

Guidance on applying exemptions from the clearing obligation under Article 4(1) of EMIR for intragroup transactions under Article 3 of EMIR with respect to a notification under Article 4(2)(a) or an application¹ under Article 4(2)(b) of EMIR

General information

(1) Pursuant to Article 4(1) of 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 (hereinafter ‘**EMIR**’), counterparties must clear with a central counterparty (CCP) all over-the-counter (OTC) derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation in accordance with Article 5(2) of EMIR, if those contracts have been concluded:

- a) **between two financial counterparties (FCs)** (defined in Article 2(8) of EMIR);
- b) **between an FC and a non-financial counterparty** (as defined in Article 2(9) of EMIR) taking positions in OTC derivative contracts which exceed the clearing threshold under Article 10(1)(b) of EMIR (hereinafter ‘**NFC+**’) and are calculated pursuant to Article 10(3) of EMIR;
- c) **between two NFC+s;**
- d) **between an FC or NFC+ and an entity established in a third country** that would be subject to the clearing obligation if it were established in the European Union (EU); or
- e) **between two entities established in one or more third countries** that would be subject to the clearing obligation if they were established in the EU, provided that the contract has a direct, substantial and foreseeable effect within the EU or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of EMIR.

(2) **Intragroup transactions** are defined in Article 3 of EMIR. With respect to intragroup transactions in the form of OTC derivative contracts, counterparties must meet the following general conditions:

- a) both counterparties are included in the same consolidation on a full basis (Article 3(3) of EMIR);
- b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;
- c) a counterparty is established in the EU or, if it is established in a third country, the Commission has adopted an implementing act under Article 13(2) of EMIR in respect of that third country.

(3) For the purposes of paragraph 2(a), pursuant to Article 3(3) of EMIR, counterparties are considered to be included in the same consolidation when they are both either:

- a) included in a consolidation in accordance with Directive 83/349/EEC or International Financial Reporting Standards (IFRS) adopted pursuant to Regulation (EC) No 1606/2002 or, in relation to a group the parent undertaking of which has its head office in a third country, in accordance with generally accepted accounting principles of a third country determined to be equivalent to IFRS in accordance with Regulation (EC) No 1569/2007 (or accounting standards of a third country the use of which is permitted in accordance with Article 4 of that

¹ Due to different procedures when applying the clearing obligation exemption for intragroup transactions under Article 4(2)(a) and Article 4(2)(b) of EMIR, a notification pursuant to Article 4(2)(b) of EMIR is considered an application. Pursuant to Article 4(2)(a) of EMIR (Examples 1 and 2), an exemption may be applied if none of the competent authorities for counterparties established in the EU objects to the application of that exemption within 30 calendar days after receipt of the notification; however, pursuant to Article 4(2)(b) of EMIR (Example 3), the competent authority of a counterparty in the EU – which in the case of Slovakia is Národná banka Slovenska (NBS) – must decide whether to authorise the application of the exemption.

Regulation); or

- b) covered by the same consolidated supervision in accordance with Directive 2006/48/EC or Directive 2006/49/EC or, in relation to a group the parent undertaking of which has its head office in a third country, the same consolidated supervision by a third-country competent authority verified as equivalent to that governed by the principles laid down in Article 143 of Directive 2006/48/EC or in Article 2 of Directive 2006/49/EC.

(4) The applicant counterparty must prove to NBS its compliance with the condition of being subject to **appropriate centralised risk evaluation, measurement and control procedures** pursuant to paragraph 2(b), at least to the following extent:

- a) by describing the risk management and risk control policies, including how those policies are centrally defined and applied;
- b) by demonstrating that senior management is responsible for risk management and that risk measurement is being periodically reviewed (stating also the intervals between periodic reviews);
- c) by demonstrating that its organisation has in place regular and transparent communication mechanisms, such that the management board, senior management, relevant business line, risk management function, and other control functions can share information on the measurement, analysis and monitoring of risks;
- d) by demonstrating that internal procedures and information systems are consistent throughout the institution and are sufficiently reliable, thereby enabling all sources of relevant risks to be identified, measured and monitored on an aggregated basis and to the extent necessary for the entity, business line, and portfolio; and
- e) by demonstrating that key risk information is regularly reported to the central risk management function in order to allow appropriate centralised risk evaluation, measurement and control procedures across relevant entities within the group.

(5) If the notification pursuant to Article 4(2)(a) of EMIR concerns transactions between counterparties established in different Member States (Example 2 below), NBS assumes that both counterparties will send their respective competent authorities (which for a counterparty established in Slovakia is NBS; for a counterparty established in another Member State, the competent authority of that Member State) similar information in order to prove compliance with the condition under paragraph 2(b) in accordance with paragraph 4.

(6) Further information on the application of the clearing obligation exemption for intragroup transactions is available in the following document published on the website of the European Securities and Markets Authority (ESMA): [ESMA Questions and Answers – Implementation of 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 \(EMIR\)](#). The relevant information is found in the section “OTC Questions – Intragroup transactions” (No 6).

(7) The application of the clearing obligation exemption for intragroup transactions applies to transactions between two counterparties – the ‘applicant’ counterparty and the ‘intragroup’ counterparty (counterparty within the group). Each pair of counterparties within the group must apply the exemption separately.

Examples of the application of the clearing obligation exemption for intragroup transactions

Counterparties to OTC derivative contracts pertaining to a class of OTC derivatives declared subject to the clearing obligation (Annex 1) may **apply the clearing obligation exemption for intragroup transactions under Article (4)(2) of EMIR** in accordance with Examples 1 to 3 below.

Example 1: Both counterparties are established in Slovakia.

(1) **Either each counterparty separately, or one counterparty on behalf of both (on the basis of a power of attorney), may notify NBS in writing** that, pursuant to Article 4(2)(a) of EMIR, they intend to apply the clearing obligation exemption for intragroup transactions relating to OTC derivative contracts concluded between each other.

(2) Such notification by counterparties must be made not less than 30 calendar days before the application of the exemption. Within 30 calendar days after receipt of that notification, NBS may object to the application of this exemption if the transactions between counterparties do not meet the conditions laid down in Article 3 of EMIR. This is without prejudice to the right of NBS to object to the application of the exemption after that period of 30 calendar days has expired where those conditions are no longer met.

(3) In assessing compliance with the conditions for applying the clearing obligation exemption pursuant to Article 3 of EMIR, NBS must examine whether the intragroup transaction meets the specified conditions in relation to an NFC and in relation to an FC in accordance with Article 3(1) and (2) of EMIR.

(4) **In relation to an NFC+** (applicant counterparty) pursuant to Article 3(1) of EMIR, NBS must examine whether the **OTC derivative contract has been concluded with another counterparty** which is part of the same group (an intragroup counterparty /FC, NFC+/) and whether:

- a) both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR; and
- b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures.

(5) **In relation to an FC** (applicant counterparty) pursuant to Article 3(2) of EMIR, NBS must examine whether:

- a) the **OTC derivative contract has been concluded with another counterparty** which is part of the same group (an intragroup counterparty), provided that the following conditions are met:
 1. the FC is established in Slovakia;
 2. the other intragroup counterparty is an FC, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements;
 3. both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR; and
 4. both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;
- b) the **OTC derivative contract has been concluded with another intragroup counterparty**

where both counterparties are part of the same institutional protection scheme, referred to in Article 80(8) of Directive 2006/48/EC, provided that the condition set out in point 2 of subparagraph (a) is met;

- c) the **OTC derivative contract has been concluded between credit institutions affiliated to the same central body or between such credit institution and the central body**, as referred to in Article 3(1) of Directive 2006/48/EC (currently, there is no such case in Slovakia); or
- d) the **OTC derivative contract has been concluded with an NFC+** which is part of the same group, provided that the following conditions are met:
 - 1. both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR;
 - 2. both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures; and
 - 3. that counterparty is established in Slovakia.

(6) To demonstrate compliance with the above conditions for intragroup transactions, the applicant counterparty (each counterparty separately or one counterparty on behalf of both) must complete the relevant fields in the template (Annex 2) in accordance with this Guidance or provide the required information in an annex to the template.

Example 2: One counterparty is established in Slovakia and the other counterparty is established in another EU Member State.

(1) **Both counterparties must separately notify their respective competent authorities in writing** that they intend to apply the clearing obligation exemption for intragroup transactions relating to OTC derivative contracts concluded between each other pursuant to Article 4(2)(a) of EMIR; i.e. the counterparty established in Slovakia must notify NBS, and the counterparty established in another Member State must notify the competent authority of that Member State.

(2) Within 30 calendar days after receipt of the notification, NBS and the competent authority of another Member State may individually object to the application of this exemption if the transactions between the counterparties do not meet the conditions laid down in Article 3 of EMIR, without prejudice to the right of the competent authorities to object to the application of the exemption after that period of 30 calendar days has expired where those conditions are no longer met.

(3) In assessing compliance with the conditions for applying the clearing obligation exemption pursuant to Article 3 of EMIR, NBS must examine whether the intragroup transaction meets the specified conditions in relation to an NFC and in relation to an FC in accordance with Article 3(1) and (2) of EMIR.

(4) **In relation to an NFC+** (applicant counterparty) pursuant to Article 3(1) of EMIR, NBS must examine whether an **OTC derivative contract has been concluded with another counterparty** which is part of the same group (an intragroup counterparty /FC, NFC+/) and whether:

- a) both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR; and
- b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures.

(5) **In relation to an FC** (applicant counterparty) pursuant to Article 3(2) of EMIR, NBS must examine whether:

- a) the **OTC derivative contract has been concluded with another counterparty** which is part of the same group (an intragroup counterparty), provided that the following conditions are met:
 1. the FC is established in the EU;
 2. the other intragroup counterparty is an FC, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements;
 3. both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR; and
 4. both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;
- b) the **OTC derivative contract has been concluded with an NFC+** which is part of the same group (an intragroup counterparty), provided that the following conditions are met:
 1. both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR;
 2. both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures; and
 3. that counterparty is established in another EU Member State.

(6) To demonstrate compliance with the above conditions for applying the clearing obligation exemption for intragroup transactions, the applicant counterparty established in Slovakia must complete the relevant fields in the template (Annex 2) in accordance with this Guidance or provide the required information in an annex to the template.

(7) The intragroup counterparty established in another Member State must demonstrate compliance with the conditions for applying the clearing obligation exemption for intragroup transactions in accordance with the procedures laid down by the competent authority of that Member State.

(8) NBS and the competent authority of another Member State must inform each other of receipt of the notification from the relevant counterparties.

(9) NBS and the competent authority of another Member State must conduct a mutual initial assessment of the notification, exchange initial views, and discuss the notifications from the relevant counterparties.

(10) If NBS and the competent authority of another Member State do not intend to object to the application of the exemption, they may agree that:

- a) they will not act within a period of 30 calendar days; the relevant counterparties may start to apply the clearing obligation exemption for intragroup transactions after the expiry of that period; or
- b) they will notify the relevant counterparties that they may start to apply the exemption before the expiry of the 30-day period.

(11) If NBS or the competent authority of another Member State (or both) intend to object to the application of the exemption, they may request additional information from the relevant counterparties and set a deadline for providing it.

(12) If NBS and the competent authority of another Member State agree to object to the application of the clearing obligation exemption, NBS and that competent authority may agree on how to transmit this information to the relevant counterparties and on its content regarding:

- a) the opinion that NBS and the competent authority of another Member State object to the application of the exemption;
- b) the reasons for the objection to the application of the exemption;
- c) the opinion that the relevant counterparties may reapply (under a new application procedure) for the clearing obligation exemption for intragroup transactions after resolving the objections specified in the reasons for the objection to the application of the exemption (provided that the relevant counterparties are able to resolve the objections).

(13) Despite their mutual communication pursuant paragraphs 8 to 9 and 11, NBS and the competent authority of another Member State may not necessarily reach the same decision after examining the information provided in the notification by the relevant intragroup counterparties.

(14) If, after receiving additional information, NBS or the competent authority of another Member State still objects to the application of the exemption, NBS and that competent authority may agree on their communication with the relevant counterparties regarding:

- a) which competent authority (NBS or the competent authority of another Member State) objects to the application of the exemption;
- b) the reasons for the objection to the application of the exemption;
- c) the opinion that the relevant counterparties may reapply (under a new application procedure) for the clearing obligation exemption for intragroup transactions after resolving the objections specified in the reasons for the objection to the application of the exemption (provided that the relevant counterparties are able to resolve the objections).

(15) If there is disagreement between NBS and the competent authority of another Member State, ESMA may, at the request of either of those authorities, assist them in reaching an agreement in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

(16) If neither NBS nor the competent authority of the counterparty in another Member State object to the application of the clearing obligation exemption for intragroup transactions – i.e. they consider the conditions set out in Article 3 of EMIR to be met – the counterparties may apply the exemption.

Example 3: One counterparty is established in Slovakia and the other counterparty is established in a third country.

(1) For authorisation to apply the clearing obligation exemption for intragroup transactions related to OTC derivative contracts concluded with a counterparty established in a third country pursuant to Article 4(2)(b) of EMIR, **the counterparty established in Slovakia must apply to NBS in writing.**

(2) **Within 30 days after receiving the authorisation application, and provided that the conditions set out in Article 3 of EMIR are met, NBS must decide on whether to authorise the exemption.**

(3) In assessing compliance with the conditions for applying the clearing obligation exemption pursuant to Article 3 of EMIR, NBS must examine whether the intragroup transaction meets the specified conditions in relation to an NFC and in relation to an FC in accordance with Article 3(1) and (2) of EMIR.

(4) **In relation to an NFC+** (applicant counterparty) pursuant to Article 3(1) of EMIR, NBS must examine whether an **OTC derivative contract has been concluded with another counterparty** which is part of the same group (an intragroup counterparty /FC, NFC+/) and whether:

- a) both counterparties are included in the same consolidation on a full basis;
- b) both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures; and
- c) the Commission has adopted an implementing act under Article 13(2) of EMIR in respect of that third country.

(5) **In relation to an FC** (applicant counterparty) pursuant to Article 3(2) of EMIR, NBS must examine whether:

- a) the **OTC derivative contract has been concluded with another counterparty** which is part of the same group (an intragroup counterparty), provided that the following conditions are met:
 1. the FC is established in a third-country jurisdiction for which the Commission has adopted an implementing act under Article 13(2) of EMIR;
 2. the other intragroup counterparty is an FC, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements;
 3. both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR; and
 4. both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;
- b) the **OTC derivative contract has been concluded with an NFC+** which is part of the same group (an intragroup counterparty), provided that the following conditions are met:
 1. both counterparties are included in the same consolidation on a full basis pursuant to Article 3(3) of EMIR;
 2. both counterparties are subject to appropriate centralised risk evaluation, measurement and control procedures;
 3. that counterparty is established in a third-country jurisdiction for which the Commission has adopted an implementing act as referred to in Article 13(2) of EMIR.

(6) To demonstrate compliance with the above conditions for intragroup transactions, the applicant counterparty established in Slovakia must complete the relevant fields in the template (Annex 2) in accordance with this Guidance or provide the required information in an annex to the template.

(7) **NBS must notify ESMA of its decision pursuant to Article 4(2)(b) of EMIR.** The counterparties may apply the clearing obligation exemption provided that NBS has authorised them to do so.

Sending a notification or application

(1) **As from 1 May 2016**, all counterparties which are established in Slovakia (**credit institutions, insurance undertakings, reinsurance undertakings, investment firms,**

management companies², supplementary pension management companies³, and non-financial counterparties⁴ if exceeding the clearing threshold must send – on paper, using the template (Annex 2) – their notification under Article 4(2)(a) of EMIR (Examples 1 and 2 above) or their application under Article 4(2)(b) of EMIR (Example 3 above) to NBS at the following address:

Národná banka Slovenska
Útvar dohľadu nad finančným trhom
Imricha Karvaša 1
813 25 Bratislava

- (2) Notifications pursuant to Example 1 must be sent in Slovak.
- (3) Notifications or applications pursuant to Examples 2 and 3 above must be sent in both Slovak and English.
- (4) The template for the notification or application pursuant to Examples 1 to 3 is given in Annex 2.
- (5) Instructions for completing selected fields in the notification or application template are given in Annex 4.

ANNEXES:

Annex 1: OTC derivative contracts pertaining to a class of OTC derivatives declared subject to the clearing obligation (*to be updated regularly*)

Annex 2: Template for the notification under Article 4(2)(a) of EMIR or for the application under Article 4(2)(b) of EMIR concerning an exemption from the clearing obligation under Article 4(1) of EMIR for intragroup transactions

Annex 3: List of countries for which the Commission has adopted an implementing act as referred to in Article 13(2) of EMIR (*to be updated regularly*)

Annex 4: Instructions for completing selected fields in the notification or application template

² For the purposes of the exemption for intragroup transactions, standard and alternative investment funds managed by management companies are excluded as the condition of inclusion in the same consolidation is not met.

³ For the purposes of the exemption for intragroup transactions, supplementary pension funds (third-pillar funds) managed by supplementary pension management companies are excluded as the condition of inclusion in the same consolidation is not met.

⁴ Including pension fund management companies; however, for the purposes of the exemption for intragroup transactions, pension funds (second-pillar funds) managed by pension fund management companies are excluded as the condition of inclusion in the same consolidation is not met.