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

Foreign Exchange Contact Group

Sophie Bening

Frankfurt am Main, 31 January 2013
Highlights of the last months

- **EMIR:**
  - 9 technical standards adopted by the Commission on 19 December 2012, incl. effective date for reporting requirements and details of the data to be reported

- **MiFIR:**
  - amendments adopted by EP on 26 October 2012
  - Council: Presidency compromise of 3 December 2012

- **DFA:**
  - Treasury determination for FX swaps and forwards
  - first mandatory clearing determination became final
  - Exemptive order on cross-border effects of the DFA
  - no-action relief letters
EMIR: 9 delegated Regulations adopted

• 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
• 3 implementing technical standards
  (all 3 published in the OJ on 21.12.2012)
EMIR: effective date for reporting

- **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: details of the data to be reported

• **Information** to be provided to TR: *counterparty data* and *common (product) data* (format set out in Annex to Commission Implementing Regulation (EU) No 1247/2012)

• **Frequency** of reporting: mark to market or mark to model valuations of contracts reported to a TR shall be done on a **daily basis**.
   
   Other reporting elements (e.g. modification or termination of a contract): as they occur
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) – **scheduled for April 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
- **Council:**
  - last Presidency compromise on MiFID II dated 3 December 2012
  - Progress report published on 13 December 2012
  - no general approach yet
- **Trilogue** between EP, Council and Commission scheduled to start in **March 2013**
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
DFA: several no-action relief letters

- **2012: 65 no-action letters** issued by CFTC staff (24 in December 2012) to delay compliance with certain rules
  - **Letter No. 12-46**: No-Action Relief providing reporting parties under Parts 20, 45 and 46 of the CFTC’s regulations with time-limited relief from requirements to report certain identifying information regarding their non-reporting counterparties. Expires on 30 June 2013.
  - **Letter No. 12-55**: No-Action Relief for SDs and MSPs from compliance with reporting obligations: time-limited relief from the obligation to report valuation data for cleared swaps. Expires on 30 June 2013.
  - **Letter No. 12-59**: No-Action Relief for SDs and MSPs from the reporting provisions of Part 45 for CDS clearing-related swaps. Expires on 30 June 2013.
  - **Letter No. 12-71**: No-Action Relief for certain U.S. banks wholly owned by non-U.S. SDs, for purposes of making calculations under the Swap Dealer definition.