeness requirement applies depends on **a further set of subcategories** of the specified categories of derivatives
- **various conditions apply** including that the account must be permanently functional and must be set up at all times for large volumes of derivatives

And...

- in terms of **scope**, the account only applies to certain types of transaction: (i) interest rate derivatives denominated in euro or zloty; and (ii) Short-Term Interest Rate (STIR) derivatives
- parties **must report on the active account requirement to NCAs** every six months and must stress test the requirements
- **exemption for entities that clear at least 85% of relevant contracts** at an authorised CCP
- NCAs can impose **periodic penalty payments** for non-compliance

Active account requirement – technical standards on representativeness

The ESMA mandate regarding technical standards for the representativeness requirement covers the following.

ESMA to specify -

- different classes of derivative contracts – up to three classes
- different maturity ranges – up to four ranges
- different trade size ranges – up to three trade size ranges



To ensure the representativeness of the derivative contracts to be cleared through active accounts

and for each class -

- subcategories to be represented in the active account – up to five subcategories

and the reference period -

- at least 6 months for counterparties with less than €100 bn notional clearing volume
- at least 1 month for counterparties with more than €100 bn notional clearing volume

On timing...

ESMA has 6 months to submit draft RTS to the Commission

Joint Monitoring Mechanism

The amending regulation inserts a new article 23c, which requires ESMA to establish a Joint Monitoring Mechanism to monitor the extent to which the EMIR 3.0 changes result in meaningful positive change. The Joint Monitoring Mechanism will share information and cooperate with the EMIR Supervisory Colleges and National Competent Authorities as necessary.

Composition

- ESMA
- EBA
- EIOPA
- ESRB
- ECB
- Central banks of issue of currencies in which the active account requirement specified categories of derivatives are denominated
- One NCA per member state
- European Commission

Scope of monitoring

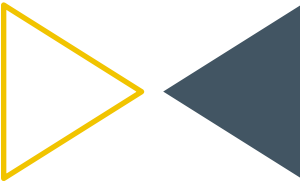
- Implementation and success of active account requirement and client information requirements
- Cross-border implications of client clearing relationships
- Resilience of CCPs
- Concentration risks
- Effectiveness of measures to improve attractiveness of EU CCPs, encouraging clearing at EU CCPs, and enhancing monitoring of cross-border risks

Exemption for post-trade risk reduction services

The amendments include an exemption from the clearing obligation for OTC derivatives which are the result of an eligible post-trade risk reduction exercise. This new provision follows work done in 2020 resulting in ESMA's final report to the European Commission on PTRR services which found that an exemption for PTRR trades would be beneficial and reduce risk in the market.

PTRR exercise requirements (article 4aa(3) summary)

Performed by a MiFID-authorized entity
Performed by an independent entity
Reduces risk for each portfolio submitted to the exercise
Accepted by participants in full (participants not being able to choose which trades to execute)
Open only to prospective participants that initially submitted a portfolio
Market risk neutral
Does not contribute to price formation
Takes the form of compression, rebalancing, or optimisation (or a combination)
Bilateral or multilateral



PTRR service provider requirements (article 4aa(4) summary)

Compliance with pre-agreed rules of the exercise
Act in reasonable, transparent and non-discriminatory manner
Ensure participants cannot influence the exercise result
Recordkeeping
Information sharing with NCA and ESMA
Monitoring to ensure participants are not using the exercise to circumvent the clearing obligation

- Plus:**
- ESMA to publish PTRR service provider list annually
 - ESMA requirement to report to the EC

Exemption for third-country pension schemes

On 18 June 2023, the exemption from the clearing obligation for pension schemes under EMIR expired. EMIR 3.0 amends article 4(1) by adding a sub-paragraph which includes a new exemption to the clearing obligation for third-country pension schemes.

Article 4(1) – additional sub-paragraph

The obligation to clear all OTC derivative contracts shall not apply to contracts concluded in the situations referred to in the first subparagraph, point (a)(iv), between

- on the one side, an FC+ or an NFC+, and
- on the other side, **a pension scheme arrangement established in a third country and operating on a national basis, provided that such entity or arrangement is authorised, supervised and recognised under national law and where its primary purpose is to provide retirement benefits and is exempted from the clearing obligation under its national law**

“To ensure a level playing field between Union and third-country credit institutions offering clearing services to pension scheme arrangements, an exemption from the clearing obligation under Article 44(1), point (iv), of Regulation (EU) No 648/2012 should be introduced where a Union financial counterparty or a non-financial counterparty that is subject to the clearing obligation enters into a transaction with a pension scheme arrangement established in a third country which is exempted from the clearing obligation under that third country’s national law.”

- Recital 8 of the Amending Regulation

Public sector entity participation

Article 5 of EMIR exempts certain public sector entities from the clearing obligation on the grounds that this is justified and in the public interest – but the European Commission aims to encourage EU public authorities to clear at EU CCPs where possible.

Accordingly, the EMIR 3.0 updates include an ESMA mandate to develop guidelines for authorised CCPs to use regarding exposure management.

Article 40 – additional paragraph (summary)

Without prejudice to Article 1(4) and (5), and with the objective of facilitating central clearing by public sector entities **ESMA shall** [within 18 months of the amending regulation coming into force] **issue guidelines [...]** **specifying the method to be used by CCPs** authorised under Article 14 [of EMIR] **for the calculation of exposures and of the contributions**, if any, **to the CCPs' financial resources of public sector entities** participating in such CCPs, duly taking account of the mandate of public sector entities.

Some public entities have chosen over the years to start centrally clearing their contracts on a voluntary basis. [...] The Commission strongly encourages public authorities in the EU to clear at EU CCPs, should they decide to clear and where the products sought are available.

A path towards a stronger EU clearing system, December 2022

ESMA public register

ESMA is already required to establish, maintain and keep up to date a public register which identifies the classes of OTC derivatives subject to the clearing obligation. The EMIR 3.0 changes add another data element that will need to be included on this register.

Current data elements (summary)

- Classes of OTC derivatives subject to the clearing obligation
- CCPs that are authorised or recognised for the purpose of the clearing obligation
- Effective date of the clearing obligation (including any phased-in implementation)
- Classes of OTC derivatives that should be subject to the clearing obligation but for which no CCP is authorised
- CCPs notified to ESMA by the competent authority for the purposes of the clearing obligation and the date of notification



New data element (summary)

The proportion, as of the end of the calendar year, of derivatives contracts cleared in EU (authorised) CCPs compared with those cleared in non-EU (recognised) CCPs

on:

- an aggregated basis; and
- per asset class

Uncollateralised bank guarantees

Article 46 is being expanded in terms of the guarantees CCPs may accept as collateral.

Key changes for CCPs



Plus...

ESMA is mandated to develop technical standards covering:

- the type of collateral that could be considered highly liquid*
- haircuts*
- conditions where guarantees may be accepted including concentration limits, credit quality requirements and wrong-way risk requirements*

Client porting in cases of member default

Two key waivers have been agreed, which originated from the European Parliament's position on the transfer of assets and positions held by clients where a clearing member defaults.



Reliance on transferor's due diligence for AML



Grace period for compliance with capital requirements

3 months*

** Current draft agreed text sets waivers at 3 months – but general industry view is that this may not be long enough.*

Clearing:

*Impact for clearing
members and clients that
provide clearing services*

Information disclosure and reporting requirements

Clearing services

- Requirement to inform clients of the possibility to clear contracts at authorised CCPs (information to be provided at outset of clearing relationship and at least quarterly)

(new Article 7b(1) and (3))

Amends on transparency

- New requirement to inform clients re:
 - margin models
 - margin calls
 - posting procedures
 - margin requirements simulations
 - other information to clearing members required so those members can comply with their own transparency obligations

(new Article 38(8))

Costs/fees

- Requirement to disclose fees charged to the clients for the provision of service
- Includes other fees and associated costs related to/associated with clearing services

(new Article 7b(2))

Information reporting for non-EU clearing

The EMIR 3.0 changes include a new requirement for clearing members and clients that provide clearing services to report clearing activity at third country CCPs to their relevant competent authority. The competent authority will then pass the information on to ESMA and the Joint Monitoring Mechanism.

Scope of reports

- Type of financial instruments or non-financial instruments contracts covered
- Average values cleared over one year per Union currency and per asset class
- Amount of margins collected
- Default fund contributions
- Largest payment obligation

On timing...

ESMA has 12 months to submit draft RTS to the Commission

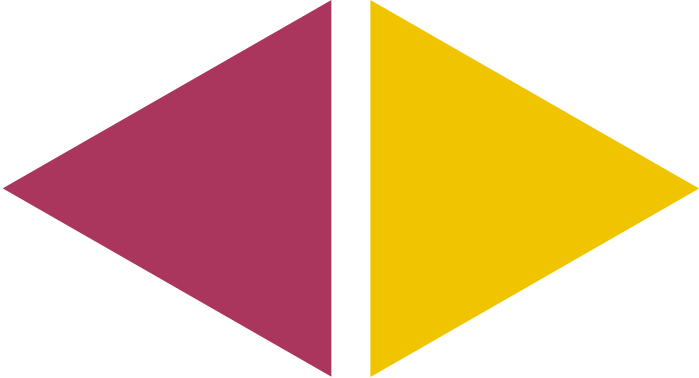
Acceptance of non-financial counterparties as clearing members

New condition for non-FC clearing members

- Non-FC must be able to demonstrate how it intends to fulfil margin requirements and default fund contributions, including in stressed market conditions

Limitation for non-FC clearing member to provide clearing services

- Non-FC clearing member can only provide services and maintain accounts for counterparties in the same group



ESMA RTS specifying elements to be considered when:

- CCP establishes admission criteria
- CCP assesses ability of non-FC to meet margin requirements and default fund contributions

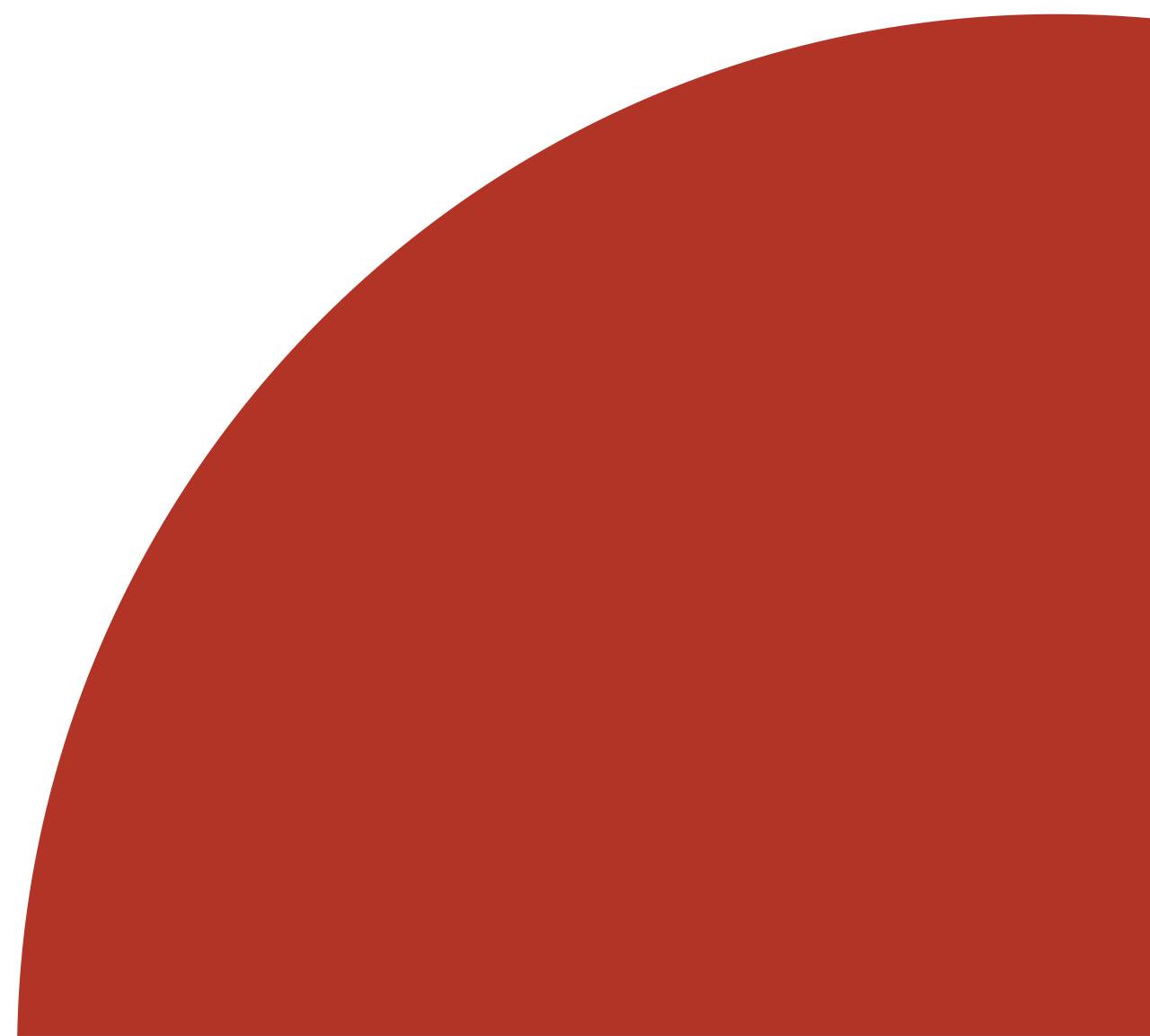
Competent authority requirements

- Regular review of CCP arrangements to monitor the condition
- Annual report to the EMIR supervisory college

On timing...

ESMA has 12 months to submit draft RTS to the Commission

Clearing:
Impact for CCPs



Impact of EMIR 3.0 for CCPs

Key changes for CCPs include the following.

1

EU CCPs reporting to ESMA (Article 7c)

2

Authorisation and recognition of CCP changes

3

Changes for Tier 2 CCPs and recovery and resolution (and ESMA's role)

4

CCP margin model disclosure (Article 49)

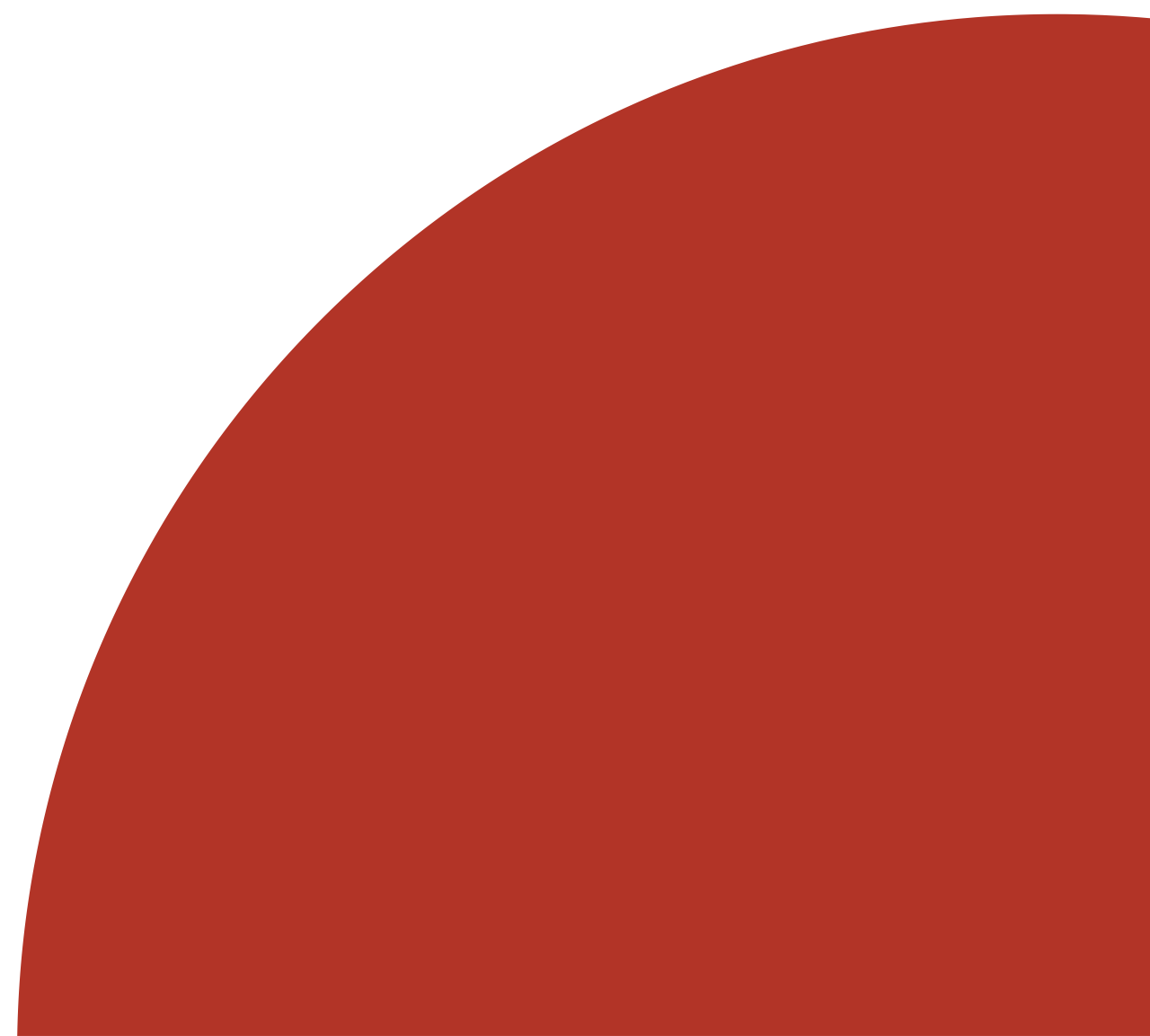
5

CCP interoperability arrangements

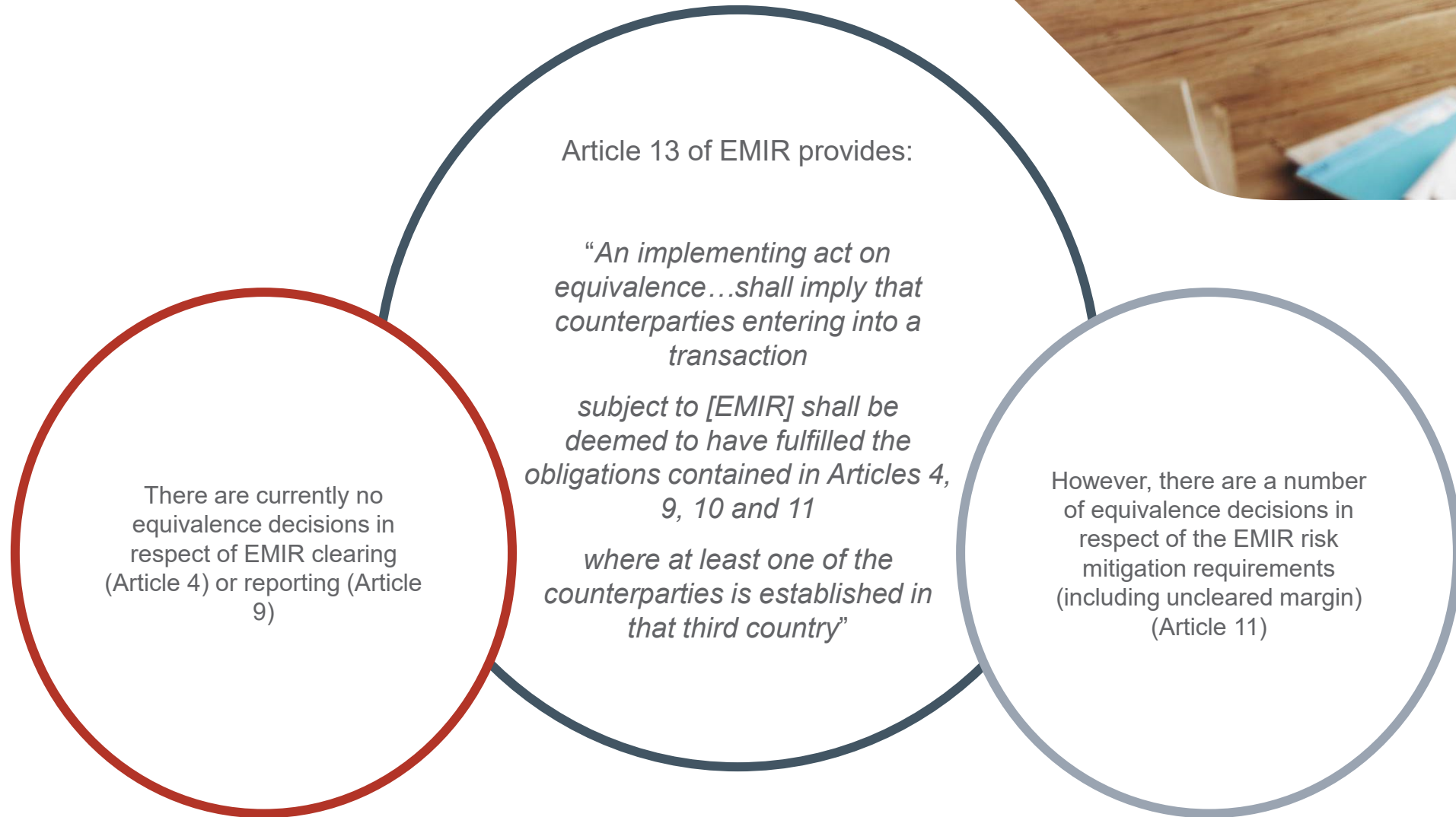
6

Infringements

Equivalence and
impact on intragroup
exemptions from
clearing and margin




Equivalence: Overview





Equivalence and relevance for intragroup exemptions from clearing and margin


Clearing

 For a cross-border counterparty pairing, ***an equivalence decision is required as a pre-requisite*** to a permanent intragroup exemption being granted on a cross-border basis


 To date, ***no equivalence decisions have been made in the context of clearing***


 However, there is a temporary cross-border intragroup ***derogation until 30 June 2025***


 The derogation will only apply if the EU counterparty has notified its competent authority in writing that conditions set out in the clearing RTS are met and, within 30 calendar days after receipt of the notification, the competent authority has confirmed that those conditions are met


 If an equivalence decision is adopted, the derogation will end 60 days after the date of entry into force of the equivalence decision


Margin


 For a cross-border counterparty pairing, ***an equivalence decision is required as a pre-requisite*** to a permanent intragroup exemption being granted on a cross-border basis

 To date, ***equivalence decisions exist for Australia, Brazil, Canada, Hong Kong, Japan, Singapore and the U.S. (CFTC and PR)***

 Note that the equivalence decision will only apply if it covers the relevant entity type and transactions specified therein

 If there is no applicable equivalence decision, entities must look to the temporary cross-border ***derogation which is currently available until 30 June 2025***

 The derogation will only apply if the EU counterparty has satisfied certain conditions

 If an equivalence decision is adopted, the derogation will end 4 months after the date of entry into force of the equivalence decision

Impact of EMIR 3.0 on equivalence and intragroup exemptions

01

Equivalence:

- Equivalence no longer an option for clearing or reporting; retained for risk mitigation
- Amendment to remove reference to counterparties “established” in a third country

02

Intragroup exemptions:

- Removal of equivalence requirement for cross-border intragroup exemptions for margin and clearing
- Replacement with a list of third countries for which an exemption should not be granted (which are on an AML or tax blacklist, or which are otherwise specified by the European Commission in a Delegated Act)

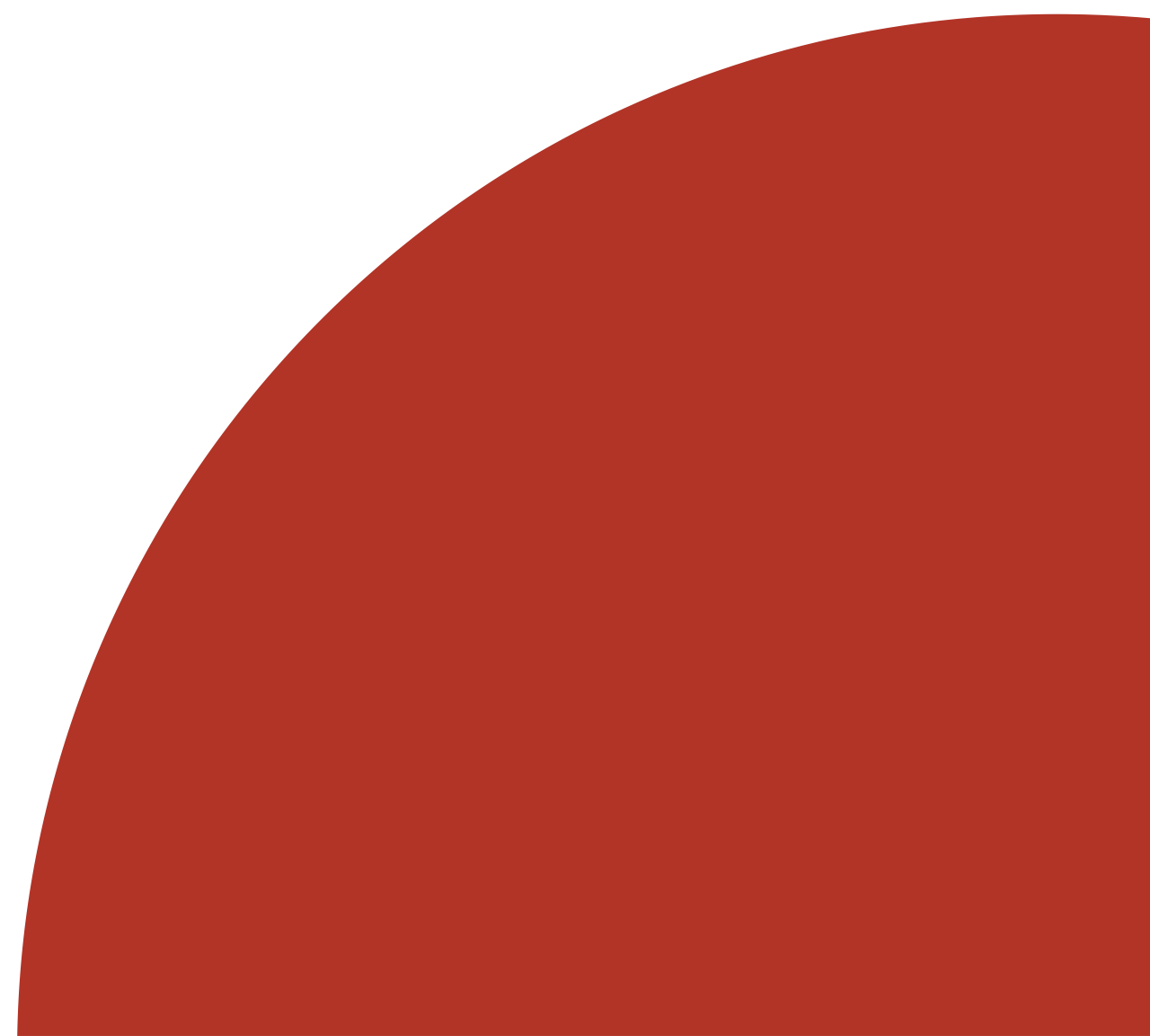
03

Amendments to CRR:

- CVA changes



Risk mitigation
(including uncleared
margin)



EMIR introduced uncleared margin requirements to manage counterparty credit risk

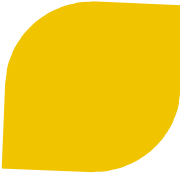


Margin rules apply to uncleared OTC derivatives as between:

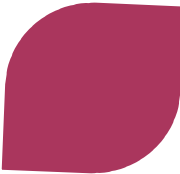
- a FC or NFC+ facing a FC, NFC+ or a third country equivalent of a FC or NFC+; or
- two third country FC or NFC+ equivalents, if the trade has “*direct, substantial and foreseeable effect*” or where application of the regulation is needed to prevent evasion
- subject to equivalence



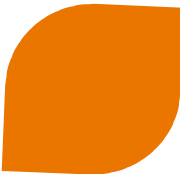
Variation Margin (VM) (title transfer): Mark-to-market exposures - Net basis, no segregation



Initial Margin (IM) (security arrangement): “Buffer” to cover potential future exposures over a 10 day period - Gross basis and segregated. Most systemically important counterparties only (EUR 8 billion threshold).



Margin rules aimed at ensuring the value of the collateral is maintained and that collateral will be available when required. For example, only “eligible collateral” may be posted and will be subject to haircuts.



Limited exemptions apply: NFC-s/covered bonds/STS securitisations/intragroup/non-netting/CCPs/FX contracts (IM)/EUR 8 billion threshold (IM)/physically settled FX forwards & swaps(VM)/equity and index options

EMIR risk mitigation – mark-to-market valuation

- 01 Only applies to FC and NFC+
- 02 Mark-to-market outstanding contracts on a daily basis
- 03 Mark-to-model permitted where market conditions prevent marking-to-market



Impact of EMIR 3.0 on risk mitigation requirements: Exemptions

01

NFCs coming into scope of margin and valuation rules for first time have 4 months to comply

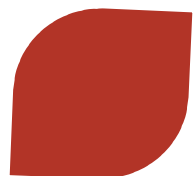
02

Exemption for single-stock equity options and index options (VM and IM)

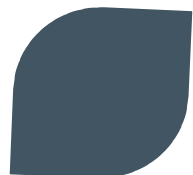
- **Current position:** ESAs proposed two year extension to existing derogation until 4 January 2026 to allow EMIR 3.0 time to take effect; forbearance available in interim period
- **Post-EMIR 3.0:** Permanent exemption adopted; ESMA review every 3 years



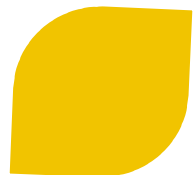
Impact of EMIR 3.0 on risk mitigation requirements: Initial margin model validation



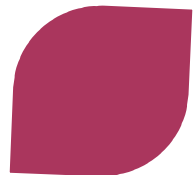
- **New requirement to obtain authorisation** from NCAs before initial use or before adopting a change to an IM model (and additionally from EBA for pro-forma models)
- **A pro-forma model (e.g. SIMM) must first be validated by the EBA** which will provide a central validation function
- Until the EBA has publicly announced that it has set up its central validation function, the validation of pro-forma models shall be carried out by NCAs



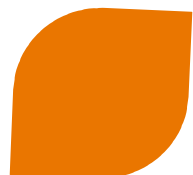
- NCAs/EBA are required to grant authorisation within **6 months** (for a new model) or **3 months** (for a change to a model) from receipt of application
- Counterparties are required to provide relevant information to their NCAs/EBA via the relevant **central database**



- EBA is mandated to **draft RTS on IM models** for credit institutions and investment firms that have, or belong to a group that has, a monthly average outstanding notional amount of non-centrally cleared OTC derivatives **higher than or equal to EUR 750 billion** (within 12 months of entry into force of EMIR 3)
- Note existing draft RTS and EBA opinion (July 2023)



- **Annual fee for using pro-forma models** based on the monthly average outstanding notional amount of non-centrally cleared OTC derivatives over the last 12 months
- EBA is mandated to issue **guidelines on the authorisation/application process** and to produce an annual report and may issue recommendations for NCAs on model validation



- **Practical impacts/concerns?**

Reporting



EMIR introduced a reporting obligation (for exchange traded and OTC derivatives)

- 01 EU counterparties are subject to the EMIR reporting obligation (*note changes effective April 2024)
- 02 All counterparties and CCPs must report details of all derivative contracts concluded, modified or terminated (subject to mandatory reporting and intragroup exemption)
- 03 Must report to registered or recognised trade repository (TR)
- 04 Must report no later than the working day following the event; Content and format in RTS/ITS; LEIs required
- 05 Recordkeeping: Counterparties will also keep a record of any derivative contact they have concluded and any modification for a least 5 years following the termination of the contract
- 06 Exemption for intragroup transactions where one party is NFC or third country NFC
- 07 Mandatory reporting may apply (see next slide); also possible to delegate reporting

EMIR: Mandatory and delegated reporting

Key takeaway: Both parties responsible for reporting except in the case of “mandatory reporting” where FCs are responsible and legally liable for OTC reporting for NFC-s (see also rules for AIFs/UCITS/IORPs)

- **Mandatory reporting**
 - Under EMIR, EU FCs are responsible and legally liable for OTC reporting for EU NFC-s they trade with (since 18 June 2020 – excludes UK NFC-s post-1 January 2021)
- **If mandatory reporting does not apply, delegation is possible:** Note industry Master Regulatory Reporting Agreement (**MRRA**) (which provides for delegated and mandatory reporting)
- **Delegated reporting** (note change post-1 January 2021 for EU vs UK pairs)
 - Third country FCs are not responsible and legally liable for OTC reporting for EU NFC-s under EMIR
 - In this scenario, the NFC- may delegate its reporting obligation under EMIR

A note on cross-border application of mandatory reporting (pre-EMIR 3)



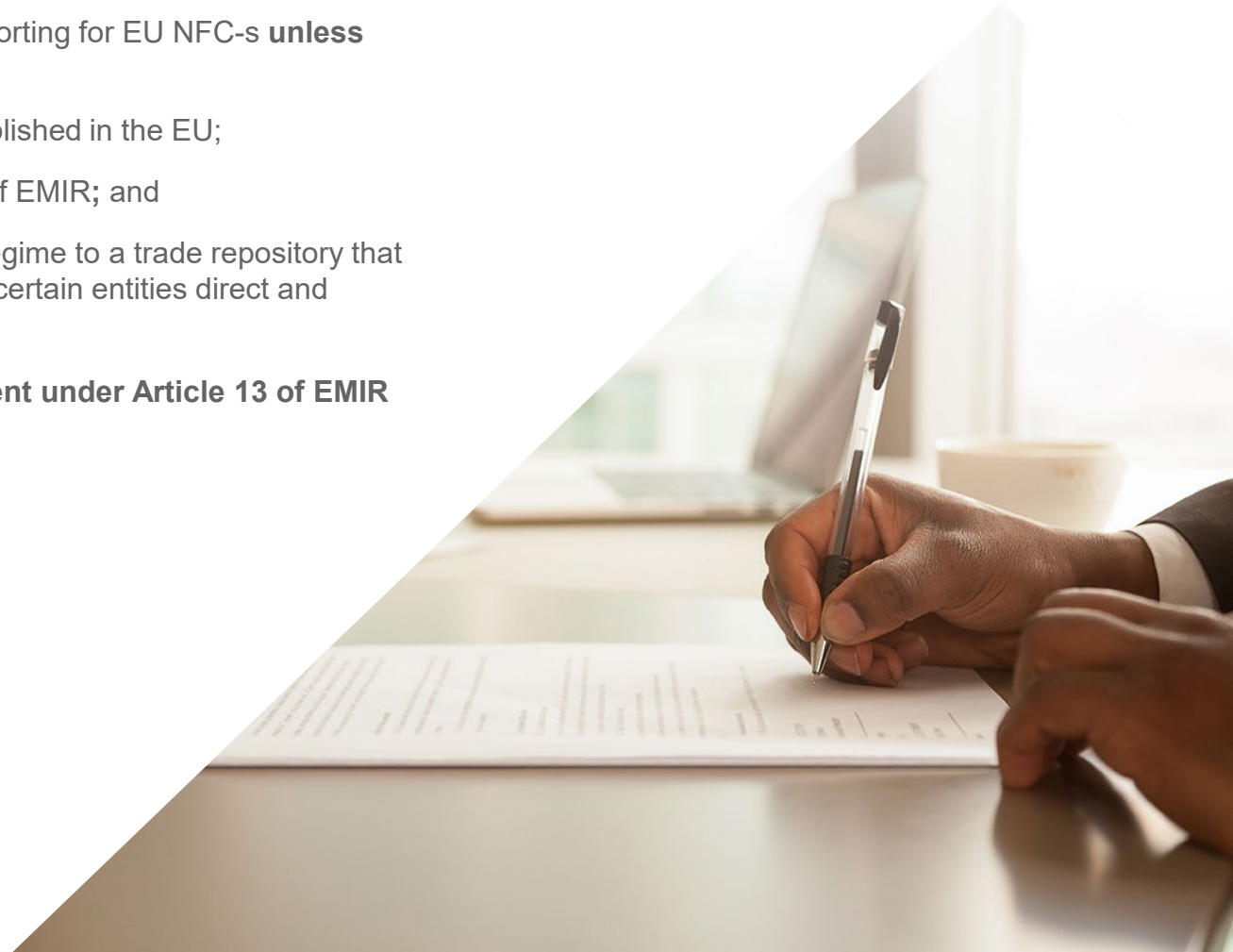
EU FCs are responsible and legally liable for OTC reporting for EU NFC-s

Third country FCs are **not** responsible and legally liable for OTC reporting for EU NFC-s **unless certain conditions have been satisfied:**

1. The third country entity would be qualified as a FC if it were established in the EU;
2. The third country regime is declared equivalent under Article 13 of EMIR; and
3. The third country FC has reported pursuant to the third country regime to a trade repository that is subject to a legally binding and enforceable obligation to grant certain entities direct and immediate access to data

No third country reporting regime has yet been declared equivalent under Article 13 of EMIR

Impact of EMIR 3 changes?



Exemption for intragroup transactions from the reporting obligation

Amendment to Article 9 EMIR

- **New reporting requirement where NFC+ benefits from the intragroup exemption**
- EU parent undertaking to report the net aggregate positions by class of derivatives of NFC+ to its competent authority on a weekly basis

Reporting – data quality and penalties



Data quality - new requirement

- New requirement to put in place **appropriate procedures and arrangements** to ensure the quality of data reported
- As before - counterparty and CCP requirement to report details of derivative contracts **correctly** and **without duplication**
- Includes where the reporting obligation has been **delegated**
- ESMA to draft **guidelines** to specify abovementioned **appropriate procedures and arrangements**



Penalties – new requirements

- Member state obligation **to set rules on penalties** for infringing rules relating to reporting (note: penalties requirements already exist but these EMIR 3.0 changes are in addition to existing requirements, and with more granularity)
- Requirement for penalties (i) to include at least administrative **finer**; and (ii) to be **effective, proportionate and dissuasive**
- Competent authority obligation to impose (or have imposed) administrative or periodic penalty payments on entities whose reports **repeatedly contain manifest errors**
- Limit on periodic penalty payments: they **shall not exceed 1% of average daily turnover** for the preceding business year and **may be imposed for a period of up to 6 months**
- ESMA to draft **RTS** specifying what constitutes **systematic manifest errors**



Contacts



Damian Carolan

Partner, London
Financial Services Regulatory

Tel +44 20 3088 2495
Mob +44 7500 841 530

damian.carolan@allenovery.com



Paul Péporté

Partner, Luxembourg

Tel +352 44 44 5 5711
Mob +352 621 268 150

paul.peporte@allenovery.com



Nick Bradbury

Partner, London
Financial Services Regulatory

Tel +44 20 3088 3279
Mob +44 7971 249 680

nick.bradbury@allenovery.com



Christian Kloepfer

Counsel, Frankfurt

Tel +49 69 2648 5944
Mob +49 172 6189432

christian.kloepfer@allenovery.com



Emma Lancelott

Knowledge Counsel, London

Tel +44 20 3088 2982
Mob +44 7 795 601 570

emma.lancelott@allenovery.com

Questions?

Allen & Overy is an international legal practice with approximately 5,600 people, including some 580 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at allenoverylaw.com/global/global_coverage.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

These are presentation slides only. This document is for general information purposes only and is not intended to provide legal or other professional advice.