

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

Foreign Exchange Contact Group

Sophie Bening

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Overview

- **EMIR:**
 - 15 March 2013: first technical standards came into effect
 - Effective date for reporting still unclear: 23 September 2013 at the earliest
- **MiFID II:**
 - Latest Presidency compromise: 4 June 2013
 - Uncertain whether agreement can still be found under Irish Presidency
- **DFA:**
 - Exemptive order on cross-border effects of the DFA
 - External Business Conduct Rules in effect since 1 May 2013
 - Other final rules (SEF, minimum block trade sizes)
 - Swaps Pushout Rule

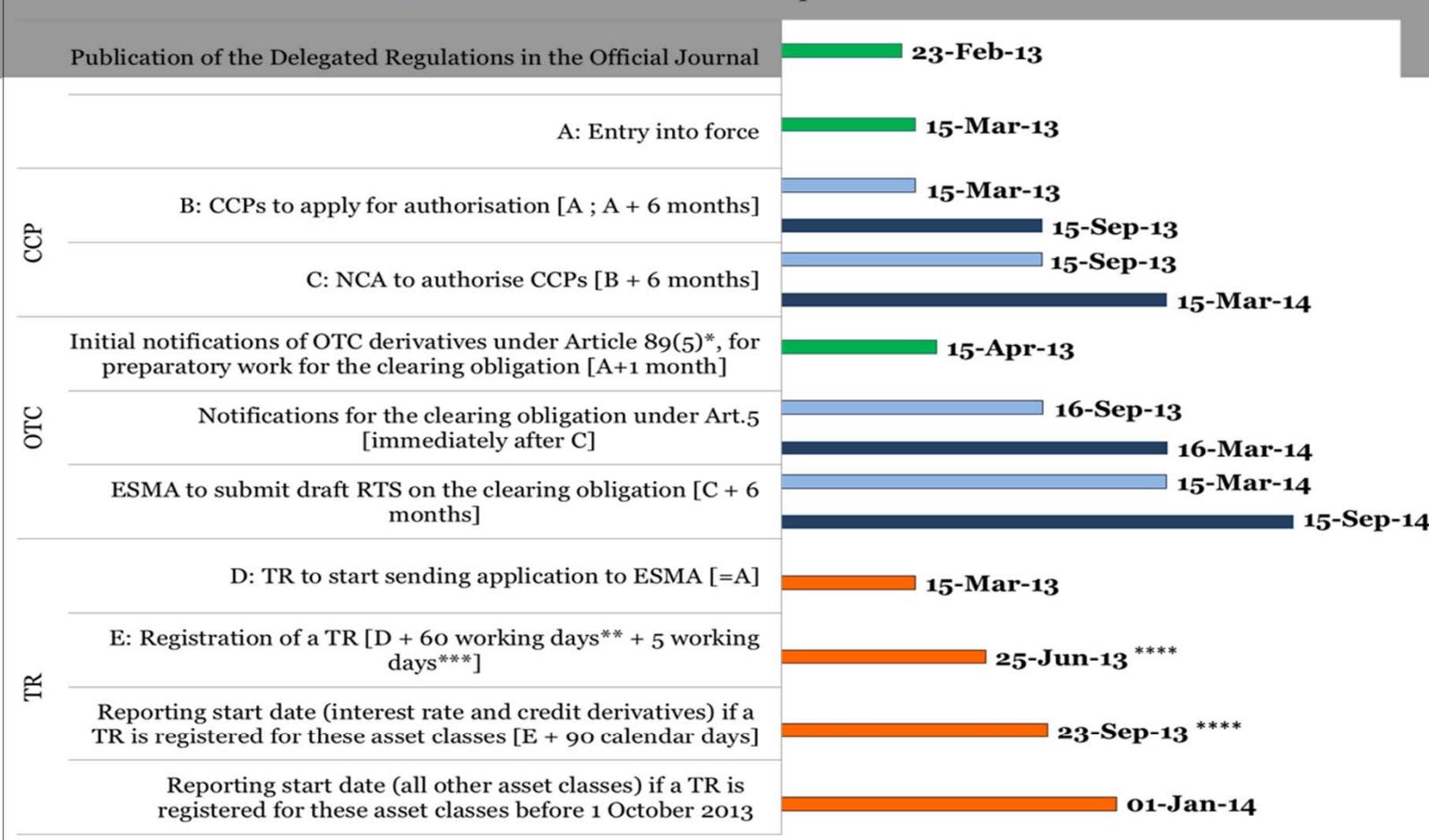
EMIR: rules already in effect

Since 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 indicative timeline - Last update: 22-May-13

■ Minimum ■ Known ■ Earliest possible ■ Maximum



* The notification under EMIR Article 89(5) do not trigger the front-loading period for a class of derivatives as described in EMIR Article 4(1)(b)(ii). This front-loading period will only be initiated by the notifications referred to in EMIR Article 5(1).

** The exact duration of the registration process of a TR will depend on whether the application is complete when it is filed and whether additional information has to be submitted to ESMA.

*** The registration decision takes effect on the fifth working day following its adoption.

**** Nevertheless, on the basis of the information available so far, ESMA's best estimate is that the registration of the first TR(s) is not likely to take place before August 2013 and the reporting start date depends on the actual date of the registration of the first TR(s).

EMIR: reporting of CDS and IRS

If entered into on or after 16 August 2012 and still outstanding:

- According to Article 5 of Regulation (EU) No 1247/2012:
 - By **1 July 2013** if TR registered before 1 April 2013
 - **90 days** after registration of TR
 - By **1 July 2015** at the latest
- ESMA estimate: first registration of TR in **August 2013**

Historical swaps:

- if still outstanding on the reporting start date: reporting due **90 days** later
- Not outstanding on the reporting start date: reporting due **3 years** later

EMIR: reporting of other classes of swaps, incl. FX

If entered into on or after 16 August 2012 and still outstanding:

- By **I January 2014** if TR registered before **I October 2013**
- **90 days** after registration of TR
- By **I July 2015** at the latest

Historical swaps:

- if still outstanding on the reporting start date: reporting due **90 days later (April 2014)**
- Not outstanding on the reporting start date: reporting due **3 years later (January 2017)**

EMIR: reporting process

- Both at **transaction** and at **counterparty level**
- **Both counterparties must report**
- **Without duplication**
- Reporting **can be delegated** to the counterparty/third party
- **Non-EU entity** to the trade **not subject to reporting obligation**
 - => counterparty data relating to the non-EU entity is not reported (only common transaction data)
- Breach of **confidentiality?**
- **LEI**

EMIR: other developments

- **Risk mitigation techniques for non-centrally cleared swaps:**
 - ESAs' joint discussion paper, 6 March 2013
 - Initial margin: segregation and no re-use
 - Intra-group exemptions
- **Third country equivalence assessments:**
 - Japan and US: ESMA's advice to COM by 15 June 2013
 - Pre-condition for recognition of third-country CCPs by ESMA
- Trades between non EU entities with a **direct, substantial and foreseeable effect within the Union**: RTS due by 25 September 2013
- **Last Q&As published by ESMA on 4 June 2013**

MiFID II: state-of-play

- **European Parliament:** amendments to MiFID II adopted on 26 October 2012
Indicative date for the plenary sitting: 10 December 2013
- **Council:**
Latest Irish Presidency compromise on MiFID II: 4 June 2013
Main issue: non-discriminatory access to CCPs, independently of the trading venue where the transaction has been traded
If no agreement at the June ECOFIN meeting, negotiations to be continued under Lithuanian Presidency

MiFIR: reporting requirements

- **Pre-trade transparency**
 - Obligation of market operators and investment firms operating a trading venue to make public current bid and offer prices; available to the public on a continuous basis
 - Competent authorities may waive this obligation
- **Post-trade disclosure**
 - Real-time public reporting of price, volume, trade time of a derivative transaction (as close to real time as technically feasible)
 - Deferred publication may be authorised by competent authorities (e.g. large in scale transactions); subject to RTS to be developed by ESMA

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**
- **Impact on branches of US persons:** non-US branch of a US bank dealing with a non-US person is not subject to DFA requirements (reporting requirements; compliance with External Business Conduct Rules; etc.)
- Exemptive order **expires on 12 July 2013**
- Expected to be **prolonged for another 6 months** (until end 2013)
- Compare with SEC cross-border guidance

DFA: temporary relief from External Business Conduct Rule for FX transactions

- 2 May 2013: **no-action letter** issued by CFTC
- SDs/MSPs temporarily exempt from External Business Conduct Standards rules in the context of certain FX transactions that are intended to be foreign exchange spot transactions
- Affects FX transactions entered into **prior to 1 September 2013** that have a settlement cycle of **no more than seven local business days** in the place of settlement.

DFA: SEF rules / block trades

- **SEF rules (effective 5 August 2013)**
 - CEA: any swap required to be clear must be traded on a DCM or SEF (unless no swap made available to trade)
 - Any trading system or platform providing more than one market participant with the ability to execute or trade swaps with more than one other market participant must register as SEF (unless registered as DCM)
 - Must grant impartial access
- **Block trades (effective 30 July 2013)**
 - SEF minimum execution methods not applicable
 - Delay in public dissemination of data about the trade (until 30 July: all trades considered block trades for reporting purposes)

DFA: Swaps Pushout Rule for U.S. branches of foreign banks

- Swaps Pushout Rule **prohibits any “federal assistance”** (FDIC insurance and access to FED’s discount window) from being provided **to swap entities**, incl. SDs and MSPs
- Effective 16 July 2013
- Transition period up to 2 years + exemption for certain swaps that are used to hedge risks
- **FED’s interim final rule:** all uninsured U.S. branches and agencies of foreign banks are treated as insured depository institutions for the purpose of the Swaps Pushout Rule
=> exemption and transition period applicable to them

Impact of regulatory changes on swap documentation

- **ISDA protocols:**
 - August 2012 Dodd-Frank protocol for compliance with External Business Conduct Rules
 - March 2013 Dodd-Frank protocol for timely confirmation obligations
 - *Under consideration:* portfolio reconciliation, dispute resolution
 - *Under consideration:* reporting obligations under EMIR
- **Other industry initiatives** (e.g. EBF-EMA)