

OTC derivatives in the EU and the US: latest regulatory developments

Operations Managers Contact Group

Sophie Bening
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Highlights of the last months

- **EMIR:**
 - 9 technical standards adopted by the Commission on 19 December 2012. All published in the OJEU.
- **MiFIR:**
 - amendments adopted by EP on 26 October 2012
 - Council: Irish Presidency compromise of 1 March 2013
- **DFA:**
 - Treasury determination for FX swaps and forwards
 - first mandatory clearing determination became final
 - Exemptive order on cross-border effects of the DFA
- **BCBS-IOSCO:**
 - second consultative paper on margin requirements for uncleared derivatives

EMIR: 9 delegated Regulations published

- **19 December 2012: technical standards adopted**
- **Commission endorsed the proposals from ESMA without modification (except one, not adopted)**
- **6 regulatory technical standards**
 - Capital requirements for CCPs
 - Requirements for CCPs
 - Clearing obligations/indirect clearing arrangements
 - Data reporting
 - TRs' registration
 - Publication of data by TRs(all published in the OJ on 23.02.2013; enter into force on 15.03.2013)
- **3 implementing technical standards**
(all 3 published in the OJ on 21.12.2012; entered into force in January)

EMIR: key dates in implementation (FSA)

- Notifications for non-financial counterparties for exceeding, and subsequently falling below, the clearing threshold: **15 March 2013**
- Operational risk management of non-cleared OTC derivatives: **middle of 2013**
- TRs recognised and reporting obligation applied: **1 July 2013** for credit and interest rate derivatives, **1 January 2014** for all other classes
- CCPs authorised and clearing obligation applied: **middle of 2013**
- Collateral posting for non-cleared trades: **consultation** is likely to be in the **first half of 2013**

EMIR: notifications to competent authority

As of 15 March 2013:

- **Clearing threshold for non-financial counterparties:**
A non-financial counterparty that enters into positions in OTC derivatives contracts that exceed the clearing thresholds specified by ESMA under Article 11 of Regulation No 149/2013 must notify its competent authority of that breach under Article 10(1) of EMIR.
- **Timely confirmation - reporting outstanding confirmations:** Financial counterparties must have procedures in place to report on a monthly basis the number of unconfirmed OTC derivative transactions that have been outstanding for more than five business days. See Article 12(4) of Regulation No 149/2013.
- **Intragroup exemptions from clearing and margin requirements:** counterparty must first notify its competent authority
- **Exemption for pension schemes:** counterparty must first apply to its competent authority

EMIR: effective date for reporting

Article 5 of Regulation (EU) No 1247/2012:

- **Credit derivatives and interest rate derivatives**
 - By **1 July 2013** if TR registered before 1 April 2013
 - **90 days** after registration of TR
 - By **1 July 2015** at the latest
- **Other derivative contracts**
 - By **1 January 2014** if TR registered before 1 October 2013
 - **90 days** after registration of TR
 - By **1 July 2015** at the latest
- Trades entered into on or after 16 August 2012, or that were outstanding on that date, must also be reported.

EMIR – equivalence assessments

- **Equivalence** of a **third country's CCPs and TRs** with EMIR requirements (Art. 25(6) and 75(1))
- **Equivalence** of a **third country's legal and supervisory arrangements** with EMIR clearing and reporting requirements (Art. 13(2))
- Determined by **Commission** in an **implementing act** following ESMA's technical advice
- **First countries to be assessed: USA and Japan** (CCPs, TRs, transaction requirements) – **by 15 June 2013**
- See also **Joint press statement of G20** regulators on ways to minimise cross-border application of rules (4 December 2012)

MiFIR: state-of-play

- **European Parliament:** amendments to MiFIR adopted on 26 October 2012
Indicative date for the plenary sitting: 8 October 2013
- **Council:**
Latest Presidency compromise on MiFID II dated 1 March 2013
- **Trilogue** between EP, Council and Commission scheduled to start in **April 2013**

DFA: Final Treasury's determination on FX

- **16 November 2012:** U.S. Treasury issued its final determination that **FX swaps and FX forwards should not be regulated as swaps under the CEA** (for most purposes, incl. registration, mandatory clearing and trade execution, margin, real-time reporting)
- FX swaps and FX forwards **narrowly defined** in the CEA:
 - **FX forward** means a transaction that **solely** involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.
 - **FX swap** means a transaction that **solely** involves-
 - (A) an exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and
 - (B) a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.

DFA: first final clearing determination

- 28 November 2012: CFTC issued **first clearing determination for certain CDS and IRS (6 classes)**
- As of that date, **four DCOs** clear CDS (but iTraxx) and IRS: **CME, ICE Clear Credit, ICE Clear Europe and LCH.Clearnet Ltd**
- **Effective dates** for mandatory clearing: **11 March 2013** for cat. 1 entities; **10 June 2013** for cat. 2 entities and **9 September 2013** for cat. 3 entities.
- Clearing requirement applies to **swaps entered into on or after the effective date** of mandatory clearing.

DFA: CFTC's Final Cross-Border Swap Exemptive Order

- **21 December 2012: CFTC approved exemptive order providing time-limited relief from certain cross-border applications of the DFA**
 - a **non-U.S. person** that registers with the CFTC as SD or MSP may delay compliance with certain **entity-level requirements** (i.e. all but SDR reporting and LTR requirements for swaps with U.S. counterparties);
 - non-U.S. SDs and MSPs and foreign branches of U.S. SDs and MSPs may delay compliance with certain **transaction-level requirements** (for transactions with non-U.S. counterparties, for which compliance with requirements of the local jurisdiction is sufficient);
 - non-U.S. person: level of swap dealing activity where counterparty is a non-U.S. person or a foreign branch of a U.S. person not to be taken into account for the purpose of registration as SD or MSP.
- Exemptive order **expires on 12 July 2013**

Margin requirements for uncleared derivatives

- 15.02.2013: **BCBS-IOSCO** published **second consultative paper on margin requirements for uncleared derivatives** (for comments until 15.03.2013)
- Initially proposed margin requirements revised to:
 - apply only to entities in consolidated groups with more than €8 billion of uncleared derivatives exposure;
 - allow for a €50 million initial margin threshold between consolidated groups; and
 - phase in initial margin requirements between 2015 and 2019, beginning in 2015 with swaps.
- Would apply to all uncleared derivatives (not only “swaps” and “security-based swaps” under the DFA)