

PUBLIC STATEMENT

On issues affecting reporting, recordkeeping, reconciliation, data access, portability and aggregation of derivatives under Article 9 EMIR in the case of UK withdrawal from the EU without a transitional agreement

The European Securities and Markets Authority (ESMA) is publishing this statement in order to clarify certain instances relating to the derivatives reported under Article 9 of EMIR (EMIR data). This public statement only applies in the case of UK withdrawal from the EU without a transitional agreement (no deal Brexit).

- This public statement should be read together with Regulation 648/2012¹, technical standards on reporting², technical standards on data availability and data access³, ESMA EMIR Q&As⁴, ESMA validation rules⁵, ESMA Guidelines on portability⁶ and ESMA Guidelines on position calculation⁷.
- EMIR data is assessed from reporting, reconciliation, recordkeeping, access, portability and aggregation perspective. To ensure a comprehensive understanding of the issues, the next section and the table in the annex clarify ESMA's expectations with regards to EMIR data in a post-Brexit environment.
- Given the dual-sided reporting requirement for counterparties established in the EU (currently 28, after Brexit 27, member states) under EMIR, four different situations from counterparties' perspective are covered (i) EU27-EU27, (ii) EU27-UK, (iii) UK-EU27 and (iv) UK-UK.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN>

² <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0001:0010:EN:PDF>, as amended by <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0104>;

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:352:0020:0029:EN:PDF>, as amended by <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0105&from=EN>;

⁴ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0033:0036:EN:PDF> as amended by <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1800&from=EN>

⁵ https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_qa_on_emir_implementation.pdf

⁶ https://www.esma.europa.eu/sites/default/files/library/esma70-145-63_emir_validation_rules_for_revised_rts_its.xlsx

⁷ https://www.esma.europa.eu/sites/default/files/library/esma70-151-552_guidelines_on_transfer_of_data_between_trade_repositories.pdf

⁷ https://www.esma.europa.eu/sites/default/files/library/esma70-151-1272_guidelines_on_position_calculation_by_trade_repositories_under_emir_final_report.pdf

- All the specific concepts and terms used in this public statement are included in a glossary in Annex 1 to this public statement and all the use cases are detailed in the table in Annex 2.

1 Onboarding to TRs

- EU27 counterparties and CCPs should refer to ESMA's statement for readiness upon Brexit⁸ published on 9 November 2018.
- EU27 counterparties and CCPs should ensure the continuous reporting of derivatives to a registered or recognised TR to comply with their reporting obligations under Article 9 of EMIR.

2 Reporting

- EU27 counterparties and CCPs should report the conclusion of derivatives to an EU27 TR or an EU27 recognised TR when they have a reporting obligation in accordance with Article 9 of EMIR. Before 29 March 2019, EU27 and UK counterparties and CCPs should continue derivative reporting as currently done by fully adhering to the most recent reporting requirements in order to facilitate data access, accurate recordkeeping and portability of outstanding derivatives.
- EU27 counterparties and CCPs should continue carefully assessing any risks that might be posed to their compliance with the reporting obligations under Article 9 of EMIR in case of delegation of reporting to a non-EU27 report submitting entity.
- As a result of the cessation of the reporting obligation for UK counterparties under EMIR, including the conclusion, modification or termination of derivatives, the side of the derivative reported by UK counterparties will remain in its state as of Brexit. Therefore, there will be a decoupling between the data reported by the EU27 counterparty and the UK counterparty.
- To provide consistent and accurate data to EU authorities, there is a need to terminate the reports submitted by UK counterparties and CCPs pertaining to outstanding derivatives.
- This should be done by the EU27 TRs. The EU27 TR should flag the reports submitted by UK counterparties and CCPs pertaining to outstanding derivatives and populate the Field "Termination date" with "2019-03-29". EU27 TRs shall use an internal field to do so. EU27 TR should complete this action within one month following Brexit date.

⁸ https://www.esma.europa.eu/sites/default/files/library/esma80-187-149_public_statement_brexit_cras_trs.pdf

- EU27 counterparties and CCPs should continue the normal course of reporting in accordance with Article 9 of EMIR.
- No action should be taken with regards to non-outstanding derivatives.
- UK counterparties are not expected to report to EU27 TR any derivative concluded on 29 March 2019 and onwards.
- UK counterparties are not expected to report correctly to EU27 TR any derivative concluded prior 29 March 2019 that was rejected as of 29 March 2019, neither to report amendments to any derivative concluded prior to 29 March 2019.
- Please refer to the table in Annex 2 for each use case.

3 Reconciliation

- Following 29 March 2019, the derivatives where at least one of the counterparties is an UK-based entity, i.e. EU27-UK, UK-EU27, UK-UK should not be reconciled. Therefore, they should also be excluded from the inter-TR reconciliation process.
- Following 29 March 2019, the EU TRs should establish the relevant controls in place to remove those derivatives from the inter-TR reconciliation process.
- EU TRs should finalise the removal of EU27-UK, UK-EU27, UK-UK derivatives from reconciliation within four months following Brexit date.
- Please refer to the table in Annex 2 for each use case.

4 TR recordkeeping

- For UK-EU and UK-UK derivatives, EU27 TRs shall maintain records of derivatives in accordance with Article 80(3) of EMIR.
- The UK-EU and UK-UK derivatives that are outstanding as of 29 March 2019 should be terminated, as indicated in section 2, and the TRs should maintain records of those derivatives at least until 29 March 2029.
- Details of derivatives that are not outstanding should be maintained by TRs in the state they were reported by counterparties and CCPs and recorded by the TRs.
- Please refer to the table in Annex 2 for each use case.

5 Counterparty recordkeeping

- EU27 counterparties and CCPs shall comply with the recordkeeping obligation under Article 9(2) of EMIR.
- UK counterparties shall comply with the recordkeeping obligation under Article 9(2) of EMIR until 29 March 2019 and subsequently with those established under UK law.
- Please refer to the table in Annex 2 for each use case.

6 Data access

- EU27 TRs shall continue providing EU27 authorities with access to all EMIR data in accordance with their responsibilities and mandates under Article 81 of EMIR and Articles 2, 4 and 5 of CDR 151/2013.
- EU27 TRs that have affiliate UK-based TRs should strive to ensure on a continuous basis and without duplication direct and immediate access to EMIR data.
- The only possibility for EU27 data to be made accessible by UK-based TRs after 29 March 2019 is that the TR is recognised in the Union.
- Following 29 March 2019, access by UK authorities to EMIR data reported pre- and post- 29 March 2019 is linked to (i) an equivalence decision by the EC, an international agreement and a cooperation arrangement under Article 75 of EMIR or (ii) an equivalence decision by the EC under Article 76a of EMIR, as amended by Refit. In case either condition (i) or (ii) is not in place as of 29 March 2019, there will be a temporary cut in UK authorities access to EMIR data.
- Please refer to the table in Annex 2 for each use case.

7 Portability of data from UK-based TR to EU27 TR

- UK-based TRs shall ensure the transfer of the full dataset to any EU27 TR prior to 29 March 2019. As provided in the Guidelines on Portability a condition for the withdrawal of registration of a TR is the full transfer of all data from the TR whose registration is withdrawn. In case TRs are facing difficulties in the data transfer due to low quality of data, they should refer the issue to the relevant competent authority of the reporting counterparties.
- UK-based TRs, whose registration is to be withdrawn in accordance with EMIR, should, in accordance with the Guidelines on Portability, provide ESMA with the relevant wind-down plan including the transfer of data.
- The transfer of data should be organised in accordance with the following waterfall:

- First, to the EU27 TR(s) that have agreed with the UK TR to receive EMIR data;
- Then, in case no EU27 TR has agreed, to the EU27 TR where the EU27 counterparty has reported;
- Lastly, to all the EU27 TR proportionately to the number of outstanding derivatives at those TRs as of 31-12-2018.

8 Portability of data to UK TRs

- Should UK counterparties require porting of data to a UK TR, this should be done only with regards to the data reported by those counterparties.

9 Aggregations

- With regards to aggregations relating to data reported during the reference period, i.e. flow aggregates, the EU 27 TRs should continue including in these aggregates the derivatives that were reported in the reference period.
- With regards to aggregation relating to outstanding derivatives, i.e. stock aggregates, the EU27 TRs should consider the latest available information in accordance with the procedure referred to in section 2.

10 Annex 1 Glossary of terms used

- Any trade repository established in EU27 Member state and registered under Article 55 of EMIR is defined as “EU27 TR”.
- Any trade repository established in the UK and registered under Article 55 of EMIR is defined as “UK-based TR”.
- Any trade repository recognised under Article 77 of EMIR is defined as “EU27 recognised TR”.
- Any trade repository established in the UK and subject to UK Statutory Instrument is defined as “UK TR”.
- Counterparties and CCPs established in a EU27 Member state which have reporting obligation under Article 9 of EMIR are defined as “EU27 counterparties and CCPs”.
- Derivatives that have not matured or which have not been the subject of a report with Action type “E”, “C”, “P” or “Z” as referred to in field 93 in Table 2 of the Annex to Commission Implementing Regulation (EU) No 1247/2012 are defined as “outstanding derivatives”.
- Derivatives that have matured or have been the subject of a report with Action type “E”, “C”, “P” or “Z” as referred to in field 93 in Table 2 of the Annex to Commission Implementing Regulation (EU) No 1247/2012 are defined as “non-outstanding derivatives”.
- Derivatives reported under Article 9 of EMIR, both by and after 29 March 2019, are defined as “EMIR data”.
- Derivatives reported under United Kingdom reporting rules following 29 March 2019 are defined as “UK data”.

11 Annex 2 EMIR data in the event of no deal Brexit

		Description of the different use cases ⁹				
		CP1/CP2→	EU27/EU27	EU27/UK	UK/EU27	UK/UK
R E P O R T I N G	EMIR data to EU27 TRs <u>pre-Brexit</u>		Yes	Yes	Yes	Yes
	EMIR data to EU27 TRs <u>post-Brexit</u>		Yes	Yes	No	No
	EMIR data to UK TRs <u>pre-Brexit</u>		Yes	Yes	Yes	Yes
	EMIR data to UK TRs <u>post-Brexit</u>		Only if recognised	Only if recognised	-	-
	EMIR data automatic termination needed <u>post-Brexit</u>		No	No	Yes	Yes
	EMIR data life-cycle reporting <u>post-Brexit</u>		Yes	Yes	No	No
	<u>Derivatives concluded on 29 March 2019</u>		Yes	Yes	No	No
	Amendments <u>post-Brexit</u> to previously rejected derivatives		Yes	Yes	No	No
R E C O N C I L I A T I O N	Reconciliation <u>pre-Brexit</u> of EMIR data		Yes	Yes	Yes	Yes
	Reconciliation <u>post-Brexit</u> by EU27 TRs of EMIR data reported <u>pre-Brexit</u>		Yes	No	No	No
	Reconciliation <u>post-Brexit</u> by UK TRs of EMIR data reported <u>pre-Brexit</u>		Only if recognised as at Brexit	No	No	No
	Reconciliation <u>post-Brexit</u> by EU27 TRs of EMIR data reported <u>post-Brexit</u>		Yes	No	-	-
	Reconciliation <u>post-Brexit</u> by UK TRs of EMIR data reported <u>post-Brexit</u>		Only if recognised	No	No	No
T R R E C O R D K E E P I N G	Record-keeping <u>pre-Brexit</u> of EMIR data		Yes	Yes	Yes	Yes
	Record-keeping <u>post-Brexit</u> at EU27 TRs of EMIR data reported <u>pre-Brexit</u>		Yes	Yes	Yes	Yes
	Record-keeping <u>post-Brexit</u> at UK TRs of EMIR data reported <u>pre-Brexit</u>		Only if recognised as at Brexit			
	Record-keeping <u>post-Brexit</u> at EU27 TRs of EMIR data reported <u>post-Brexit</u>		Yes	Yes	-	-
	Record-keeping <u>post-Brexit</u> at UK TRs of EMIR data reported <u>post-Brexit</u>		Only if recognised	Only if recognised	-	-

⁹ considering identical UK derivatives rules on data access

Description of the different use cases⁹

	CP1/CP2→	EU27/EU27	EU27/UK	UK/EU27	UK/UK
CP TY R E C O R D K E E P I N G	Record-keeping <u>pre-Brexit</u> of EMIR data	Yes	Yes	Yes	Yes
	Record-keeping <u>post-Brexit</u> of EMIR data reported <u>pre-Brexit</u>	Yes	Yes	No under EMIR	No under EMIR
	Record-keeping <u>post-Brexit</u> of EMIR data reported <u>post-Brexit</u>	Yes	Yes	-	-
	Record-keeping <u>post-Brexit</u> of UK data reported <u>post-Brexit</u>	-	-	-	-
	EU27 authorities' access to EMIR data reported <u>pre-Brexit</u>	Yes	Yes	Yes	Yes
D A T A	EU27 authorities' access to EMIR data reported <u>post-Brexit</u>	Yes	Yes	-	-
	EU27 access to UK data reported <u>post-Brexit</u>	-	-	Equivalence	Equivalence
	UK authorities' access <u>pre-Brexit</u> to EMIR data reported <u>pre-Brexit</u>	Yes	Yes	Yes	Yes
A C C E S S	UK authorities' access <u>post-Brexit</u> to EMIR data reported <u>pre-Brexit</u>	Equivalence ¹⁰	Equivalence	Equivalence	Equivalence
	UK authorities' access <u>post-Brexit</u> to EMIR data reported <u>post-Brexit</u>	Equivalence	Equivalence	-	-
	Portability from UK TRs to EU27 TR of EMIR data reported <u>pre-Brexit</u>	Yes	Yes	Yes	Yes
	Portability to UK TR of EMIR data reported <u>pre-Brexit</u>	No	No	Yes	Yes
	Inclusion of derivatives in position calculations	Yes	Yes	No	No
	Inclusion of derivatives in public aggregates	Yes	Yes	No	No

¹⁰ In case the Refit proposal is not adopted by Brexit, the data access by UK authorities would require also an international agreement with the EU