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# European Market Infrastructure Regulation (EMIR 3.0)

## Obligations on the buy-side

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# Background

The European Market Infrastructure Regulation (EU EMIR), among other things, lays down rules on over-the-counter (OTC) derivatives, central counterparties (CCPs) and trade repositories. Since its publication in 2012, EU EMIR has been updated multiple times, including some significant changes pursuant to EMIR "Refit" in 2019.

In 2020, the UK left the EU, though EU law including EU EMIR continued to apply until January 2021. At that point EU EMIR, and its updates until then, became part of EU retained law (UK EMIR). Updates to EU EMIR after that time, including those set out below will not apply automatically to UK EMIR, though the UK may choose to follow some of them.

On 7 February 2024, the Council and the Parliament reached a provisional political agreement on a review of EU EMIR, which proposes certain amendments to the regulation. On 24 April 2024, the Parliament adopted the final text in its plenary session. This proposed update to EU EMIR (known as EMIR 3.0) contains the following changes:

## Clearing:

- introducing a new "active account obligation";
- providing a clearing exemption for third-country pension scheme arrangements;
- adding a clearing exemption for post-trade risk reduction services;
- creating a new reporting requirement in relation to clearing;
- updating what collateral can be provided to CCPs; and
- increasing clearing and CCP transparency.

## Risk mitigation and margin:

- adding an implementation period for newly-classified NFC+s in relation to the daily valuation of outstanding contracts;
- adding an implementation period for newly-classified NFC+s in relation to the exchange of margin;
- formalising the margin exemption for stock options and equity index options; and
- creating rules regarding initial margin model validation.

## Trade reporting:

- building on enhanced reporting requirements;
- introducing additional reporting requirements for certain NFC+s;
- amending how reporting can apply to some trading relationships of NFC-s; and
- codifying penalties for reporting breaches.

## Classification and scoping:

- updating the clearing threshold calculations; and
- changing the definition of intragroup transactions.

EMIR 3.0 also makes some amendments to the Capital Requirements Regulation[1] and the Money Market Funds Regulation[2] that are beyond the scope of this article.

In respect of many of these changes, EMIR 3.0 provides that additional secondary legislation and guidance will be produced to address its detailed requirements. As such, whilst we hope that market participants find this article helpful, it should be noted that the rules are likely to evolve and change, and the full scope of several of the obligations is not yet clear. We will be monitoring developments closely and will provide updates as required.

We provide further detail on how this might affect market participants, with a particular focus on the buy-side[3].

## Timing

EMIR 3.0 will come into force 20 days after publication in the Official Journal (albeit, as set out below, certain provisions will not apply immediately). Market participants therefore expect EMIR 3.0 to come into force during the autumn of 2024.

As noted below, certain provisions will technically be in force while details as to how the updated regulation should be complied with have yet to be published. There is therefore a risk that EMIR 3.0 comes into force without counterparties having the full information available to them to ensure compliance. Previously, the European Securities and Markets Authority (ESMA) has addressed this by effectively requesting that the relevant supervisory entities do not enforce the relevant provisions until such later date as all the information is available. We therefore might expect a similar approach to be taken for EMIR 3.0, if needed.

> As we approach the implementation of EMIR 3.0, it is vital for market participants to review the significant developments in clearing and reporting requirements set forth by this update. Understanding the scope of the changes (to the extent possible) and adapting promptly will be essential to navigate the strengthened regulatory framework, ensure compliance, and sustain efficiency amidst the evolving landscape of European financial regulations.

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# Clearing

## Active account obligation[4]

### Background

As the review of EU EMIR has progressed, the proposed "active account" obligation has been one of the key discussion points of EMIR 3.0. Broadly, it seeks to incentivise EU counterparties to clear a certain number of derivatives at an EU authorised CCP, with the general aim of bringing into the EU the clearing of certain derivatives and reducing the reliance of EU counterparties on large third-country CCPs (i.e. those in London).

Given the scope of the Active Account Obligation (as defined below), it is unlikely to be applicable to large portions of the buy-side; however, market participants should be aware of the rules and how these might impact them if they were to come into scope.

### Scope

A counterparty that:

a. is subject to the clearing obligation (i.e. an "FC+" or "NFC+")[5]; and

b. exceeds the clearing threshold[6] in respect of the Relevant Derivatives (as defined below)[7] (either individually or when aggregated across the Relevant Derivatives),

may need to, in respect of:

a. interest rate derivatives denominated in euro and Polish zloty; and

b. short-term interest rate derivatives denominated in euro,

(together the Relevant Derivatives)[8]

hold at least one active account at an EU authorised CCP[9] (the Account), and clear at least a "representative number of trades" in this account (the Active Account Obligation).

If a counterparty is subject to the Active Account Obligation, it should ensure that it meets the following requirements (unless it benefits from an exemption – see below for further details):

1. the Active Account Functionality Requirements (as defined below);
2. the Active Account Reporting Requirement (as defined below); and
3. (provided the threshold noted below is met) the Active Account Representative Clearing Requirement (as defined below).

We summarise each of these requirements below, and include a flowchart on page 7 for a visual representation.

### Active Account Functionality Requirements

Counterparties subject to the Active Account Obligation must ensure that all of the following conditions are met:

a. the Account must be permanently functional, including with legal documentation, IT connectivity, and internal processes associated with the Account being in place;

b. the counterparty must have systems and resources available to be operationally able to use the Account, even at short notice, for large volumes of Relevant Derivatives at all times and to be able to receive, in a short period of time, a large volume of transactions from positions held at a Tier 2 CCP[10]; and

c. it must be possible for all new trades of the counterparty in Relevant Derivatives to be cleared in the Account at all times,

(together, the Active Account Functionality Requirements).

The Active Account Functionality Requirements must (i) be met by the counterparty within six months of becoming subject to the Active Account Obligation, and (ii) be "regularly stress-tested", at least once per year.

ESMA (in cooperation with other EU authorities) will be drafting legislation further specifying the conditions relating to (a), (b) and (c) above, as well as the conditions of the related stress-testing. In developing that legislation, ESMA will take into account the size of the portfolios of different counterparties, so that counterparties with more trades in their portfolios will be subject to more stringent operational conditions.

### Active Account Reporting Requirement

A counterparty that is subject to the Active Account Obligation must calculate its activities and risk exposures in the Relevant Derivatives and report the information necessary to assess compliance with the Active Account Obligation (the "Active Account Reporting Requirement") to its competent authority every six months. The reporting must include a demonstration to the competent authority that the legal documentation, IT connectivity and internal processes associated with the active accounts are in place.

Counterparties subject to the Active Account Reporting Requirement which hold, for the Relevant Derivatives, accounts at a Tier 2 CCP in addition to active accounts, must also report information on the resources and systems that they have in place to their competent authority every six months to ensure limb (b) of Active Account Functionality Requirements (see above for further information) is met (Resources and Systems Reporting).

ESMA (in cooperation with other EU authorities) will be drafting legislation further specifying the details of the reporting referred to above. In developing that legislation, ESMA will take into account the size of the portfolios of different counterparties, so that counterparties with more trades in their portfolios will be subject to more stringent reporting conditions.

In addition, competent authorities can require more frequent reporting in particular where insufficient steps have been taken to meet the requirements of the Active Account Obligation.

### Active Account Representative Clearing Requirement

The Active Account Representative Clearing Requirement (as defined below) only applies to counterparties with a notional amount outstanding cleared of at least €6bn in Relevant Derivatives.[11] It aims to ensure that such counterparties clear a minimum number of trades at an EU authorised CCP.

If the requirement is applicable, a counterparty must clear in the Account a "Relevant Number" per sub-category of the "Representative Derivatives" during a "Reference Period" (the Active Account Representative Clearing Requirement).

For the purposes of the above:

1. "Relevant Number" is, on an annual average basis:
   a. at least five trades per Reference Period; or
   b. where the resulting number of trades exceeds half of that counterparty's total trades for the preceding 12 months, at least one trade per Reference Period.
2. "Reference Period" is:
   a. if a counterparty has a notional clearing volume outstanding of less than €100bn in Relevant Derivatives, at least[12] six months; or
   b. if a counterparty has a notional clearing volume outstanding of more than €100bn in Relevant Derivatives, at least[13] one month.
3. "Representative Derivatives" should be representative of the Relevant Derivatives that are cleared at a Tier 2 CCP[14]. These will be determined by ESMA, but should be based on a number of sub-categories (which is limited to five sub-categories, and is based on the size of trades and maturity ranges (which are themselves subject to certain limits)) per class of derivative (which is limited to three classes).

Practically speaking, this means that the largest traders may be required to clear up to 900 trades per year through the Account (being five trades per month, in up to five sub-categories of three classes of derivative).

### Exemptions

Counterparties that are subject to the Active Account Obligation and already clear at least 85% of their Relevant Derivatives at an EU authorised CCP are exempt from the Active Account Functionality Requirements, the Active Account Representative Clearing Requirement and Resources and Systems Reporting (which is part of the Active Account Reporting Requirement, noted above).

### Timing

If a counterparty becomes subject to the Active Account Obligation, it must:

a. notify ESMA;
b. notify its relevant competent authority; and
c. establish the Account within six months of becoming subject to the obligation.

### Penalties for breaches

If a counterparty breaches its obligations under the Active Account Obligation, its competent authority is required to impose administrative penalties or periodic penalty payments (or request that the relevant competent judicial authorities do so).

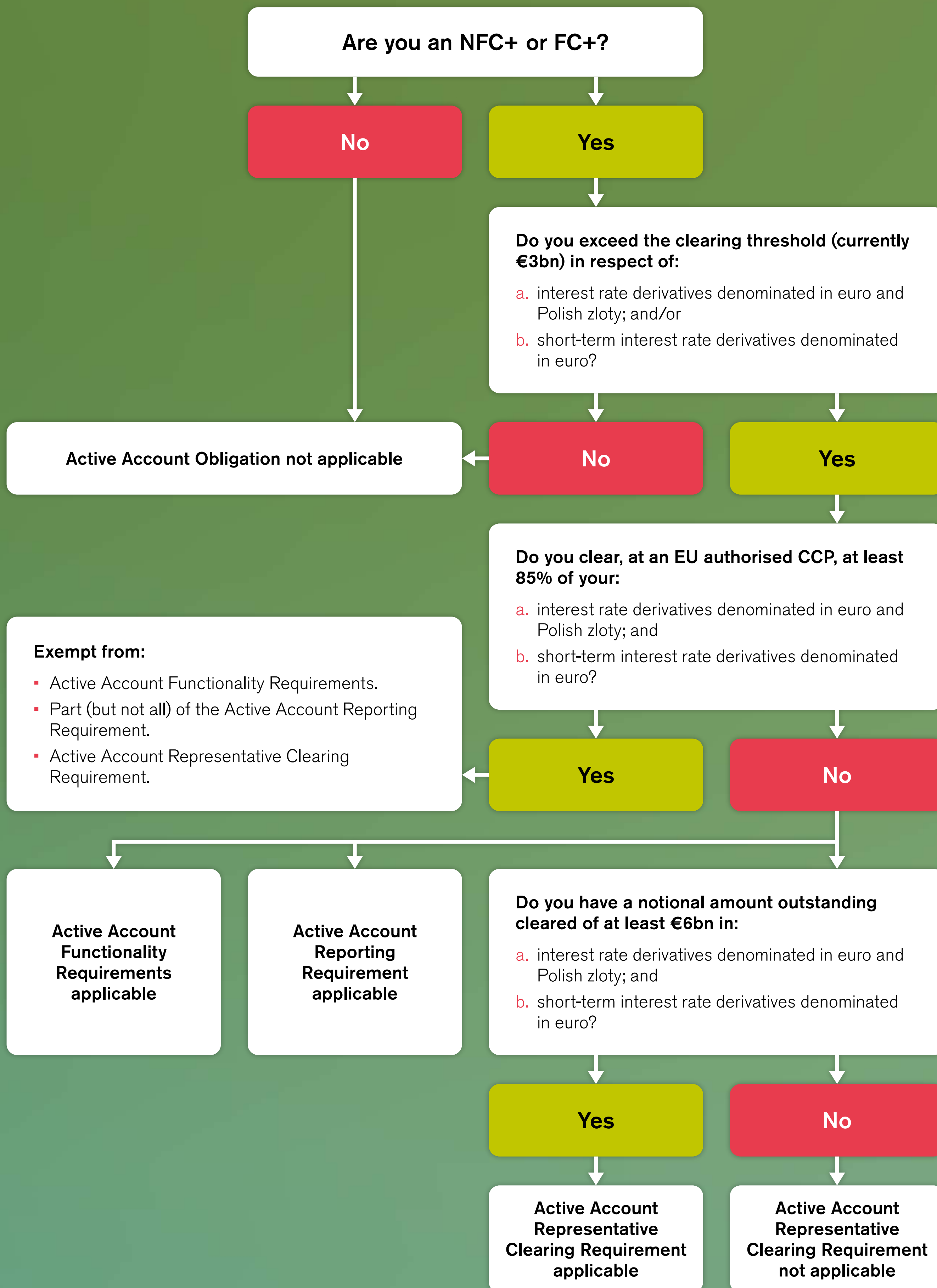
Any periodic penalty payments must:

- be effective and proportionate;
- not exceed a maximum of 3% of the average daily turnover in the preceding financial year;
- be imposed for each day of delay;
- be calculated from the date stipulated in the decision imposing the periodic penalty payment; and
- be imposed for a maximum period of six months following the notification of the competent authority's decision (and, at the end of that period, the competent authority must review the measure and can extend it if necessary).

## Practical considerations

Market participants should familiarise themselves with the Active Account Obligation. If a market participant thinks it may be in scope, it should check its clearing arrangements to see whether it can already clear using an EU authorised CCP through its existing clearing brokers[15]. If this is not possible, the market participant may want to consider engaging with its clearing brokers to see whether the arrangement can be updated or whether arrangements should be put in place with new clearing brokers. Clearing arrangements are often complex and it can take time to negotiate the legal documentation.

## Applicability of the Active Account Obligation



## Third-country pension scheme arrangement clearing exemption[16]

EMIR 3.0 provides that third-country pension scheme arrangements (i.e. pension scheme arrangements outside of the EU) may now be able to benefit from a clearing exemption.[17]

Specifically, it states that the obligation to clear OTC derivative contracts does not apply to contracts entered into by a pension scheme arrangement established in a third country and operating on a national basis provided that:

i. the pension scheme arrangement is authorised, supervised and recognised under national law;

ii. its primary purpose is to provide retirement benefits; and

iii. it is exempted from the clearing obligation under its national law.

This is a welcome development for UK pension schemes (which may currently benefit from a clearing exemption under UK EMIR, but do not benefit from such an exemption under EU EMIR) that trade with EU banks.

Even prior to the above change coming into force pursuant to EMIR 3.0, ESMA has issued a statement deprioritising supervisory actions linked to the clearing obligation for third-country pension scheme arrangements.[18] Practically, this means that third-country pension scheme arrangements may be able to benefit from the above pension scheme arrangement clearing exemption as of 27 March 2024.

Given the complexities of the pension scheme arrangement clearing exemptions in the EU and the UK, we summarise the potential availability of the exemptions, below:

| Parties (assuming that, but for any exemption, each would be subject to the clearing obligation) | | UK EMIR pension scheme arrangement clearing exemption potentially available? | EU EMIR pension scheme arrangement clearing exemption potentially available? |
|---|---|---|---|
| **UK pension scheme arrangement** | **UK bank counterparty** | Yes | N/A (EU EMIR is unlikely to apply to the trading relationship generally) |
| | **EEA[19] bank counterparty** | Yes (and due to the new third-country pension scheme arrangement clearing exemption under EU EMIR, the EEA bank counterparty may not be required to clear the derivatives under EU EMIR) | Yes (due to the new third-country pension scheme arrangement clearing exemption under EU EMIR) |
| **EEA pension scheme arrangement** | **UK bank counterparty** | Yes (however, the EEA pension scheme arrangement may be required to clear the derivatives under EU EMIR) | No |
| | **EEA bank counterparty** | N/A (UK EMIR is unlikely to apply to the trading relationship generally) | No |

## Post-trade risk reduction services clearing exemption[20]

EMIR 3.0 introduces a clearing exemption for post-trade risk reduction (PTRR) services. This provides that the clearing obligation does not apply to "an OTC derivative contract that is initiated and concluded as the result of an eligible post-trade risk reduction exercise" (a PTRR Transaction). PTRR typically involves trade compression or rebalancing to reduce risk and it might result in some new trades being created, or existing trades amended sufficiently that they would otherwise come within the scope of clearing.

A PTRR Transaction is only exempted from the clearing obligation where:

a. the entity providing the post-trade risk reduction exercise complies with certain requirements[21]; and

b. the PTRR exercise itself complies with certain requirements[22].

This exemption is quite complex and should be considered carefully if a counterparty is looking to rely on it.

## Clearing activity reporting[23]

EMIR 3.0 introduces additional reporting requirements in relation to certain cleared derivatives. This is separate and in addition to the existing exchange traded derivatives (ETD) and OTC derivatives reporting obligation under Article 9 of EU EMIR.

Clearing members and clients that clear contracts through a *recognised* CCP (which includes several UK CCPs[24]) must report their clearing activity to their competent authorities.

If:

- the relevant entity is established in the EEA but not part of a group subject to consolidated supervision in the EEA, it must report to its competent authority; and
- if the relevant entity is part of a group subject to consolidated supervision in the EEA, the EEA parent undertaking of that group must report such clearing activity on a consolidated basis to its competent authority.

The report must set out the scope of the clearing activity undertaken at the recognised CCP on an annual basis, specifying all of the following:

a. the type of financial instruments or non-financial instruments cleared;

b. the average values cleared over one year per EEA currency and per asset class;

c. the amount of margins collected;

d. the default fund contributions; and

e. the largest payment obligation.

ESMA (in cooperation with other EU authorities) will be developing draft legislation further specifying the regularity of the reporting, the content of the information to be reported and the level of detail required.

## CCP collateral[25]

EMIR 3.0 updates EU EMIR to provide that a CCP may now accept public guarantees, public bank guarantees, or commercial bank guarantees as collateral to cover its initial and ongoing exposure to its clearing members, or clients of its clearing members, provided that:

- the clearing member or its client (as applicable) is an NFC; and
- the guarantee is unconditionally available upon request within a certain period of time.

## Increased clearing and CCP transparency[26]

EMIR 3.0 introduces several provisions that increase the level of information to be provided to the buy-side regarding the activities of CCPs and their clearing arrangements.

For example, Article 7c of EU EMIR (as introduced by EMIR 3.0) states that clearing members and clients:

i. that provide clearing services both at an EU authorised CCP and a recognised CCP must inform their clients, where the offer is available, of the possibility to clear their contracts at through an EU authorised CCP; and

ii. that provide clearing services to clients must disclose, in a clear and understandable manner, for each CCP at which they provide clearing services, the fees to be charged to clients for the provision of a clearing service and any other fees charged, including fees charged to the client which pass on costs and other associated costs related to the provision of clearing services.

ESMA will be developing further legislation further specifying the type of information required.

Similarly, Article 38 of EU EMIR (as updated by EMIR 3.0) states that clients and clearing members providing clearing services must provide their clients with at least the following:

a. information on the way the margin models of the CCP work;

b. information on the situations and conditions that may trigger margin calls;

c. information on the methodology used to establish the amount to be posted by the clients; and

d. a simulation of the margin requirements the clients may be subject to under different scenarios (which must include both the margins required by the CCP and any additional margins required by the clearing members and the clients providing clearing services).

This will presumably be done through additional website disclosures by each of the CCPs.

# Trade reporting

## Reporting requirements[27]

In relation to reporting, EMIR 3.0 provides that:

i. counterparties that are required to report the details of derivative contracts shall ensure that such details are reported correctly and without duplication, including where the reporting obligation has been delegated; and

ii. counterparties that are subject to the reporting obligation must put in place appropriate procedures and arrangements to ensure the quality of the data they report. ESMA (in cooperation with other EU authorities) will develop guidelines further specifying such "procedures and arrangements".

These changes align the EU EMIR primary text with the separate changes to EU EMIR reporting that came into force in April this year. The reporting regime in respect of UK EMIR is also being updated and draft guidance has been produced.

## Reporting requirements by NFC+s that benefit from the intragroup reporting exemption[28]

EMIR 3.0 introduces a new requirement that, for NFC+s that are part of a group that benefits from the intragroup reporting exemption, the EU parent undertaking of that counterparty must report the net aggregate positions by class of derivatives of that counterparty to its competent authority on a weekly basis. For a counterparty established in the EEA, the competent authority of the parent undertaking must share the information with ESMA and with the competent authority of that counterparty.

## Reporting by NFC-s[29]

EMIR 3.0 amends the conditions required for an entity to benefit from Mandatory Reporting (as defined below).

Under EMIR 3.0, for an NFC- that concludes an OTC derivative contract with an entity established in a third country, the NFC- is not required to report it (and is not legally liable for reporting or ensuring the accuracy of the details of such OTC derivative contracts) under EU EMIR (Mandatory Reporting), if:

a. that third-country entity would be qualified as an FC if it were established in the EEA; and

b. the third-country FC has reported such information pursuant to that third-country legal regime for reporting to a trade repository that is subject to a legally binding and enforceable obligation to grant various entities (including ESMA, the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Systemic Risk Board, amongst others) direct and immediate access to the data.

As such, unlike under EU EMIR prior to the changes introduced by EMIR 3.0, it will no longer be necessary for the legal regime for reporting to which that third-country entity is subject to have been declared equivalent. This makes it potentially more feasible for NFC-s to benefit from Mandatory Reporting[30] in relation to their cross-border trading arrangements.

## Penalties[31]

EMIR 3.0 provides additional detail regarding the potential penalties for breaches of the reporting requirements.

Under EU EMIR prior to the changes introduced by EMIR 3.0, Member States have been given broad discretion to develop rules on penalties for infringements of EU EMIR (with the requirement that these rules include at least administrative fines).

This broad discretion remains under EMIR 3.0; however, the updated legislation provides that competent authorities must impose administrative penalties or periodic penalty payments (or request that the relevant judicial authorities do so), on the entities subject to the reporting obligation under Article 9 of EU EMIR where the details reported repeatedly contain "systematic manifest errors". ESMA (in cooperation with other EU authorities) will develop draft regulatory technical standards specifying what constitutes systematic manifest errors.

Specifically, the periodic penalty payment:

- must not exceed a maximum of 1% of the average daily turnover for the preceding financial year which, in the case of an ongoing infringement, the entity must pay for every day that the infringement continues until compliance with the obligation is restored; and
- may be imposed for a period of up to six months from the date set out in the decision of the competent authority imposing the periodic penalty payment.

# Risk mitigation and margin

## Daily valuation of the value of outstanding contracts – implementation period for NFCs[32]

FCs and NFC+s must mark-to-market on a daily basis the value of outstanding contracts (and, where market conditions prevent marking-to-market, a reliable and prudent marking-to-model must be used).

EMIR 3.0 now provides that an NFC that becomes an NFC+ has four months to put in place the necessary arrangements to comply with this requirement and is exempted from the obligation for contracts entered into during the four months following becoming an NFC+.

## Exchange of margin – implementation period for NFCs[33]

FCs and NFC+s must have in place risk management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts.

EMIR 3.0 now provides that an NFC that becomes an NFC+ has four months to put in place the necessary arrangements to comply with this requirement and is exempted from the obligation for contracts entered into during the four months following becoming an NFC+.

## Stock options and equity index options margin exemption[34]

EMIR 3.0 helpfully states that single-stock options and equity index options that are not cleared by a CCP are exempted from the requirement to exchange of collateral. This permanent exemption (albeit subject to review, as noted below) replaces the rolling temporary exemptions we have had until this point.

ESMA (in cooperation with other EU authorities) will monitor:

a. regulatory developments in third-country jurisdictions in relation to the treatment of single-stock options and equity index options;

b. the impact of the exemption on the financial stability of the EEA or of its Member States; and

c. the development of exposures in single-stock options and equity index options not cleared by a CCP.

At least every three years, ESMA (in cooperation with other EU authorities) must report its findings to the European Commission and, within one year of receiving the report, the European Commission will assess (among other things) the treatment of single-stock options and equity index options.

The European Commission may remove this exemption; however, it is required to provide an "adaptation period" of up to two years.

## Model validation[35]

EMIR 3.0 introduces new requirements in relation to the authorisation and validation of initial margin models.

Many buy-side entities use industry-wide initial margin models, such as ISDA SIMM (in EMIR 3.0, these are referred to as "pro-forma" models). EMIR 3.0 provides that a pro-forma model should be validated by the European Banking Authority (the EBA), following which competent authorities can authorise the model's use (with the competent authorities broadly having responsibility for the implementation of the model).

The EBA can charge an annual fee per pro-forma model to counterparties using the model (which will be proportionate to the monthly average outstanding notional amount of non-centrally cleared OTC derivatives for which the counterparty uses the model).[36]

In line with EU EMIR prior to the changes introduced by EMIR 3.0, EMIR 3.0 also mandates that the EU regulatory authorities will produce additional legislation on initial margin model validation. However, helpfully for the buy-side, EMIR 3.0 envisages that such legislation should apply only to credit institutions authorised in accordance with the Capital Requirements Directive and investment firms authorised in accordance with MiFID II that have (or belong to a group that has) a monthly average outstanding notional amount of non-centrally cleared OTC derivatives of at least €750bn (calculated as the average of the total gross notional amount recorded on the last business day of March, April and May of the preceding year) (i.e. certain "phase 4" initial margin entities).

Whilst there are still concerns in the market regarding the model validation process, this is should mean that a significant portion of the buy-side that use ISDA SIMM should no longer be caught by the most onerous provisions of initial margin model validation. Note, however, that additional processes are potentially relevant for those counterparties that do not use a pro-forma model.

By contrast, under UK EMIR, the Prudential Regulation Authority and the Financial Conduct Authority propose not to implement a supervisory pre-approval requirement at this stage for using initial margin models.

# Classification and scoping

## Clearing threshold calculations

Under EU EMIR, as amended by EMIR Refit, FCs and NFCs may calculate their derivatives exposures to determine whether they are above or below each of the clearing thresholds (colloquially known as being a "+" or a "-", respectively). If such a calculation is not undertaken, the entity is considered to be a "+".

Whether an entity is a "+" or a "-" is important to determining the scope and depth of regulatory obligations with respect to an entity (predominantly impacting the application of the clearing obligation; but also potentially impacting the requirement for, for example, NFCs to exchange margin).

EMIR 3.0 amends the calculation methodology and changes the scope of derivatives that must be included in the calculation as set out below.

### Financial counterparties[38]

For FCs, EMIR 3.0 provides that there are two calculations to be made (each on an annual basis) to determine whether such counterparty is a "+" or a "-":

i. in relation to the aggregate month-end average "uncleared positions" for the previous 12 months (the Uncleared Positions Calculation); and

ii. in relation to the "aggregate month-end average positions in cleared and uncleared derivative contracts for the previous 12 months" (the Aggregate Positions Calculation).

The Uncleared Positions Calculation should include all OTC derivative contracts[39] that are not cleared at an EU authorised or recognised CCP[40] entered into by the FC or by other entities (including NFCs) within the FC's group.

The Aggregate Positions Calculation should include all OTC derivative contracts (i.e. cleared and uncleared) entered into by the FC or by other entities (including NFCs) within the FC's group.

Helpfully for UCITS and AIFs, EMIR 3.0 makes it clear that both the Uncleared Positions Calculation and the Aggregate Positions Calculation should be made at the level of the fund (subject to certain requirements, as has been the case under EMIR Refit).

The relevant thresholds against which the Uncleared Positions Calculation should be compared is not expressly set out in EMIR 3.0; however, in respect of the Aggregate Positions Calculation, ESMA is mandated to draft additional legislation setting out the thresholds relevant to that calculation. This suggests that the Uncleared Positions Calculation may use the existing clearing thresholds[41]; whereas the Aggregate Positions Calculation may use a different set of thresholds.

An FC is considered an FC+ if:

- the results of either the Uncleared Positions Calculation or the Aggregate Positions Calculation exceed a relevant threshold; or
- the FC does not perform both the Uncleared Positions Calculation and the Aggregate Positions Calculation.

### Non-financial counterparties[42]

For NFCs, EMIR 3.0 provides that the Uncleared Positions Calculation should be undertaken to determine whether such counterparty is a "+" or a "-".

This calculation should include all OTC derivative contracts that are not cleared at an authorised or recognised CCP entered into by the NFC which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the NFC or its group.

Importantly, as compared to EU EMIR (and UK EMIR), this means that an NFC no longer needs to include in its calculation (i) those derivatives that are cleared at an EU authorised or recognised CCP, nor (ii) any derivatives entered into by other NFCs in its group (and instead it should look solely at its own positions).

### Timing[43]

The above changes to the clearing threshold calculations will only come into force once regulatory technical standards setting out the updated clearing thresholds (referred to above) come into force. ESMA has 12 months from the date on which EMIR 3.0 comes into force to develop these technical standards (which must then be adopted by the European Commission before coming into force). As such, market participants should have a good amount of time to consider the impact of the changes to the clearing threshold calculations and to implement any process updates as may be required.

## Intragroup transactions[44]

The definition of intragroup transactions is being updated by EMIR 3.0. This is relevant to certain exemptions that may be available under EU EMIR regarding margining and clearing.

The change means that, for a counterparty established in a third country, rather than its jurisdiction having to benefit from an equivalence decision in order for its transactions to be considered intragroup transactions (and, therefore, potentially eligible for the exemptions referred to above); instead, its jurisdiction needs only to not be identified as (i) having strategic deficiencies in its regime on anti-money laundering and counter terrorist financing[45], or (ii) being non-cooperative for tax purposes.

In relation to jurisdictions in which the buy-side frequently operates, it is worth noting that in recent years the Cayman Islands has been identified under both (i) and (ii) above. However, the Cayman Islands was recently removed from the relevant EU list in respect of (i), and was removed from the relevant EU list in respect of (ii) in 2020.

## Next steps

As previously noted, EMIR 3.0 will come into force 20 days after publication in the Official Journal. Market participants should therefore look to understand the changes prior to the regulation coming into force so that they can put in place any required processes or documentation in good time. Once EMIR 3.0 comes into force, there will be some significant differences between EU EMIR and UK EMIR, and market participants that operate under both regimes may need to have in place processes to address both sets of rules.

In addition, significant amounts of secondary legislation and guidance will be produced to address the detailed requirements of the changes to EU EMIR pursuant to EMIR 3.0. We will be monitoring developments closely and will provide updates as required.

**Please speak to your usual Macfarlanes contact, or the article authors below, if you have any questions.**

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## Endnotes

1. Regulation (EU) No 575/2013
2. Regulation (EU) No 2017/1131
3. This note does not cover all of EMIR 3.0, for example it does not address all of the provisions applicable to CCPs (e.g. information requirements; authorisation processes; supervision; emergency situation provisions; recognition; comparable compliance; organisational requirements; conduct of business rules; prudential requirements; margin requirements; default procedures; model reviews, changes and stress-testing; and interoperability arrangements); provisions creating a new "central database"; provisions creating a new "joint monitoring mechanism"; provisions changing the anti-duplication rules; and various provisions relating to reports required of EU authorities. If you have any questions on these, please speak to your usual Macfarlanes contact.
4. Article 7a and 7b of EU EMIR, as introduced by EMIR 3.0.
5. For further detail, please see our note on EMIR Refit, in particular the details of how alternative investment funds are treated for the purposes of the regulation.
6. Currently, this is €3bn in respect of interest rate derivative contracts.
7. In determining its obligations, a counterparty belonging to a group subject to consolidated supervision in the EU should consider all Relevant Derivatives that are cleared by that counterparty or by other entities within the counterparty's group (with the exception of intragroup transactions).
8. Note that this list of Relevant Derivatives may be amended.
9. See here for a list of EU authorised CCPs – List of Central Counterparties authorised to offer services and activities in the Union (europa.eu)
10. The language used in EMIR 3.0 is "clearing service of substantial systemic importance". Substantively, this means Tier 2 CCPs, which are CCPs that are "systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States". This includes LCH and ICE Clear Europe, in the UK – third-country_ccps_recognised_under_emir.pdf (europa.eu).
11. There is limited guidance regarding how this should be assessed. As such, we assume that this relates to the notional clearing volume outstanding as at any given moment. This may be clarified by ESMA in due course in its Q&As – Q&A on EMIR implementation (europa.eu).
12. ESMA is required to submit legislation specifying the Reference Period within six months after the date of entry into force of EMIR 3.0.
13. ESMA is required to submit legislation specifying the Reference Period within six months after the date of entry into force of EMIR 3.0.
14. The language used in EMIR 3.0 is "clearing service of substantial systemic importance". Substantively, this means Tier 2 CCPs, which are CCPs that are "systemically important or likely to become systemically important for the financial stability of the Union or of one or more of its Member States". This includes LCH and ICE Clear Europe, in the UK – third-country_ccps_recognised_under_emir.pdf (europa.eu).
15. See here for a list of EU authorised CCPs – List of Central Counterparties authorised to offer services and activities in the Union (europa.eu).
16. Article 4 of EU EMIR, as amended by EMIR 3.0.
17. The EU pension scheme arrangement clearing exemption under EU EMIR expired in June 2023 and was not extended.
18. ESMA public statement, 27 March 2024 – ESMA provides market participants with guidance on the clearing obligation for trading with 3rd country Pension Schemes (europa.eu).
19. The European Economic Area (EEA).
20. Article 4aa of EU EMIR, as introduced by EMIR 3.0.
21. Such as, complying with the pre-agreed rules of the PTRR exercise; ensuring the participating entities have no influence over the result; potentially undertaking regular compression exercises; certain record-keeping requirements; and certain monitoring requirements to prevent misuse or circumvention of the clearing obligation.
22. Such as, it is performed by an entity authorised in accordance with Article 7 of MiFID II that is independent of the counterparties to the OTC derivative contracts included in the PTRR exercise; it achieves a reduction in risk in each of the portfolios submitted to the PTRR exercise; it is accepted in full; it is open for participation only to the entities that initially submitted a portfolio to the PTRR exercise; it is market risk neutral; it does not contribute to price formation; it takes the form of a compression, rebalancing or optimisation exercise or a combination thereof; and it is executed on a bilateral or multilateral basis.
23. Article 7d of EU EMIR, as introduced by EMIR 3.0.
24. Currently, LCH, ICE Clear Europe and LME Clear are recognised CCPs – third-country_ccps_recognised_under_emir.pdf (europa.eu).
25. Article 46 of EU EMIR, as amended by EMIR 3.0.
26. Article 7c of EU EMIR, as introduced by EMIR 3.0 and Article 38 of EU EMIR, as amended by EMIR 3.0.
27. Article 9 of EU EMIR, as amended by EMIR 3.0.
28. Article 9 of EU EMIR, as amended by EMIR 3.0.
29. Article 9 of EU EMIR, as amended by EMIR 3.0.
30. Meaning that the NFC- does not have the legal responsibility for EU EMIR reporting – see here for further detail.
31. Article 12 of EU EMIR, as amended by EMIR 3.0.
32. Article 11 of EU EMIR, as amended by EMIR 3.0.
33. Article 11 of EU EMIR, as amended by EMIR 3.0.
34. Article 11 of EU EMIR, as amended by EMIR 3.0.
35. Article 11 of EU EMIR, as amended by EMIR 3.0.
36. The European Commission is required to adopt additional legislation setting out: (a) the method for the determination of the amount of the fees; and (b) the modalities of the payment of the fees.
37. Currently, these are:
    - EUR1bn in gross notional value for credit derivative contracts;
    - EUR1bn in gross notional value for equity derivative contracts;
    - EUR3bn in gross notional value for interest rate derivative contracts;
    - EUR3bn in gross notional value for foreign exchange derivative contracts; and
    - EUR4bn in gross notional value for commodity derivative contracts and other OTC derivative contracts not provided for above.
38. Article 4a of EU EMIR, as amended by EMIR 3.0.
39. Exchange traded derivatives executed on a UK trading venue are considered OTC derivatives for the purposes of EU EMIR.
40. Note that for both NFCs and FCs, the calculation of uncleared positions includes derivatives that are not cleared by an EU authorised CCP or by a third-country recognised CCP. Three UK CCPs are currently recognised by the EU until the end of June 2025.
41. Currently, these are:
    - EUR1bn in gross notional value for credit derivative contracts;
    - EUR1bn in gross notional value for equity derivative contracts;
    - EUR3bn in gross notional value for interest rate derivative contracts;
    - EUR3bn in gross notional value for foreign exchange derivative contracts; and
    - EUR4bn in gross notional value for commodity derivative contracts and other OTC derivative contracts not provided for above.
42. Article 10 of EU EMIR, as amended by EMIR 3.0.
43. Article 4 of EMIR 3.0.
44. Article 3 of EU EMIR, as amended by EMIR 3.0.
45. The language used in EMIR 3.0 is "where the third country is a high-risk third country as referred to in Article 29 of Regulation (EU) 2024/... of the European Parliament and of the Council".

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## We are a unique firm. Our blend of expertise, agility and culture means we have the flexibility to meet our clients' most challenging demands and to champion innovation.

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