MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**European Market Infrastructure Regulation
('EMIR')**

**ESMA finalises the draft technical standards under EMIR on contracts with a direct, substantial and foreseeable effect within the Union and non-evasion of rules and obligations**

The European Securities and Markets Authority ('ESMA') has submitted to the European Commission draft regulatory technical standards ('RTS') with regards to the direct, substantial and foreseeable effect of contracts within the Union and to prevent the evasion of rules and obligations, as provided in Article 11(12) and Article 4(1)(a)(v) of EMIR. ESMA has also submitted to the Commission a final report based on the responses received following a discussion and a consultation paper on the draft RTS.

ESMA's draft RTS clarifies that OTC derivative contracts entered into by two counterparties established in one or more non-EU countries for which a decision on equivalence of the jurisdiction's regulatory regime has not been adopted, will be subject to EMIR where one of the following conditions are met:

I. An OTC derivative contract shall be considered as having a direct, substantial and foreseeable effect within the Union when at least one third country counterparty benefits from a guarantee provided by a financial counterparty established in the Union which covers all or part of its liability resulting from that OTC derivative contract, to the extent that the guarantee meets both of the following conditions:

   a. it covers the entire liability of a third country counterparty resulting from one or more OTC derivative contracts for an aggregated notional amount of at least EUR 8 billion or the equivalent amount in the relevant foreign currency, or it covers only a part of the liability of a third country counterparty resulting from one or more OTC derivative contracts for an aggregated notional amount of at least EUR 8 billion or the equivalent amount in the relevant foreign currency divided by the percentage of the liability covered;

   b. it is at least equal to 5 per cent of the sum of current exposures, as defined in Article 272 (17) of Regulation (EU) N° 575/2013, in OTC derivative contracts of the financial counterparty established in the Union issuing the guarantee; and

II. An OTC derivative contract shall be considered as having a direct, substantial and foreseeable effect within the Union where the two counterparties established in a third country enter into the OTC derivative contract through their branches in the Union and would qualify as financial counterparties if they were established in the Union.

ESMA’s draft RTS will cover OTC derivative contracts concluded after the date upon which the RTS becomes applicable.

The RTS also specifies cases of transactions which are aimed at evading EMIR’s regulatory requirements, which would be the case for derivative contracts or arrangements concluded without any business substance or economic justification, and in a way to circumvent the clearing obligation and risk mitigation provisions.

The Commission has three months to decide whether to endorse ESMA’s draft RTS.

**Contacts**

Should you have any queries on EMIR, please do not hesitate to contact: Mr Christopher P. Buttigieg, Deputy Director, Securities and Markets Supervision Unit, (cbuttigieg@mfsa.com.mt), Mr Edward Grech, Analyst, Securities and Markets Supervision Unit (egrech@mfsa.com.mt), or Mr Nathan Fenech, Analyst, Securities and Markets Supervision Unit (nfenech@mfsa.com.mt).

**Communications Unit**
**Malta Financial Services Authority**
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