SLAUGHTER AND MAY

BRIEFING
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EMIR: reporting of derivatives from 12 February 2014

From 12 February 2014 (the **reporting start date**), *all counterparties established in the European Union* (including financial and non-financial counterparties and central counterparties (**CCPs**)) will, by virtue of the European Market Infrastructure Regulation (**EMIR**),[1] need to report details of any derivative contract (defined in Article 2 of EMIR) they have concluded, or which they have modified or terminated, to a registered or recognised trade repository.

This briefing provides an overview of the reporting obligation, which arises under Article 9 of EMIR and is further developed by certain implementing and regulatory technical standards adopted by the European Commission.[2]

Counterparties established in the European Union (the **EU**) are already likely to be putting in place arrangements and internal processes, and liaising with their counterparties where necessary, in order to be prepared for the reporting start date.

WHICH DERIVATIVE TRANSACTIONS NEED TO BE REPORTED?

The reporting obligation applies to all derivative transactions (both OTC and exchange-traded and cleared and non-cleared) of all asset classes which are, or were, outstanding at any time on or after 16 August 2012 (Article 9(1) of EMIR).

There is no exemption for intra-group transactions.

WHEN DO THE DERIVATIVE TRANSACTIONS NEED TO BE REPORTED?

- Derivative transactions *entered into on or after the reporting start date* (**new trades**) must be reported **within one business day** of the date they are executed (Article 9 of EMIR and Articles 2 and 5(1) and (2) of the Implementing Regulation).[3]

[1] 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.

[2] Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (the **Implementing Regulation**).

Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories (the **Delegated Regulation**).

[3] Specifically, a derivative transaction must be reported by the end of the business day following execution. See the Questions and Answers published by the European Securities and Markets Authority (**ESMA**).

- Derivative transactions which are *outstanding on the reporting start date and which were entered into on or after 16 August 2012* (**post-existing trades**) must be reported **on or before the reporting start date** (Article 9 of EMIR and Articles 5(1) and (2) of the Implementing Regulation).[4]

- Derivative transactions which are *outstanding on the reporting start date and which were also outstanding on 16 August 2012* (**pre-existing trades**) must be reported **on or before 13 May 2014** (i.e. within 90 days of the reporting start date) (Article 9 of EMIR and Article 5(3) of the Implementing Regulation).

- Any modification to, or termination of, a derivative transaction which is either:

  – a new trade;

  – a post-existing trade; or

  – a pre-existing trade,

  must be reported **within one business day** of the occurrence of the modification or termination (Article 9 of EMIR and Article 2 of the Implementing Regulation). For post-existing trades and pre-existing trades, there is no need to report modifications that occurred prior to the reporting start date (in the case of post-existing trades) or 13 May 2014 (in the case of pre-existing trades). Post-existing trades and pre-existing trades should be reported as they exist at the reporting start date or 13 May 2014, as applicable. "Termination" in this context means termination prior to the date originally scheduled as the termination date for the relevant derivative transaction.[5]

- Derivative transactions which are *no longer outstanding on the reporting start date* which:

  – were entered into before 16 August 2012 and were still outstanding on that date; or

  – were entered into on or after 16 August 2012 (in either case, **historical trades**),

  must be reported **on or before 12 February 2017** (i.e. within three years of the reporting start date) (Article 9 of EMIR and Article 5(4) of the Implementing Regulation).

Backloading:

If they have not already done so, counterparties may wish to begin the process of "backloading" post-existing trades, by submitting the relevant details of them to a registered or recognised trade repository in advance of the reporting start date. The same process can be undertaken for pre-existing trades and historical trades in advance of the respective 13 May 2014 and 12 February 2017 reporting deadlines for these derivative transactions.

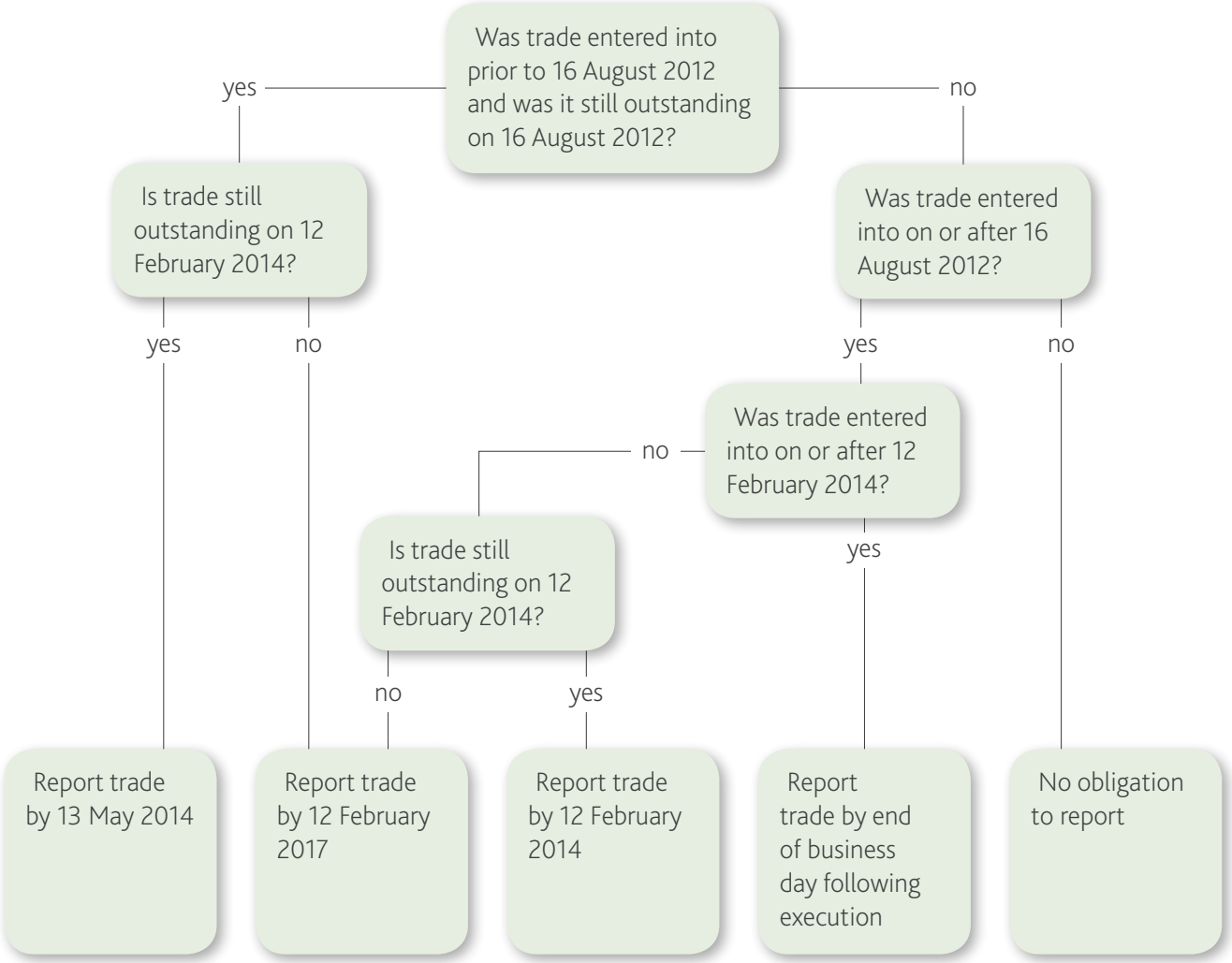
[4] The Financial Conduct Authority (the **FCA**) indicated in an EMIR trade reporting presentation on 8 January 2014 that it will not require post-existing trades to be reported before 13 February 2014 (one business day following the reporting start date) but, in the absence of any written guidance on this point, counterparties established in the United Kingdom may still wish to report any post-existing trades by the reporting start date.

[5] These points are clarified in the Questions and Answers published by ESMA.

Reporting of exposures:

From **11 August 2014** (i.e. 180 days after the reporting start date), financial counterparties and non-financial counterparties exceeding the clearing threshold must report details of exposure (Article 5(5) of the Implementing Regulation and Article 3 of the Delegated Regulation). Reporting of exposures must be done on a daily basis (Article 2 of the Implementing Regulation).

The following flowchart illustrates the deadlines for the reporting of derivative transactions:[6]



WHO HAS TO REPORT?

- The reporting obligation applies to all counterparties (whether financial or non-financial) established in the EU which enter into derivative transactions. The obligation also applies to CCPs. The central banks of the EU member states, the European Central Bank and the Bank for International Settlements are exempted.[7]

6 Excluding modifications to, or terminations of, derivative transactions.

7 Together with certain national and EU bodies performing similar functions. See Article 1(4) of EMIR.

- Each of the counterparties has an obligation to report the derivative transaction, each reporting the transaction from its own perspective.
- Each counterparty may individually carry out the reporting or, by way of previously agreed delegation, the reporting may be carried out by one counterparty for itself and on behalf of the other counterparty.
- Each counterparty should ensure that only one report for a derivative transaction (excluding any subsequent modification or termination) is submitted by it or on its behalf.
- Either counterparty (or the counterparties together) may alternatively delegate the reporting to a third party, such as a CCP or trading platform.
- If one report is made on behalf of both counterparties, the report should indicate this fact. In these circumstances, the report should include a set of information (**counterparty data**) on each of the counterparties, but the information on the terms of the derivative transaction (**common data**) should be included only once.
- Where one counterparty reports on behalf of the other counterparty, or a third party carries out the reporting on behalf of both counterparties, the report must include the full set of details that would have been reported had the derivative transaction been reported by each counterparty separately.
- A counterparty who delegates the reporting of its derivative transactions (whether to the other counterparty or to a third party) remains legally responsible for the reporting obligation. A delegating counterparty may want to check therefore that its derivative transactions are reported accurately, e.g. by asking for copies of the reports made to a trade repository.
- Even where they are reporting separately, counterparties should agree on the common data to be submitted for a derivative transaction, so that their reports are consistent.
- Where the reporting is delegated, it is recommended that the delegation should be effected by means of a written agreement. The International Swaps and Derivatives Association, Inc. (**ISDA**) and the Futures and Options Association have jointly published a form of reporting delegation agreement.

TO WHOM ARE THE REPORTS SUBMITTED?

Reports must be submitted to trade repositories which are registered or recognised by ESMA, of which there are currently six:

- DTCC Derivatives Repository Ltd. (DDRL) (for all derivative asset classes).
- Krajowy Depozyt Papierów Wartosciowych S.A. (KDPW) (for all derivative asset classes).
- Regis-TR S.A. (for all derivative asset classes).
- UnaVista Limited (UnaVista) (for all derivative asset classes).
- CME Trade Repository Ltd. (CME TR) (for all derivative asset classes).

- ICE Trade Vault Europe Ltd. (ICE TVEL) (for commodities, credit, equities and interest rates).[8]

Counterparties not intending to delegate the reporting of their derivative transactions will need to enter into arrangements with their selected trade repository, in order to be able to submit reports direct to it. The trade repository selected by a counterparty need not be the same as the trade repository selected by the other counterparty.

WHAT DETAILS NEED TO BE REPORTED?

The annex to the Delegated Regulation sets out the minimum details that must be included in any report to a trade repository. The format in which the details must be specified in the report is set out in the annex to the Implementing Regulation.[9] The information falls into two categories:

- Counterparty data – of which there are 26 fields, including the identifier, name and registered office of the reporting counterparty and its classification under EMIR (i.e. whether it is a financial or non-financial counterparty and, if it is a non-financial counterparty, whether or not it has exceeded the clearing threshold). The counterparty data also includes, where applicable, details of exposure.

- Common data – of which there are 59 fields, including the trade identifier, asset class, underlying, notional amount and currency and maturity date of the derivative transaction.

Legal entity identifier:

All counterparties will need to have a legal entity identifier (**LEI**) in order to meet the reporting obligation. This is to be included in every report on a derivative transaction as part of the counterparty data.

LEIs are not currently available. In the meantime, counterparties should use an interim entity identifier known as a pre-LEI issued by any of the endorsed pre-Local Operating Units (**LOUs**) of the Global Legal Entity Identifier System. There are ten pre-LOUs which have so far been endorsed to issue pre-LEIs (including the London Stock Exchange). The list of endorsed pre-LOUs is available at http://www.leiroc.org/publications/gls/lou_20131003_2.pdf.

If they have not already been allocated with one, counterparties should be obtaining their pre-LEIs by registering with one of the endorsed pre-LOUs.

Many counterparties will already have obtained an entity identifier called a CFTC Interim Compliant Identifier (CICI) in connection with the obligation to report derivatives under the US Dodd-Frank regime. The CICI Utility (which is the sole provider of CICIs) is one of the endorsed pre-LOUs from which counterparties can obtain their pre-LEIs for reporting under EMIR. If a counterparty has already been issued with a CICI, the CICI can be used as a pre-LEI and included in reports under EMIR.

[8] The latest lists of registered or recognised trade repositories are published by ESMA on its website.

[9] The text of the two regulations (including their respective annexes) can be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0001:0010:EN:PDF and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:352:0020:0029:EN:PDF.

Only one pre-LEI may be obtained per legal entity. It is not currently possible for different branches or offices of the same legal entity to obtain separate identifiers.

Details of exposure:

Where applicable, details of exposure must be included in the report as part of the counterparty data, including the mark-to-market or mark-to-model valuation of the derivative transaction, the value of any collateral posted by the reporting counterparty with the other counterparty and whether the collateral obligation is determined on a transaction or portfolio basis.

If the derivative transaction is cleared by a CCP, the mark-to-market valuation used in the report should be the same as the mark-to-market valuation provided by the CCP. If collateral is reported on a portfolio basis, a code identifying the specific portfolio of transactions of which the derivative transaction forms part should be included in the report.

Unique product identifier:

Each report must include, as part of the common data, a product ID to identify the derivative transaction. Article 4 of the Implementing Regulation provides that a report should identify the derivative transaction using one of three methods. Neither the first method (using a unique product identifier) nor the second method (using a combination of certain alternative identifiers) specified in the Implementing Regulation is currently available. In this situation, the Implementing Regulation requires a derivative transaction to be identified in the report by specifying one of the following derivative classes:

- commodities;
- credit;
- foreign exchange;
- equity;
- interest rate; or
- other

and one of the following derivative types:

- contracts for difference;
- forward rate agreements;
- forwards;
- futures;
- options;
- swaps; or
- other,

identifying the class or type that the counterparties agree that the derivative transaction most closely resembles when the transaction does not fall into one of the classes or types listed. If two classes or types are relevant, ESMA advises that both should be selected, e.g. "foreign exchange" and "interest rate" for a cross-currency swap.

Unique trade identifier:

The report must also include, as part of the common data, a unique trade ID or identifier (**UTI**) for the derivative transaction.[10] If no endorsed UTI is available (which is currently the case), a unique code should be generated and bilaterally assigned to the derivative transaction by the counterparties or, for derivative transactions traded on a platform, assigned to the derivative transaction by the venue operator.

For post-existing trades and pre-existing trades, a trade ID will need to be agreed between the two counterparties and reported.

WILL REPORTING BREACH CONFIDENTIALITY OBLIGATIONS?

Article 9(4) of EMIR provides that a counterparty will not be considered to be in breach of any confidentiality obligation (whether imposed by the terms of the derivative transaction itself or statute) when reporting details of a derivative transaction in accordance with EMIR. However, it is not clear whether this provision would be upheld in jurisdictions outside of the EU.

ARE COUNTERPARTIES ESTABLISHED OUTSIDE THE EU REQUIRED TO DO ANYTHING IN RELATION TO THE REPORTING OBLIGATION UNDER EMIR?

Counterparties that are not established in the EU are not subject to the reporting obligation under EMIR. However, a counterparty established in the EU reporting a derivative transaction it has entered into with a counterparty established outside the EU will need to include in the report the ID of the counterparty established outside the EU. Counterparties established outside the EU may therefore be asked by their EU counterparties to provide their pre-LEIs.

WHAT ARE THE CONSEQUENCES OF FAILING TO COMPLY WITH THE REPORTING OBLIGATION?

Individual member states of the EU are to apply their own rules on penalties for a counterparty breaching the rules in EMIR (Article 12(1) of EMIR). In the United Kingdom, the FCA may impose on a counterparty a penalty of whatever level it deems appropriate if the FCA considers that the counterparty has breached a requirement imposed on it by EMIR. The FCA also has the power to publish a statement that it considers the counterparty to be in breach of a requirement in EMIR.

[10] The trade ID should be comprised of up to 52 alphanumerical digits. See the annex to the Implementing Regulation.

RESOURCES

ESMA Questions and Answers on the Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), last published on 20 December 2013 (available at http://www.esma.europa.eu/content/EMIR-QA).

EMIR: Frequently Asked Questions, last published by the European Commission on 18 December 2013 (available at http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/emir-faqs_en.pdf).

Reporting Guidance Note published by ISDA on 19 July 2013 (available at http://www2.isda.org/emir/).

WHEN DO THE VARIOUS OBLIGATIONS UNDER EMIR COME INTO FORCE?

Obligation	In force
Obligation to keep records of derivative transactions	16 August 2012
Notification by non-financial counterparties exceeding clearing threshold	15 March 2013
Timely confirmation of non-cleared OTC derivative transactions	15 March 2013
Daily mark-to-market (or mark-to-model) of non-cleared OTC derivative transactions (financial counterparties and non-financial counterparties exceeding clearing threshold)	15 March 2013
Portfolio reconciliation and compression of non-cleared OTC derivative transactions	15 September 2013
Dispute resolution mechanisms for non-cleared OTC derivative transactions	15 September 2013
Reporting to trade repository of details of all derivative transactions (except details of exposure)	12 February 2014
Reporting to trade repository of details of exposure (financial counterparties and non-financial counterparties exceeding clearing threshold)	11 August 2014
Clearing obligation	Expected from latter half of 2014
Collateral exchange for non-cleared OTC derivative transactions (financial counterparties and non-financial counterparties exceeding clearing threshold)	Expected from 1 December 2015 Draft regulatory technical standards on collateral exchange not yet available. The policy framework on margin requirements for non-centrally cleared derivatives (by the Basel Committee on Banking Supervision and the International Organization of Securities Commissions) published in September 2013 is expected to form the basis for the EMIR rules on collateral exchange.

If you would like to discuss any of the issues raised in this briefing, please contact one of the following or your usual Slaughter and May contact:

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