

# FAQs about the FSMA Regulation of 17 January 2017 on the cooperation of statutory auditors in the supervision of compliance with the EMIR Regulation by non-financial counterparties

## **Preliminary remarks**

The questions and answers below refer specifically and exclusively to the FSMA Regulation of 17 January 2017 on the cooperation of statutory auditors in the supervision of compliance with the EMIR Regulation by non-financial counterparties (hereafter the “FSMA Regulation”).

Questions and answers about the application of the EMIR Regulation<sup>1</sup> and its implementing regulations are addressed, among other places, in the FAQs about EMIR published by the European Commission<sup>2</sup> and by ESMA<sup>3</sup>. The FSMA recommends consulting these FAQs as well.

**Question 1. Article 2 of the FSMA Regulation: territorial scope?**

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<sup>1</sup> [EMIR](#)

<sup>2</sup> [EC FAQs](#)

<sup>3</sup> [ESMA Q&As](#)

### **Question 1. Article 2 of the FSMA Regulation: territorial scope?**

**Q:** Pursuant to Article 2 of the FSMA Regulation, non-financial counterparties (hereafter "NFCs") with a portfolio of at least 100 OTC derivatives or OTC derivative contracts, or with a portfolio of OTC derivatives or OTC derivative contracts with a gross notional value of at least EUR 100 million, are subject to the agreed-upon procedures (hereafter AUP).

**If an NFC governed by Belgian law prepares consolidated financial statements, do the aforementioned verifications have to be conducted on the consolidated derivative position or on the stand-alone derivative position? Please clarify using the following example:**

**A Belgian NFC X has two subsidiaries:**

- **A, a subsidiary governed by Belgian law, and**
- **B, a subsidiary established abroad.**

**Which transactions serve as the basis for the verification conducted by the auditor of X:**

- **the transactions of X?**
- **the transactions of X, A and B?**
- **or the transactions of X and A?**

**A:** The FSMA is competent for NFCs with registered office in Belgium, including branches of entities that are established in States other than Belgium (whether or not within the EEA).

The FSMA is thus not competent for the supervision of branches established in Belgium of NFCs whose registered office is abroad, or for the supervision of foreign subsidiaries of Belgian companies.

The application of this principle of territoriality follows from the reading of the EMIR Regulation. By extension, the auditor's cooperation applies to those NFCs for which the FSMA is competent: the statutory auditor is thus required to conduct verification of the stand-alone derivative position of NFCs governed by Belgian law (including their branches).

This means that in the example above, X's auditor will have to take account only of X's own transactions (intragroup and external transactions, see Question 4). Similarly, A's auditor (in this case a different auditor than that of X) will conduct verifications of A based on A's own transactions. B's transactions are not required to undergo a verification by a Belgian statutory auditor, subject to what is laid down under Question 5.

### **Question 2. Link to a financial counterparty**

**Q:** If a Belgian NFC (A from the example in Question 1) is part of a Belgian insurance group or banking group (X from the example in Question 1), is that NFC subject to the AUP (if, on a stand-alone basis, it exceeds the threshold of € 100 million gross notional value or 100 contracts), or is that not the case because the parent company is a financial counterparty (FC)?

**A:** The NFC is subject to the AUP on a stand-alone basis, provided it exceeds the thresholds on a stand-alone basis.

### **Question 3. Treatment of (foreign) treasury centres**

**Q:** Some treasury centres in Belgium are responsible for the EMIR process and for meeting the reporting obligations of several entities of a group, including entities whose registered office is in

another EU country. Consequently, it may be that they have already reported to another supervisor in application of EMIR. If this is the case, can these reports also be used for reporting to the FSMA?

A: The FSMA has no objection to the use of reports prepared for other authorities, provided the scope and the verifications are identical to the Belgian AUP. The FSMA will assess this on a case-by-case basis.

**Q: Can the report drawn up for the FSMA be used for reporting to other supervisory authorities abroad?**

A: In light of the principle of confidentiality, the FSMA will have to determine on a case-by-case basis whether the report intended for the FSMA may be shared with other authorities.

**Q: In another scenario, a treasury centre abroad may be responsible for the EMIR process and for meeting the reporting obligations of a Belgian entity. Should the AUP be implemented for these kinds of entities as well?**

A: Yes, the AUP must be implemented for Belgian NFCs (including their branches).

#### **Question 4. Article 2, §2 of the FSMA Regulation: intragroup transactions?**

**Q: NFCs with a portfolio of at least 100 OTC derivatives or OTC derivative contracts, or with a portfolio of OTC derivatives or OTC derivative contracts with a gross notional value of at least EUR 100 million, are subject to the AUP. Article 2, § 2 of the FSMA Regulation provides that for calculating these thresholds, among other things, the NFCs' intragroup transactions as referred to in Article 3 of the EMIR Regulation must also be taken into account.**

**Which intragroup transactions are meant?**

A: Only an NFC's own transactions executed with other NFCs within the same group must be taken into account, and not intragroup transactions of other NFCs within the group that do not involve the NFC in question. The reason for this is that Article 2 refers exclusively to the transactions of the NFC in question (intragroup and external transactions).

#### **Question 5. Procedure 1.3 of the AUP "clearing thresholds"**

**Q: The tests intended to determine whether an NFC is an NFC- or an NFC+ must be conducted at consolidated level. The procedure 1.3 indeed mentions that derivative contracts entered into by other NFCs within the group must be taken into account.**

**As regards a Belgian NFC that is the head of a group with subsidiaries abroad, the statutory auditor must (under procedure 1.3) include, in its sample, transactions executed by the foreign subsidiaries.**

**Furthermore, how is procedure 1.3 to be implemented in cases where the Belgian NFC is the subsidiary of a foreign group? A sampling at the level of the Belgian entity alone will not be sufficient to determine whether the group is an NFC- or an NFC+. On the other hand, it is doubtful whether a foreign group would open the books of all its subsidiaries outside Belgium to a Belgian auditor.**

A: Unlike what has been stated in response to questions 1 and 4, all transactions of all NFCs within the group must be included when calculating the thresholds (EUR 1 or 3 billion respectively, depending on the type of derivative) used to determine whether an NFC is an NFC+ as referred to in Article 10 of EMIR.

In light of the direct application of the EMIR Regulation, the transactions of all subsidiaries of a group will hence be included within the auditor's scope. Auditors are asked to use all possible sources in order to collect data, knowing that the latter is done on a purely voluntary basis.

Nevertheless, it is not impossible that a Belgian statutory auditor may be refused access to data on the transactions of foreign subsidiaries. In such a case, the report to the FSMA needs to mention that the auditor was unable to implement procedure 1.3 due to lack of access to the data. The FSMA will subsequently assess, on a case-by-case basis, whether to invoke its right of investigation as provided for in Article 34 of the Law of 2 August 2002<sup>4</sup>, in order that it may itself verify the clearing thresholds.

### **Question 6. Data available**

**Q: The AUP regularly refers to (in)formal arrangements. What information does the FSMA wish to receive in cases where only informal arrangements are in place?**

A: The FSMA expects a description of the arrangements in question, whether or not they are formalized.

**Q: The EMIR Regulation does not specify the form in which the data regarding derivative contracts must be stored. What forms of data storage are acceptable to the FSMA?**

A: It is sufficient to describe the way in which the company has decided to store the data.

### **Question 7. Timing**

**Q: In a number of AUP (for example, transaction reporting and risk mitigation techniques), the population goes back several years (to 2012), whereas Article 2, § 4 of the FSMA Regulation refers to the accounting year under review.**

**Should we limit the different populations for testing to the accounting year under review or continue working with the populations as defined in the AUP?**

A: You should use the populations as defined in the AUP.

### **Question 8: Sample size**

**Q: It seems that certain companies only started to adopt/implement procedures as mentioned in EMIR in 2017. In that case, the auditor would report the date when a procedure was implemented and focus the sample (still using the full sample size as set out in the AUP) on the period during which the procedures were implemented. Is this the correct method?**

A: This will have to be assessed on a case-by-case basis, taking into account the specific AUP and the availability of (unwritten) procedures.

### **Question 9. SIC/VBS and SIR/GVVs**

**Q: Undertakings for investment in receivables (SIC/VBS) are addressed in the Law of 3 August 2012<sup>5</sup>. Are SIC/VBS "UCITS" within the meaning of Directive 2009/65/EC, and therefore FCs?**

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<sup>4</sup> Law of 2 August 2002 on the supervision of the financial sector and on financial services.

<sup>5</sup> Law of 3 August 2002 on institutions for collective investment meeting the conditions of Directive 2009/65/EC and undertakings for investment in receivables.

### **Are SIR/GVV "AIFs" within the meaning of Directive 2011/61/EC, and therefore FCs?**

A: SIC/VBS do not fulfil either the criteria for an AIF or those for a UCITS. SIR/GVV are not AIFs. Therefore, SIC/VBS and SIR/GVV are NFCs according to the current status of EMIR<sup>6</sup>.

### **Question 10. Rejection and reconciliation reports**

**Q: If a counterparty delegates to a third party, such as a credit institution, the reporting obligation to a trade repository as provided for in Article 9 of EMIR, does the credit institution as well as the counterparty have to receive the rejection and the reconciliation reports prepared by the trade repository?**

A: Yes, both entities need to receive the reports.

### **Question 11. Public sector entities**

**Q: Must auditors subject public sector entities, such as municipalities, to the AUP?**

A: With the exception of the reporting obligation under Article 9 of EMIR, EMIR does not apply to public sector entities, provided they meet the conditions set out in Article 1, § 5 of EMIR<sup>7</sup>. The assessment of this will have to be done on a case-by-case basis<sup>8</sup>.

The aforementioned means that public sector entities are in any case subject to the AUP on "transaction reporting" where they exceed the thresholds referred to in Article 2 of the FSMA Regulation.

Moreover, EMIR does apply not government institutions charged with or intervening in the management of the public debt<sup>9</sup>.

### **Question 12. Language of the reports**

**Q: In what language should the auditor's report, as referred to in Article 2 of the FSMA Regulation, be written?**

A: The report should be written in Dutch, French or in a language customary in the sphere of international finance (i.e. English). As regards NFCs that have cross-border activities, it is recommended that they draw up the report in English.

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<sup>6</sup> We also refer to the FAQs about EMIR published by the European Commission (question 10).

<sup>7</sup> Article 1, § 5 of EMIR stipulates: "With the exception of the reporting obligation under Article 9, this Regulation shall not apply to the following entities:

- a) (...);
- b) public sector entities within the meaning of point (18) of Article 4 of Directive 2006/48/EC where they are owned by central governments and have explicit guarantee arrangements provided by central governments"; Public sector entities are defined in point (18) of Article 4 of Directive 2006/48/EC as "non-commercial administrative bodies responsible to central governments, regional governments or local authorities, or authorities that in the view of the competent authorities exercise the same responsibilities as regional and local authorities, or non-commercial undertakings owned by central governments that have explicit guarantee arrangements, and may include self administered bodies governed by law that are under public supervision".

<sup>8</sup> We also refer to the FAQs about EMIR published by the European Commission (question 15).

<sup>9</sup> See Article 1, § 4 of EMIR.

**Question 13. Change of statutory auditor**

**Q: If an NFC decides or decided to change its statutory auditor after the closing of the financial period, which auditor is required to implement the AUP: the auditor who will be appointed at the shareholders' meeting (= new auditor) or the auditor who was in post at the closing date (= former auditor)?**

A: The statutory auditor who was in post at the closing date of the financial period (and who thus issues the audit opinion on the annual financial statements) must implement the AUP, unless the NFC and both auditors agree on another *modus operandi*.

**Question 14: EMIR Review**

**Q: Does the proposal for a review of the EMIR Regulation, as published by the European Commission on 4 May 2017, have any impact on the AUP to be implemented in 2017?**

A: No. When the amended EMIR enters into force, certain AUPs will be amended.