

**EXPLANATORY MEMORANDUM TO**  
**THE FINANCIAL SERVICES AND MARKETS ACT 2000 (OVER THE COUNTER**  
**DERIVATIVES, CENTRAL COUNTERPARTIES AND TRADE REPOSITORIES)**  
**(AMENDMENT) REGULATIONS 2019**

**2019 No. 1031**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 Derivative contracts are financial instruments which rely on, or derive their value from, something else (e.g. a change in interest rates). Over the Counter (OTC) derivatives are derivative contracts which are agreed between parties without going via an exchange (e.g. a stock exchange) or another intermediary. The regulatory framework for OTC derivatives sets out when OTC derivatives should be cleared in a central counterparty (a “CCP”) or be subject to other risk-mitigation techniques.
- 2.2 These Regulations make the necessary changes to UK legislation to implement *Regulation (EU) No 2019/834 of the European Parliament and of the Council amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories* (more commonly known as EMIR REFIT).
- 2.3 EMIR REFIT updates the European Market Infrastructure Regulation (EMIR) – *Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories*.
- 2.4 This instrument makes changes to the *Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013* (S.I. 2013/504) (“2013 EMIR implementing regulations”), which implemented EMIR in the UK, in order to ensure that EMIR REFIT is fully effective and enforceable in the United Kingdom.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

#### **4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

#### **5. European Convention on Human Rights**

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

#### **6. Legislative Context**

- 6.1 These regulations implement EMIR REFIT. EMIR REFIT makes changes to EMIR, originally agreed in 2012.
- 6.2 As EMIR REFIT is a directly applicable EU Regulation, the changes will automatically have effect in UK law from the date they apply without extensive implementing regulations. However, to ensure EMIR REFIT can be fully implemented, some minor changes are required to the 2013 EMIR implementing regulations.
- 6.3 These Regulations make amendments to regulation 8 of the 2013 EMIR implementing regulations to enable the Financial conduct authority (FCA) to specify what information should be included in an application or notification in areas where EMIR REFIT requires a firm to notify its home competent authority.
- 6.4 This instrument also amends regulation 2 of the 2013 EMIR implementing regulations to update the definition of “EMIR” to reflect the fact that EMIR has now been updated by EMIR REFIT.

#### **7. Policy background**

##### *What is being done and why?*

- 7.1 As a response to the financial crisis, leaders at the G20 Pittsburgh meeting in 2009 agreed that “...all standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements”.
- 7.2 In the European Union, these commitments were primarily implemented in EMIR, which was adopted in 2012.
- 7.3 In 2015-16 EMIR was reviewed by the European Commission. As a result of this review, the European Commission proposed a series of updates to EMIR in May 2017. The changes will be implemented by EMIR REFIT. This is separate from the Commission’s proposal in June 2017 to update the framework for third country CCPs (known as EMIR “supervision”), which has been agreed by the European Parliament and Council but has not yet been formally adopted.
- 7.4 Whilst the European Commission concluded that no fundamental change to EMIR was required, EMIR REFIT makes targeted changes to reduce burdens on businesses while maintaining financial stability.

- 7.5 Alongside minor amendments, EMIR REFIT introduces a recalibration of the firms who are subject to clearing and reporting requirements in EMIR, as well as an extension of the clearing exemption for pension funds.
- 7.6 EMIR REFIT was approved by the European Parliament and the Council, published in the Official Journal of the European Union on 28th of May 2019.
- 7.7 As a regulation, EMIR REFIT is directly applicable in the UK, so no comprehensive implementation in UK law is necessary.
- 7.8 This instrument makes small changes to regulation 8 of the 2013 EMIR implementing regulations to enable the FCA to specify what information should be included in an application or notification in areas where EMIR REFIT now requires a firm to notify its home competent authority. The FCA already has this power in areas where notification is already required under EMIR.
- 7.9 This instrument also amends regulation 2 of the 2013 EMIR implementing regulations to update the definition of “EMIR” to reflect the fact that EMIR has now been updated by EMIR REFIT.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 This instrument does not consolidate any other instrument

## **10. Consultation outcome**

- 10.1 The changes introduced in EMIR REFIT do not require a consultation because as a directly applicable EU Regulation with requirements and obligations which apply without implementation into domestic law, the Treasury needs only to ensure that existing domestic legislation is consistent with it.
- 10.2 HM Treasury concluded that only minor changes to Regulations 2 and 8 of the 2013 EMIR implementing regulations were required. As there was a very limited way in which a consultation could affect the draft legislation, no consultation was necessary

## **11. Guidance**

- 11.1 The Treasury does not propose to produce any guidance in relation to the Regulations. The European Securities and Markets Authority (ESMA) and the competent authorities within the UK (the Bank of England and the FCA) have the power to issue guidance in relation to EMIR and these Regulations.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because EMIR is a directly applicable EU Regulation with requirements and obligations which apply without implementation into domestic law, and this instrument makes small changes

to UK domestic law to ensure consistency with the changes introduced in EMIR REFIT.

- 12.4 The European Commission carried out an impact assessment to the EMIR REFIT proposal in May 2017 and found that the package reduced costs to firms.<sup>1</sup>

### **13. Regulating small business**

- 13.1 This instrument applies to activities that are undertaken by small businesses. The population of firms that are required to comply with the EMIR requirements on OTC derivatives – for example investment companies, insurance companies, credit institutions and banks – will include some small businesses.
- 13.2 The primary aim of EMIR REFIT regulation is to introduce or maintain exemptions for smaller business from EMIR requirements. This instrument requires firms to notify and provide appropriate information to the FCA where EMIR REFIT requires them to do so, which is a process many market participants are already familiar with.

### **14. Monitoring & review**

- 14.1 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015. John Glenn MP has made the following statement: “In my view, it is not appropriate to include a statutory review clause in The Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (Amendment) Regulations 2019 because it would be disproportionate taking into account the low economic impact of the regulatory provisions contained in these Regulations”.

### **15. Contact**

- 15.1 Tim Garbutt at HM Treasury Telephone: 020 7270 5601 or email: Tim.Garbutt@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Tom Duggan, Deputy Director for Securities, Markets, and Banking at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Glen, Economic Secretary to the HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

---

<sup>1</sup> The European Commission’s Impact Assessment can be downloaded here: [https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-208\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-208_en)