PICTET 1805

EMIR FAQs

1. What is EMIR?

The European Market Infrastructure Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (hereafter EMIR) introduces a set of new rules and requirements aimed at improving transparency and reducing the risks related to derivatives markets.

EMIR requires all derivatives contracts to be reported to trade repositories, over the counter (OTC) derivatives contracts to be centrally cleared while also setting a framework that enhances the safety of central counterparties (CCPs) and trade repositories (TRs). EMIR also introduces a range of risk mitigation techniques with the aim of increasing financial market stability.

The EMIR page on the European Securities and Markets Authority (ESMA) website, and in particular ESMA's EMIR Questions and Answers page, are another source of information that should be consulted regularly. EMIR was adopted by the European Parliament on 4 July 2012 and entered directly into force in all Member States on 16 August 2012.

2. To whom does EMIR apply?

EMIR concerns all legal entities incorporated within the European Economic Area – including personal investment companies, foundations and family offices as well as similar structures. Trusts are also defined as companies if they engage in 'economic activities' (e.g. trade with goods and/or services).

EMIR applies to both financial and non-financial counterparties (FC or NFC, respectively) that enter into derivatives contracts.

3. How can I determine my EMIR classification? Do I classify as an FC or an NFC?

Under EMIR, each participant is responsible for determining its classification. EMIR makes the distinction between Financial Counterparties (FCs) and Non-Financial Counterparties (NFCs).

Financial counterparties are legal entities that are involved in financial markets in a professional capacity. In accordance with Directive 2011/61/EU, the following entities are, for example, classified as FCs under EMIR: banks, insurance companies, brokerage firms, pension funds, fund management companies, alternative investment funds, collective investment schemes, investment vehicles, investment foundations, as well as holdings of a financial or insurance group, etc.

A market participant that does not qualify as an FC is ordinarily considered as an NFC.

4. What are FC+, FC-, NFC+s and NFC-s?

Entering into derivative transactions identifies you as a 'counterparty'.

EMIR introduces two sets of counterparties:

1. Financial Counterparties (FC) include banks, investment managers, insurance companies or brokers.
2. Non-Financial Counterparties (NFC) include all entities that are not Financial Counterparties

EMIR identifies two types of Non-Financial Counterparties (NFC) and Financial Counterparties (FC).

All types of Non-Financial Counterparties (NFC) and Financial Counterparties (FC) must calculate their group's aggregate month-end average position in derivative contracts for the previous 12 months, excluding, for Non-Financial Counterparties, derivative trades executed for hedging purposes (i.e. derivative contracts objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the Non-Financial Counterparty) (the "Position"). The first calculation had to be conducted by 17 June 2019 for the period between 1 June 2018 and 31 May 2019 and must be conducted every 12 months thereafter.

Non-Financial Counterparties (NFC) and Financial Counterparties (FC) must compare the Position to the EMIR clearing thresholds stated below to determine if they exceed them in any asset class:

– Credit derivatives	EUR 1 billion
– Equity derivatives	EUR 1 billion
– Interest-rate derivatives	EUR 3 billion
– FX derivatives	EUR 3 billion
– Commodity and other derivatives	EUR 3 billion

When a Non-Financial Counterparty (NFC) or a Financial Counterparty (FC) determines that its Position does not exceed any asset class clearing threshold, it is classified as a "*Non-Financial Counterparty below the clearing thresholds*" or "*NFC-*" or as a "*Small Financial Counterparty*" or "*FC-*".

When a Non-Financial Counterparty (NFC) or a Financial Counterparty (FC) determines that its Position exceeds an asset class-clearing threshold or decides not to calculate its Position, it is classified as a"*Non-Financial Counterparty above the clearing thresholds*" or "*NFC+*" or as a "*Large Financial Counterparty*" or "*FC+*".

If a Non-Financial Counterparty above the clearing thresholds (NFC +) has been qualified as such because it has decided not to calculate its Position, it will be subject to the clearing obligation in respect of all asset classes irrespective of whether its Position in a specific asset class exceeds the clearing thresholds or not.

If a Non-Financial Counterparty above the clearing threshold (NFC+) has determined that its Position exceeds the clearing threshold in respect of one or more asset classes, it will be subject solely to the clearing obligations in respect of the asset class(es) in which its Position has exceeded the clearing threshold. However, exceeding the clearing threshold in one asset class will make a Non-Financial Counterparty above the clearing threshold (NFC+) subject to the collateralisation requirement in respect of all asset classes.

A Small Financial Counterparty (FC-) is exempted from the clearing obligation but remains subject to risk mitigation obligations, including margin requirements. A Large Financial Counterparty (FC+) is subject to risk mitigation obligations (including margin requirements) and to the clearing obligation for all OTC derivative contracts pertaining to any class of OTC derivatives for which the clearing obligation is applicable (regardless of the fact that it does not exceed the clearing threshold of each asset class).

Sectors applicable to Financial Counterparties

Sectors applicable to Financial Counterparties (to be evaluated "as if" the Client were incorporated in the EU).

- Assurance undertakings (including life insurance companies) authorised in compliance with Directive No. 2002/83/EC
- Credit institutions authorised in compliance with Directive No. 2006/48/EC
- Investment firms authorised in compliance with Directive No. 2004/39/EC
- Insurance undertakings authorised in compliance with Directive No. 73/239/EEC
- Alternative investment funds managed by managers of alternative investment funds authorised or registered in compliance with Directive No. 2011/61/EU

- Institutions for occupational retirement provision pursuant to Article 6(a) of Directive No. 2003/41/EC
- Reinsurance undertakings authorised in compliance with Directive No. 2005/68/EC
- UCITS and their management companies authorised in compliance with Directive No. 2009/65/EC

5. Given my EMIR classification, what are my obligations?

EMIR classifications trigger the obligations that the participants have to implement:

	FC+	FC-	NFC+	NFC-
Timely confirmation	√	√	√	√
Portfolio reconciliation	√	√	√	√
Dispute resolution	√	√	√	√
Portfolio compression	√	√	√	√
Trade reporting obligation	√	√	√	√
Daily valuation, reporting valuations & collateral	√	√	√	
Clearing obligation	√		√	
Margin requirements	√	√	√	
Platform trading	√	(√)*	√	

* ESMA 12 July 2019 statement on MiFIR implementation regarding DTO following the entry into force of EMIR Refit: National Competent Authorities (NCAs) shall not prioritise their supervisory actions in relation to the derivatives trading obligation (DTO) towards counterparties exempted from the clearing obligation (CO) following the entry into force of EMIR Refit.

6. What obligations does EMIR impose?

6.1 The reporting obligation – what is EMIR reporting?

Reporting means the daily process by which data relating to derivatives and their counterparties are submitted to a trade repository. A trade repository is a body established to manage data within a secure and confidential framework, under the terms of EMIR.

The aim of reporting is to increase transparency by making the information on derivatives provided to trade repositories available to supervisory authorities. This provides them with an accurate overview of the derivatives market and the exposure of market participants with a view to contributing to the prudential regulation of financial markets.

Who is subject to the reporting obligation?

All participants in the EU derivatives market (FC+, FC-, NFC+ and NFC-) are subject to the reporting obligation under EMIR, irrespective of whether they engage in derivatives transactions with other EU or third country counterparties. Third countries will not be subject to the reporting obligation under EMIR.

Which derivatives are subject to the reporting obligation?

When the reporting obligation comes into force, EU derivatives market participants will have to ensure that the components of any derivative contract they enter into (OTC and ETD), as well as any change to or termination of the contract, are reported to an ESMA- approved trade repository. The report must be made no later than on the business day following the conclusion of, change to or termination of such derivative contracts (D+1).

When should transactions be reported?

EMIR entered into force on 16 August 2012 with the reporting obligation becoming effective at a later date. The start date for the reporting obligation, in respect of all derivatives classes, was 12 February 2014. The date by which derivatives will need to be reported also depends on when the derivative contract was entered into and terminated, as set out in the table below.

Derivative contract date of conclusion	Reporting deadline
From 12 February 2014	D+1
Since 16 August 2012 and ongoing as of 12 February 2014	12 February 2014
Before 16 August 2012 and ongoing as of 12 February 2014	13 May 2014
Before 16 August 2012 and ongoing as of 16 August 2012, but terminated as of 12 February 2014	12 February 2019
Since 16 August 2012 but terminated as of 12 February 2014	12 February 2019

In addition, FC+s and NFC+s are obliged to report daily mark-to- market valuations and collateral data from 11 August 2014 (i.e. 180 calendar days from the effective date of the reporting obligation).

6.2 Risk mitigation techniques
Risk mitigation techniques should be used in respect of OTC derivatives that are not cleared via CCPs. They consist of:

- timely confirmation of trades
- daily mark-to-market valuations of trades
- having dispute resolution processes in place
- engaging in portfolio reconciliation and using portfolio compression
- exchange of collateral

6.3 NFC Notifications - Which notification obligations are NFCs subject to?
On the first day an NFC exceeds any of the clearing thresholds, it has to notify ESMA and its relevant national authority. Where a group has NFCs established in different EU jurisdictions, the group is expected to submit a single notification to ESMA, and all NFCs established in a particular jurisdiction are expected to notify the relevant national authority in that jurisdiction. These notifications are required regardless of whether the NFC actually ends up exceeding the relevant clearing threshold(s) on the basis of the 30 working-day rolling average test and therefore becomes an NFC+.

No notifications are required upon NFCs actually becoming NFC-.

NFC+s also need to notify ESMA and their relevant national authority as soon as the 30 working-day rolling average of their notional positions in OTC derivatives (excluding 'hedging' ones) no longer exceeds the relevant clearing threshold(s).

6.4 The Clearing Obligation - What is "clearing" for OTC derivatives?
Clearing for OTC derivatives is the process by which two parties to a single OTC derivative contract replace it with two separate contracts with a central counterparty (CCP) that takes over each party's positions under the original contract. The two parties no longer have a contract with each other but instead with the CCP, thereby making the CCP the counterparty to each of the original parties.

The clearing obligation will apply only if the relevant OTC derivative is of a class that has been declared subject to the clearing obligation and entered into between any combination of FC+s and NFC+s, provided that at least one of the parties is established in the EU. The clearing obligation will not apply where at least one of the counterparties is an NFC- (or a third-country foreign counterparty that would be an NFC- if it were established in the EU). The same also applies to the FC- after introduction of the EMIR Refit.

In practice, only interest rate swaps (IRS) in G4 currencies and index CDS (iTraxx) are subject to the EMIR clearing obligation. The EU authorities may decide to expand the list of OTCs subject to this obligation.

Following the entry into force of the EMIR Refit in June 2019, FC-s are now exempted from the clearing obligation.

6.5 Do market participants have to obtain an LEI to comply with the reporting obligation under EMIR?

EMIR requires market participants to obtain a global legal entity identifier (LEI), where possible, for the purposes of reporting counterparty data. The Regulatory Oversight Committee (ROC) is currently finalising the implementation of the global LEI initiative, which should result in a number of local operating units (LOUs) being approved to issue LEIs which are mutually recognised by as many jurisdictions as possible.

In its EMIR Questions & Answers, ESMA clarified that a pre-LEI issued by any of the endorsed pre-Local Operating Units (pre-LOUs) listed on the LEI ROC website should be used to identify counterparties.

Please note that EU derivatives market participants dealing with US counterparties are also likely to be required by their US counterparties to obtain an LEI as US counterparties have to report their counterparties' LEIs.

7. How is an LEI obtained?

Companies may register at designated institutions known as Local Operating Units (LOUs) to obtain an LEI. A list of LOUs may be found under www.leiroc.org.

Clients may have already registered for an 'CFTC Interim Compliant Identifier' (CICI), which is used for reporting under the US Dodd- Frank regime. The CICI can also be used as LEI for the purposes of EMIR.

By way of example, the Pictet Group has registered itself with www.gmeiutility.org.

8. Consequences of non-compliance with EMIR and not providing an LEI on time

It should be noted that not providing an LEI to the Bank within the appropriate timeframe might have financial consequences. You may also face penalties in your country of incorporation.

The EU has decreed that the LEI is mandatory information for any client domiciled in Europe dealing in derivatives or securities admitted to trading on a European exchange.

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