

# Opinion of the European Banking Authority on the application of EMIR 3 with respect to Initial Margin models as referred to in Article 1, points (10) and (53) of Regulation (EU) No 2024/2987

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## Introduction and legal basis

1. Article 11(3), third subparagraph of Regulation 648/2012<sup>1</sup> (EMIR) introduced by Regulation (EU) No 2024/2987<sup>2</sup> (EMIR 3) sets out for the first time a prior authorisation regime for Initial Margin (IM) models used as a risk-mitigation technique for OTC derivative contracts not cleared by a CCP by providing:

*“Financial counterparties and non-financial counterparties referred to in Article 10(1) shall apply for authorisation from their competent authorities before using, or adopting a change to, a model for initial margin calculation with regard to the risk-management procedures laid down in the first subparagraph of this paragraph”.*

2. Article 11(3), fourth and fifth subparagraph of EMIR introduced by EMIR3 provide:

*“Where the model referred to in the third subparagraph of this paragraph is based on a pro forma model, the counterparty shall apply for the validation of that model to EBA and shall provide EBA with all relevant information referred to in that subparagraph via the central database. In addition, the counterparty shall provide EBA with the information on the outstanding notional amount referred to in paragraph 12a of this Article via the central database.*

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<sup>1</sup> 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 (OJ L 201, 27.7.2012, p. 1).

<sup>2</sup> Regulation (EU) 2024/2987 of the European Parliament and of the Council of 27 November 2024 amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets (OJ L, 2024/2987, 4.12.2024).

*Where the model referred to in the third subparagraph of this paragraph is based on a pro forma model, the competent authorities may grant the authorisation only where the pro forma model has been validated by EBA”.*

3. Article 11(15)(aa) of EMIR as amended by EMIR3 provides that in order to ensure a consistent application of EMIR, the European Supervisory Authorities (the ESAs) shall develop common draft regulatory technical standards specifying:

*“the supervisory procedures, to ensure initial and ongoing validation of the risk-management procedures referred to in paragraph 3 applied by credit institutions authorised in accordance with Directive 2013/36/EU and investment firms authorised in accordance with Directive 2014/65/EU that have, or belong to a group that has, a monthly average outstanding notional amount of non-centrally cleared OTC derivatives of at least EUR 750 billion, calculated in accordance with the regulatory technical standards to be developed by the ESAs in accordance with this paragraph”.*

4. Article 11(3), sixth subparagraph introduced by EMIR3 provides:

*“EBA, in cooperation with ESMA and EIOPA, may issue guidelines or recommendations with a view to ensuring the uniform application and authorisation process of the risk-management procedures referred to in the first subparagraph of this paragraph in accordance with the procedure laid down in Article 16 of Regulation (EU) No 1095/2010.”*

5. Finally, Article 89(13) of EMIR introduced by EMIR 3 provides:

*“By way of derogation from Article 11(12a), until EBA has publicly announced that it has set up its central validation function, the validation of pro forma models shall be carried out by competent authorities”.*

6. The EBA’s competence to deliver this Opinion in the form of no action letter is based under Article 9c of Regulation (EU) No 1093/2010<sup>3</sup> according to which such letter shall be issued where the absence of delegated acts would raise legitimate doubts concerning the proper application of a legislative act, where the absence of guidelines would raise practical difficulties concerning its application and where the EBA has received relevant information and considers on the basis of that information that the application of the relevant provisions raises significant exceptional issues pertaining to market confidence, customer or investor protection, the orderly functioning and integrity of financial markets or commodity markets, or the stability of the whole or part of the financial system in the Union.

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<sup>3</sup> Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

7. In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors<sup>4</sup>, the Board of Supervisors has adopted this Opinion which is addressed to the Commission and to competent authorities (CAs) as referred to in Article 2(13) of EMIR.

## Description of the issue

8. Notwithstanding harmonisation of the requirements applicable to IM models having been achieved to a large extent by Commission Delegated Regulation 2016/2251 of 4 October 2016<sup>5</sup> (the joint ESAs RTS on uncleared OTC derivatives) issued on the basis of an empowerment to the three ESAs provided by means of Article 11(15) of EMIR, no explicit requirement for authorisation of IM models by CAs has been included in EMIR until today.
9. EMIR 3 requires, therefore for the first time, relevant counterparties to apply for authorisation by their CAs *'before using, or adopting a change to, a model for initial margin calculation'*. In addition, where that model is based on a pro forma model (such as the ISDA SIMM<sup>6</sup>), EMIR 3 includes the requirement for counterparties to also apply for validation of that model to the EBA. EMIR 3 clarifies that, 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 competent authorities'*.
10. As EMIR 3 is now limiting the scope of the regulatory technical standards already proposed as draft technical standards by the EBA, in cooperation with the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), on the basis of Article 11(15)(aa)<sup>7</sup> (the IMMV RTS) only to credit institutions and investment firms above a EUR 750 billion threshold, there is a need for these technical standards to be revised and for guidelines or recommendations mandated under Article 11(3) of EMIR to be developed for other counterparties *"with a view to ensuring the uniform application and authorisation process of the risk-management procedures"* related to these IM models.
11. Article 11(3) of EMIR 3 does not capture in its scope IM models in use prior to its date of entry into force. As such, existing models may continue to be used without seeking authorisation by the CAs. The first instance of a counterparty seeking authorisation from its CA will be following a change in the existing model. Due to the fact that changes to IM models occur relatively frequently, it is expected that CAs will receive applications to process soon after EMIR 3 is adopted and in force.

<sup>4</sup> Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

<sup>5</sup> The EBA, ESMA and EIOPA developed, pursuant to Article 11(15) of EMIR, draft regulatory technical standards (RTS) supplementing EMIR on risk mitigation techniques for non-centrally cleared over-the-counter (OTC) derivatives ('Joint ESAs RTS on uncleared OTC derivatives'), which were adopted by the European Commission (EC) as Delegated Regulation (EU) 2016/2251 of 4 October 2016, OJ L 340, 15.12.2016, p. 9. These RTS constitute the framework that prescribes the exchange of variation and initial margins in the EU and implement the global standards agreed by BCBS and IOSCO.

<sup>6</sup> ISDA SIMM - Standard Initial Margin Model: an industry standard methodology, based on sensitivities, used for calculating regulatory initial margin for non-centrally cleared derivatives

<sup>7</sup> <https://www.eba.europa.eu/publications-and-media/press-releases/eba-publishes-validation-requirements-initial-margin-models>

12. Hence, CAs should expect all counterparties currently subject to the requirement to exchange initial margin in accordance with EMIR and Article 36 of the joint ESAs RTS on uncleared OTC derivatives to require authorisation for changes to their existing IM models soon after the entry into force of EMIR 3 and to submit relevant applications.

13. Immediately upon entry into force of EMIR 3, the application of the validation and authorisation requirements for IM models referenced in Article 11 may raise difficulties for CAs and counterparties. This situation will persist until EBA has set up its central validation function and until the IMMV RTS and the guidelines or recommendations referred to in Article 11(3) are in place. The entry into force of EMIR 3 should not result in a disruption of an already well-functioning market in which IM models and pro forma models to be authorised and validated are already being used by a wide range of counterparties.

## Specific proposals

14. In the meantime, CAs should:

- a. Consider that existing IM models remain in use following the entry into force of EMIR 3 and treat changes to IM models subsequent to any first application submitted after the entry into force of EMIR 3, as updates to that application;
- b. Follow the operational clarifications set out in the Annex to this Opinion on the information to be provided by counterparties as part of submitted applications;
- c. Refrain from prioritising any supervisory or enforcement action in relation to the processing of applications received from 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 of at least EUR 750 billion until the draft RTS on IMMV become applicable and consider postponing decisions in relation to such applications until the draft RTS on IMMV become applicable;
- d. Refrain from prioritising any supervisory or enforcement action in relation to the processing of applications received from counterparties other than the counterparties referred to in the previous point until guidelines or recommendations issued under Article 11(3), sixth subparagraph of EMIR become applicable and consider postponing decisions in relation to such applications until the guidelines or recommendations become applicable.

This opinion will be published on the EBA's website.

Done at Paris, 17 December 2024

[signed]

[José Manuel Campa]

Chairperson

For the Board of Supervisors

## ANNEX

## OPERATIONAL CLARIFICATIONS FOR COMPETENT AUTHORITIES WITH RESPECT TO FIRST AND SUBSEQUENT APPLICATIONS FOR INITIAL MARGIN MODEL AUTHORISATION UNDER EMIR 3

**Operational clarifications for any first application submitted to CAs after the entry into force of EMIR 3**

Any first application submitted to CAs after the entry into force of EMIR 3 of counterparties in scope of IM model authorisation should include, without prejudice to more specific requirements that CAs may set out pending the adoption of the revised IMMV RTS and the relevant guidelines, all of the following information:

- (a) their aggregate (month-end) average notional amount of non-centrally cleared OTC derivatives (AANA) at reference date 2024 calculated in accordance with Article 39 of the joint ESAs RTS on uncleared OTC derivatives i.e. for the months March, April, and May 2024
- (b) their total amount, calculated at the level of the applying entity, of initial margin for non-centrally cleared OTC derivatives of all netting sets, for which the applying entity calculates initial margin
- (c) their total amount, calculated at the level of the applying entity, of initial margin for non-centrally cleared OTC derivatives of all netting sets, for which an IM model is used to calculate initial margin [*Total IM\_mod*']
- (d) for each of their own IM models<sup>8</sup>:
  - (i) the name of the IM model
  - (ii) a description of the rationale and objective of the IM model
  - (iii) the scope of application of the IM model, including covered risk classes, covered product classes and total amount of collected initial margin computed with that IM model
  - (iv) whether the IM model is based on a pro forma model (such as the ISDA SIMM) and the applying entity is a licensed user (e.g. ISDA SIMM licensed user)
- (e) Where the applying entity relies on the IM models provided by one or more of its counterparties for the computation of initial margin, the percentage of the applying entity's *Total IM\_mod*, which is calculated using counterparties' IM models.

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<sup>8</sup> For the purposes of this opinion, own IM models refer to IM models developed in-house, with no or limited recourse to outsourcing. Own IM models may or may not be based on a pro forma model (such as the ISDA SIMM).

### Operational clarifications for changes to IM models subsequent to any first application submitted after the entry into force of EMIR 3

Information on subsequent changes to IM models that should be notified to CAs on a yearly basis by counterparties in scope of IM model authorisation, together with other minimum information to be notified on a yearly basis, includes the following:

- (a) a list of changes to their own IM models; for own IM models based on a pro forma model (such as the ISDA SIMM), changes related that pro forma model do not need to be communicated
- (b) their AANA calculated in accordance with Article 39 of the joint ESAs RTS on uncleared OTC derivatives i.e. aggregate month-end average notional amount of non-centrally cleared OTC derivatives for the given calendar year
- (c) their total amount, calculated at the level of the entity, of initial margin for non-centrally cleared OTC derivatives of all netting sets for which the entity calculates initial margin
- (d) their total amount, calculated at the level of the entity, of initial margin for non-centrally cleared OTC derivatives of all netting sets for which an IM model is used to calculate initial margin [*Total IM\_mod*]
- (e) where the entity relies on the IM models provided by one or more of its counterparties for the calculation of initial margin, the percentage of the entity's *Total IM\_mod*, which is calculated using counterparties' IM models.