EMIR: illustrative implementation timeline – update

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CLIFFORD CHANCE

Contents

This document is intended as a summary of the matters covered. It is not intended to be comprehensive or to provide legal advice. For more information, contact one of the Clifford Chance lawyers named below

Timeline for EMIR implementation – update

The implementation timetable for the EU derivatives reforms is now taking shape.

The EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR) was adopted in July 2012 and came into force on 16 August 2012.

The key regulatory technical standards (RTS) and implementing technical standards (ITS) specifying the detail of many of the obligations under EMIR came into force on 15 March 2013.

Some of the EMIR obligations already apply whilst other obligations are deferred or subject to compliance schedules.

The illustrative timeline below shows when the main EMIR obligations could start to apply.

It focuses on the obligations that apply to market participants other than CCPs, TRs or trading venues (for example, it does not discuss the possible impact of EMIR on EU clearing members of non-EU CCPs requiring recognition in the EU).

The timeline focuses on the main obligations where there is available information on the likely timing of application. Other obligations are discussed later.

This paper does not discuss the detail of the obligations that apply. Further information on this is available on request.

The timeline also indicates when other key EU legislative initiatives are likely to take effect.

The revisions to the bank and investment firm capital directives (CRD4/CRR), which will implement Basel 3, are to take effect on 1 January 2014 (if the legislation is published in the OJ by 30 June 2013) or on 1 July 2014 (if published later).

The revisions to the Markets in Financial Instruments Directive (MiFID2/MiFIR) which will (among other things) implement the remainder of the G20 derivatives agenda, are expected to be finalised in 2013. The new rules will mainly take effect 32 months after publication of the legislation in the OJ.

The timeline is subject to assumptions and could be affected by a number of events.

The main assumptions are outlined further below.

EMIR in outline

Core definitions

Derivatives: Derivatives covered by the Markets in Financial Instruments Directive (MiFID).

OTC derivatives: Derivatives not executed on a regulated market or equivalent non-EU market.

FC (financial counterparty): An investment firm, credit institution, insurance/reinsurance undertaking, UCITS/UCITS manager, pension scheme and alternative investment fund managed by an alternative investment fund manager, in each case where authorised or registered in accordance with the relevant EU directive.

NFC (non-financial counterparty): An undertaking established in the EU which is not a financial counterparty or CCP.

NFC+: A non-financial counterparty whose positions in OTC derivatives (excluding hedging positions) exceed a specified clearing threshold.

TCE (third country entity): an entity not established in the EU that would be subject to the relevant EMIR obligation if established in the EU.

CCPs (central counterparties): EMIR provides for the authorisation of EU CCPs and the recognition of non-EU CCPs, including CCPs clearing OTC and exchange traded derivatives and securities and other transactions.

TRs (trade repositories): EMIR provides for the registration of EU TRs and the recognition of non-EU TRs for reporting purposes.

Main obligations

Clearing obligation: FCs and NFC+s must clear OTC derivatives contracts which are declared subject to the clearing obligation through an authorised/recognised CCP when they trade with each other or with TCEs.

TR reporting: Counterparties must report all their OTC and exchange traded derivative transactions to registered/recognised TRs or to ESMA.

NFC+ notification: NFCs must immediately notify the competent authority if their positions in OTC derivatives (excluding hedging positions) exceed the specified clearing threshold.

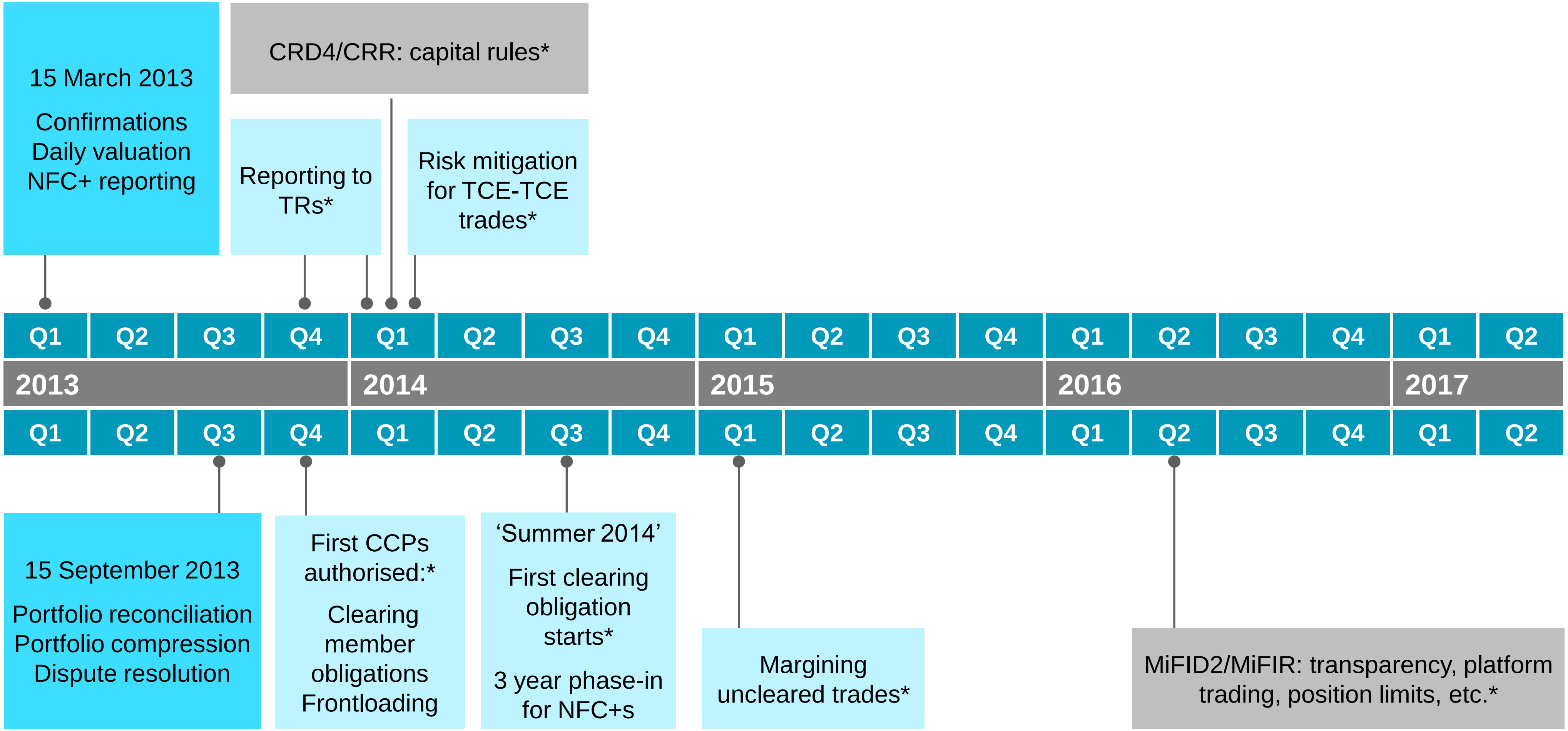
Risk mitigation rules for uncleared OTC derivatives:

- **Confirmations:** FCs and NFCs must confirm transactions by set deadlines (and FCs must have procedures for monthly reporting of unconfirmed transactions).
- **Portfolio reconciliation/compression:** FCs and NFCs must agree processes for regular portfolio reconciliation with counterparties and have processes to address portfolio compression opportunities.
- **Dispute resolution:** FCs and NFCs must agree procedures for identification, recording, monitoring and resolution of disputes (and FCs must report on unresolved disputes).
- **Daily valuation:** FCs and NFC+s must carry out daily mark-to-market or, where market conditions prevent this, mark-to-model valuation.
- **Margin:** FCs and NFC+s must have procedures for the exchange of collateral.
- **Capital:** FCs must have appropriate capital for uncollateralised risks.

TCE-TCE trades: RTS will determine when the clearing and risk mitigation rules will apply to trades between TCEs.

Clearing members: Clearing members of CCPs are subject to certain segregation, disclosure and other obligations.

EMIR: illustrative implementation timeline – update



•Estimated start dates for these obligations.
See following pages for further explanation and the main assumptions underlying the illustrative timeline.

Detailed key

Obligation	EMIR	Adopted RTS/ITS	Applies to[1]	Dealing with[1]	Product	Comment
Frontloading	Art. 4(1)(b)(ii)	Not yet adopted	FC, NFC+	FC, NFC+, TCE[2]	OTCD	OTCD entered into after a CCP is authorised may later become subject to mandatory clearing
Clearing obligation	Art. 4	Not yet adopted	FC, NFC+	FC, NFC+, TCE[2]	OTCD	Clearing obligation may be subject to phase-in (and see below for indirect clearing)
TR reporting	Art. 9	RTS/ITS on TR reporting	FC, all NFCs[3]	Any	OTCD and ETD	Subject to a compliance schedule for some requirements, including backloading (see below)
NFC+ notification	Art. 10	Rec. 17-25, Arts. 10 and 11 RTS	NFC+	Any	OTCD	Obligation to notify competent authority immediately if over clearing threshold applies from 15 March 2013
Confirmations	Art. 11(1)	Rec. 26-27, Arts. 1(c) and 12 RTS	FC, all NFCs	FCs, all NFCs, TCEs[4]	Uncleared OTCD[5]	Applies from 15 March 2013, subject to a compliance schedule (see below)
Portfolio reconciliation	Art. 11(1)	Rec. 28-29, Art. 13 RTS	FC, all NFCs	FCs, all NFCs, TCEs[4]	Uncleared OTCD[5]	Applies from 15 September 2013
Portfolio compression	Art. 11(1)	Rec. 30, Art. 14 RTS	FC, all NFCs	FCs, all NFCs, TCEs[4]	Uncleared OTCD[5]	Applies from 15 September 2013. Only where ≥ 500 open contracts with counterparty
Dispute resolution	Art. 11(1)	Rec. 31, Art. 15 RTS	FC, all NFCs	FCs, all NFCs, TCEs[4]	Uncleared OTCD[5]	Applies from 15 September 2013
Daily valuation	Art. 11(2)	Rec. 32-34, Arts. 16 and 17 RTS	FC, NFC+	Any	Uncleared OTCD[5]	Applies from 15 March 2013
Margining	Art. 11(3)	Not yet adopted	FC, NFC+	TBD	Uncleared OTCD[5]	Expected to apply from 1 January 2015, in line with BCSBS-IOSCO proposals
Clearing member obligations	Arts. 37(3), 38(1), 39(4)-(7)	n/a	CCP clearing members	n/a	Cleared transactions	Unclear whether apply to clearing members of recognised non-EU CCPs

1. Article 1 EMIR exempts certain entities from EMIR obligations,. Where one party is established in a non-EU state, counterparties are deemed to fulfil the clearing, NFC+ notification, reporting and risk mitigation obligations if the Commission determines non-EU state has "equivalent" regulatory framework (Art. 13 EMIR). See below for the application of the clearing and risk mitigation obligations to transactions between TCEs.
2. There are transitional exemptions for certain pension funds (Arts. 85(2) and 89(1) and (2) EMIR).
3. The TR reporting obligation is expressed to apply to "counterparties". ESMA's Q&A indicate that the obligation only applies to FCs and NFCs.
4. Although some of the provisions of the RTS implementing Article 11(1) EMIR are expressed to be restricted to transactions concluded between FCs/NFCs ESMA has stated that they apply to transactions between FCs/NFCs and TCEs.
5. The heading to Article 11 EMIR indicates that it applies to uncleared OTCD, although some of its provisions and the related RTS might appear to have broader scope.

Timing of other obligations

Intra-group transactions exemptions

EMIR provides exemptions from the clearing and margining rules for intra-group transactions, subject to prior notification to or authorisation by the competent authorities.

FCs and NFC+s and their group companies wishing to rely on the exemption will need to notify or seek authorisation in advance of the margin rules or clearing obligation beginning to apply to them.

Where authorisation is required, then the application must be made sufficiently far in advance to allow time for the competent authority to grant the application before the obligation begins to apply.

Parties using exemption from the margin rules for intra-group transactions are subject to ongoing public disclosure requirements.

In the case of transactions with non-EU group companies, it may be necessary for the Commission first to have assessed the non-EU jurisdiction as having "equivalent" regulation for EMIR purposes.

Reference: Articles 3, 4(2) and 11(5)-(11) EMIR (and Articles 18-20 RTS).

Indirect clearing

EMIR allows counterparties to satisfy the clearing obligation for OTC derivatives by using indirect clearing arrangements through a client of a clearing member.

The adopted RTS specify the permitted arrangements and impose obligations on CCPs, clearing members and clients involved in indirect clearing.

Reference: Article 4(3) EMIR (and Articles 2-5 RTS).

Record-keeping

Counterparties are required to keep records of their derivative contracts (and any modification) for at least five years following the termination of the contract. This obligation came into force on 16 August 2012.

Reference: Article 9(2) EMIR.

Margin

FCs and NFC+s are required to have procedures (to be specified by RTS) for the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts entered into on or after 16 August 2012 (see the Commission FAQs for the extent of this obligation pending the relevant RTS coming into force).

Reference: Article 11(3) EMIR.

Capital

EMIR requires FCs to hold an appropriate and proportionate amount of capital to cover uncollateralised risks (to be specified by RTS). There is no timetable yet set for RTS to specify these obligations.

Reference: Article 11(4) EMIR.

Extra-territorial application

EMIR extends the clearing and risk mitigation obligations to transactions between TCEs where the transaction has a direct, substantial or foreseeable effect within the EU or it is necessary to prevent evasion of EMIR's rules. ESMA is to propose draft RTS by 25 September 2013.

Reference: Articles 4(1)(a)(v) and 11(12) EMIR.

Other timing issues

Extension of exemptions

Article 1(4) EMIR exempts EU central banks, EU public debt management bodies and the Bank for International Settlements from EMIR.

EMIR contemplates the possible addition of non-EU entities to Article 1(4). On 22 March 2013, the Commission published a report on the international treatment of public debt management bodies and central banks in Japan, Switzerland, the United States, Australia, Canada and Hong Kong.

EMIR gives a 3 year exemption to certain pension funds from the clearing obligation (in some cases, subject to national authorisation). This exemption can be extended for up to 3 further years.

Adoption of the remaining Level 2 acts

RTS on operation of colleges of regulators for CCPs (Article 18(6)): ESMA published a revised draft on 15 March 2013.

RTS on margin requirements (Article 11(3)): no timing yet set though the BCBS-IOSCO policy framework contemplates implementation of the margining rules from 1 January 2015.

RTS on application of clearing and risk mitigation rules to transactions between non-EU counterparties (Articles 4(1)(a)(v) and 11(12)): ESMA to propose draft RTS by 25 September 2013.

RTS on scope of mandatory clearing (Article 4(2)): awaits authorisation/ recognition of CCPs.

Acts extending exemptions to non-EU public debt management bodies and central banks (Article 1(6)): no timing yet set though the Commission's report concludes acts are required in respect of Japan and the United States.

Clearing phase-in

The Commission has stated that the clearing obligation for NFC+s will be subject to a phase-in period of three years.

National implementation

Member States were required to designate competent authorities and grant them powers and adopt penalty regimes and notify them to the European Commission by 17 February 2013. Countries such as Germany, the Netherlands, Poland and the UK have adopted implementing rules.

Implementation may also require amendment to other Member State rules, e.g. the UK FCA has amended its client money regime.

Member States may also need to amend their insolvency laws to ensure that the arrangements for portability and segregation are effective locally e.g. Germany and the UK have modified their insolvency laws.

Restriction on non-EU CCPs

Article 25(1) EMIR prohibits non-EU CCPs providing clearing services to clearing members and trading venues established in the EU (including the non-EU branches of EU firms).

Prohibition likely came into force on 16 August 2012 but CCPs already active in the EU before 19 December 2013 benefit from transitional provisions if they apply for recognition before 15 September 2013.

FAQs

The Commission and ESMA have published answers to FAQs and further clarifications are expected.

Main assumptions

Assumption	Main impact of variance	Comment
A TR for all interest rate and credit derivatives is registered under EMIR in Q3 2013.	Reporting starts 90 days after registration of the TR under EMIR (or at latest 1 July 2015).	ESMA has indicated that no TR is likely to be registered earlier than August 2013.
A TR for all other classes of derivatives is registered under EMIR before 1 October 2013.	If a TR is not registered under EMIR for these asset classes before 1 October 2013, reporting would start 90 days after registration of the TR under EMIR (or at latest 1 July 2015).	The ITS provide that where a TR is registered under EMIR for these asset classes before 1 October 2013, reporting starts on 1 January 2014.
CCPs are authorised under EMIR to clear OTC derivatives in Q4 2013.	The timing of authorisation will affect the date of application of the clearing member obligations and (if the CCP is clearing OTC derivatives) the start of the frontloading period and, potentially, the start of the clearing obligation.	There is significant uncertainty as to when the first CCPs will submit their formal applications and receive authorisation under EMIR. Different CCPs may be authorised for different products on different dates.
No non-EU CCP is recognised under EMIR before end 2013.	The recognition of a non-EU CCP to clear OTC derivatives may affect the start date of the clearing obligation.	
There is a gap of 6-8 months between authorisation of a CCP to clear OTC derivatives and the start of the clearing obligation.	The RTS imposing the clearing obligation will specify the start date (and any phasing in of the obligation).	In December 2012 the Executive Director of ESMA indicated ESMA's projection that the first clearing obligation should start to apply "during the summer of 2014". The Commission statement following the withdrawal of the European Parliament motion indicated that there would be a 3 year phase-in of the clearing obligation for NFC+s.
RTS specifying obligations for TCE-TCE trades are adopted and come into force in Q1 2014.	A delay in the application of these RTS will mainly affect the timing of application of operational risk mitigation obligations (any clearing and margining rules for TCE-TCE trades should not take effect before those applicable to trades by FCs/NFC+s).	It is not yet clear what (if any) obligations ESMA will propose for TCE-TCE trades, but if ESMA delivers draft RTS on 25 September 2013 and the Commission takes the full three months to adopt them, they are unlikely to take effect before Q1 2014.
The start date for margining uncleared OTC derivatives follows BCBS-IOSCO proposals.	The RTS imposing the requirements for margining uncleared OTC derivatives will specify the start date for the obligations.	BCSB-IOSCO 2nd consultative document on margin requirements for non-centrally cleared derivatives (February 2013) proposed a 1 January 2015 start date for mandatory margin requirements (subject to a phase-in of some requirements)..

Some timing constraints

Effective date of RTS/ITS

- Council/European Parliament can object to RTS within 1 month of adoption, extendible by a further month (or 3+3 months if adopted with modifications to ESMA's draft)
- RTS published in OJ after end of objection period (unless Council/Parliament previously both notify Commission that have no objections). ITS published in OJ immediately following adoption
- RTS/ITS come into force 20 days after publication in the OJ

Authorisation of CCPs

- Existing CCPs have until 15 September 2013 to apply to national competent authorities for authorisation under EMIR
- Within 30 working days of receipt, competent authority assesses whether application complete and may require more information
- Competent authorities have up to 6 months from receiving a complete application to grant or refuse authorisation

Recognition of non-EU CCPs

- Non-EU CCPs active in the EU before 19 December 2012 have until 15 September 2013 to apply for recognition under EMIR
- ESMA has 180 working days following receipt of a complete application to grant or refuse recognition
- Recognition can only be granted if the Commission has made an equivalence assessment on the CCP's home state and a co-operation agreement with the home state regulators is in place

Start of clearing obligation

- After authorisation/recognition of a CCP to clear OTC derivatives, ESMA consults on whether to impose mandatory clearing and, if so, drafts RTS for Commission endorsement
- Commission has 3 months to endorse the RTS
- Council/European Parliament can object within 1 month of adoption, extendible by a further month (or 3+3 months if Commission amends ESMA's draft)
- The RTS must be published in OJ and will specify start date and any phase in period

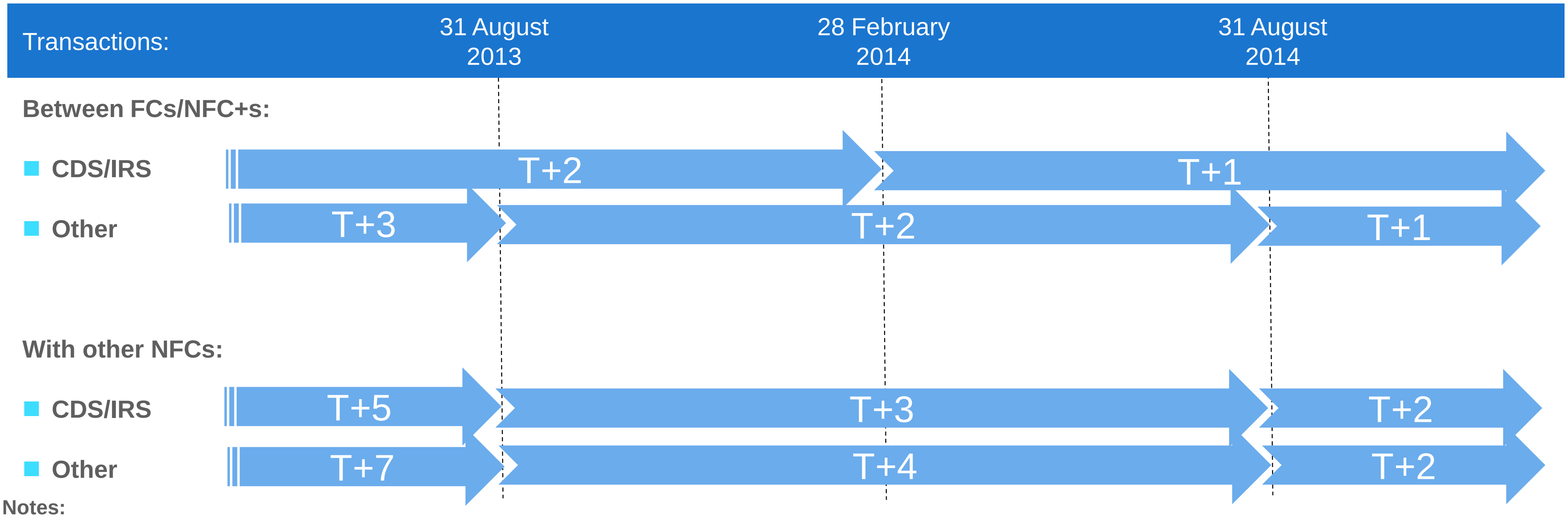
Registration of TRs

- Existing TRs have until 15 September 2013 to apply for registration
- ESMA has 40 working days from receipt of a complete application to grant or refuse registration
- Registration takes effect on 5th working day following its adoption

Recognition of non-EU TRs

- Existing non-EU TRs allowed to operate in the EU have until 15 September 2013 to apply for recognition
- ESMA has 180 working days following receipt of a complete application to grant or refuse recognition
- Recognition can only be granted if the Commission has made an equivalence assessment on the TR's home state and an international agreement is in place

Compliance schedule: confirmations



Notes:

- **Confirmation requirements apply from 15 March 2013.**
- **The obligations apply to all FCs and NFCs entering into OTC derivatives not cleared by a CCP with other FCs or NFCs. ESMA has stated that the obligations also apply to transactions between FCs/NFCs and TCEs (even though RTS are not drafted to achieve this).**
- **FCs/NFCs must have "appropriate procedure and arrangements" to confirm transactions "as soon as possible" and "where available by electronic means" and at the latest by the deadlines stated above.**
- **Additional business day allowed if execution after 16.00 local time or with a counterparty in a different time zone which does not allow same day confirmation.**
- **Confirmation is defined to mean the documentation of the counterparties to all the terms of the contract (this may take form of an electronically executed contract or document signed by both counterparties).**
- **FCs must have procedures to report monthly to competent authority on unconfirmed transactions outstanding for more than 5 business days.**

Compliance schedule: reporting to TRs

Credit/interest rate derivatives

Reporting start date	Condition
1 July 2013	If TR for derivative class registered before 1 April 2013
90 days after registration of TR	If above condition not fulfilled
1 July 2015 (reports made to ESMA)	If no TR for derivative class registered by 1 July 2015

Other derivatives

Reporting start date	Condition
1 January 2014	If TR for derivative class registered before 1 October 2013
90 days after registration of TR	If above condition not fulfilled
1 July 2015 (reports made to ESMA)	If no TR for derivative class registered by 1 July 2015

Notes:

- Reporting start date (RSD) deferred by 180 days for data on mark-to-market/model valuations and information on collateral.
- RTS do not address case where a non-EU TR is recognised by ESMA under Article 77 EMIR

Frequency of reports

EMIR requires reporting to TRs no later than the next working day following the conclusion, modification or termination of the contract.

ITS require reporting daily valuations and changes to posted collateral and certain other information as they occur.

Backloading

Contract entered into	Condition	Reportable by
Before 16 August 2012	No longer outstanding on 16 August 2012	Not reportable
Before 16 August 2012 (and outstanding on that date)	No longer outstanding on RSD	RSD + 3 years
	Still outstanding on RSD	RSD + 90 days
On or after 16 August 2012 and before RSD	No longer outstanding on RSD	RSD + 3 years
	Still outstanding on RSD	RSD
On or after RSD		T+1

Timing of the Commission's equivalence assessments

EMIR envisages equivalence assessments by the Commission of non-EU jurisdictions:

- **as part of the recognition process for non-EU CCPs;**
- **as part of the recognition process for non-EU TRs;**
- **for the purpose of determining the exemption from conflicting or duplicative clearing, reporting and risk mitigation obligations for transactions with a counterparty established in an equivalent non-EU jurisdiction.**

The Commission has asked ESMA for technical advice on selected jurisdictions:

- **To assist the Commission in its assessments.**
- **To be given in two phases (see chart).**
- **The timing of these has been delayed and the request for advice on Dubai has now been withdrawn.**

No clear timetable for the Commission to adopt its assessments after receives advice:

- **Positive assessment depends on progress in non-EU jurisdictions in adopting and implementing regulations reflecting G20 commitments.**
- **Timing may be affected by progress on negotiations on US extraterritoriality.**

	CCPs	TRs	Conflicting/ duplicative rules
US	I	I	I
Japan	I	I	I
Australia	II	II	II
Canada			II
Hong Kong	II	II	II
India	II		TBD
Singapore	II	II	TBD
South Korea	II		TBD
Switzerland	II	TBD	II
Rest of world			

Key:

Phase I	ESMA to advise on equivalence by 1 Sept. 2013
Phase II	ESMA to advise on equivalence by 1 Oct. 2013
	No current request for ESMA advice

Note: Derivatives executed on non-EU exchanges are treated as OTC derivatives under EMIR unless the exchange is considered "equivalent" to an EU regulated market under MiFID. The Commission has not published any list of equivalent exchanges under MiFID and there is no clear timetable for this assessment.

List of adopted RTS/ITS

Regulatory technical standards

RTS on capital requirements for central counterparties

RTS on requirements for central counterparties

RTS on indirect clearing arrangements, clearing obligation, public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP

RTS on minimum details of data to be reported to trade repositories

RTS specifying details of application for registration as a trade repository

RTS specifying data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data

Implementing technical standards

ITS on requirements for central counterparties

ITS on minimum details of data to be reported to trade repositories

ITS specifying details of application for registration as a trade repository

Glossary

- **BCBS:** Basel Committee on Banking Supervision
- **CCP:** central counterparty
- **Clearing threshold:** the threshold size of derivatives positions specified for the purposes of determining whether a non-financial counterparty is subject to the clearing obligation under EMIR
- **Commission:** the European Commission
- **Competent authority:** the national authority designated by a Member State as responsible for carrying out functions under an EU regulation or directive
- **CPSS:** Committee on Payment and Settlement Systems
- **Derivative:** as defined in EMIR, i.e. a financial instrument as set out in points (4) to (10) Section C, Annex 1, MiFID, as implemented by the MiFID implementing regulation
- **EMIR:** the EU regulation on OTC derivatives, central counterparties and trade repositories
- **ESA:** European Supervisory Authority (i.e. EBA, EIOPA or ESMA)
- **ESMA:** European Securities and Markets Authority
- **EU:** European Union
- **ETD:** exchange traded derivatives
- **FC:** financial counterparty as defined in EMIR, i.e. an investment firm, credit institution, insurance/reinsurance undertaking, UCITS/UCITS manager, pension scheme and alternative investment fund managed by an alternative investment fund manager, in each case where authorised or registered in accordance with the relevant EU directive
- **IOSCO:** International Organisation of Securities Commissions
- **ITS:** implementing technical standards proposed by an ESA and adopted by the Commission under powers conferred by an EU regulation or directive
- **Member State:** member state of the EU
- **MiFID**: the EU Markets in Financial Instruments Directive
- **NFC:** non-financial counterparty as defined in EMIR, i.e. an undertaking established in the EU which is not a financial counterparty or CCP
- **NFC+:** a non-financial counterparty whose positions in OTC derivatives (excluding positions reducing risks directly relating to commercial or treasury financing activity) exceed the clearing threshold
- **OJ:** Official Journal
- **OTC derivative (OTCD):** over-the-counter derivative as defined in EMIR, i.e. a derivative executed outside a regulated market (as defined in MiFID) or equivalent non-EU market
- **RTS:** regulatory technical standards proposed by an ESA and adopted by the Commission under powers conferred by an EU regulation or directive
- **TCE:** third country (i.e. non-EU) entity which would be subject to the relevant EMIR obligation if it was established in the EU
- **TR:** trade repository
- **Trading venue:** a regulated market or multilateral trading facility

Contacts

Chris Bates
Partner
T: +44 20 7006 1041
M: +44 7785 700236
E: chris.bates@cliffordchance.com

Dr. Marc Benzler
Partner
T: +49 697199 3304
M: +49 170922 2892
E: marc.benzler@cliffordchance.com

Caroline Dawson
Senior Associate
T: +44 20 7006 4355
M: +44 7949 443527
E: caroline.dawson@cliffordchance.com

Simon Gleeson
Partner
T: +44 20 7006 4979
M: +44 7977 423944
E: simon.gleeson@cliffordchance.com

Frank Graaf
Partner
T: +31 20711 9150
M: +31 62123 8601
E: frank.graff@cliffordchance.com

Frédérick Lacroix
Partner
T: +33 14405 5241
M: +33 6881 44673
E: frederick.lacroix@cliffordchance.com

Caroline Meinertz
Senior Associate
T: +44 20 7006 4253
M: +44 7717 693723
E: caroline.meinertz@cliffordchance.com

Habib Motani
Partner
T: +44 20 7006 1718
M: +44 7785 700107
E: habib.motani@cliffordchance.com

Nick O'Neill
Partner
T: +1 212878 3119
M: +44 7798 503501
E: nick.o'neill@cliffordchance.com

Sébastien Praicheux
Senior Associate
T: +33 14405 5156
M: +33 6077 41468
E: sebastien.praicheux@cliffordchance.com

Monica Sah
Partner
T: +44 20 7006 1103
M: +44 7747 627820
E: monica.sah@cliffordchance.com

Jeremy Walter
Partner
T: +44 20 7006 8892
M: +44 7717 693702
E: jeremy.walter@cliffordchance.com

Worldwide contact information

35* offices in 25 countries

Abu Dhabi
Clifford Chance
9th Floor
Al Sila Tower
Sowwah Square
PO Box 26492
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 613 2300
Fax +971 (0)2 613 2400

Amsterdam
Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
Tel +31 20 7119 000
Fax +31 20 7119 999

Bangkok
Clifford Chance
Sindhorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
Tel +66 2 401 8800
Fax +66 2 401 8801

Barcelona
Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
Tel +34 93 344 22 00
Fax +34 93 344 22 22

Beijing
Clifford Chance
33/F, China World Office 1
No. 1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004
China
Tel +86 10 6535 2288
Fax +86 10 6505 9028

Brussels
Clifford Chance
Avenue Louise 65 Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Bucharest
Clifford Chance Badea
Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1
Bucharest, 010016
Romania
Tel +40 21 66 66 100
Fax +40 21 66 66 111

Casablanca
Clifford Chance
169, boulevard Hassan 1er
Casablanca 20000
Morocco
Tel +212 520 132 080
Fax +212 520 132 079

Doha
Clifford Chance
QFC Branch
Suite B, 30th floor
Tornado Tower
Al Funduq Street
West Bay PO Box 32110
Doha
State of Qatar
Tel +974 4491 7040
Fax +974 4491 7050

Dubai
Clifford Chance
Building 6, Level 2
The Gate Precinct
Dubai International Financial Centre
PO Box 9380
Dubai
United Arab Emirates
Tel +971 4 362 0444
Fax +971 4 362 0445

Düsseldorf
Clifford Chance
Königsallee 59
40215 Düsseldorf
Germany
Tel +49 211 43 55-0
Fax +49 211 43 55-5600

Frankfurt
Clifford Chance
Mainzer Landstraße 46
60325 Frankfurt am Main
Germany
Tel +49 69 71 99-01
Fax +49 69 71 99-4000

Hong Kong
Clifford Chance
28th Floor
Jardine House
One Connaught Place
Hong Kong
Tel +852 2825 8888
Fax +852 2825 8800

Istanbul
Clifford Chance
Kanyon Ofis Binasi Kat 10
Büyükdere Cad. No. 185
34394 Levent
Istanbul
Turkey
Tel +90 212 339 0001
Fax +90 212 339 0098

Kyiv
Clifford Chance
75 Zhylyanska Street
01032 Kyiv
Ukraine
Tel +380 44 390 5885
Fax +380 44 390 5886

London
Clifford Chance
10 Upper Bank Street
London, E14 5JJ
United Kingdom
Tel +44 20 7006 1000
Fax +44 20 7006 5555

Luxembourg
Clifford Chance
2-4 place de Paris
B.P. 1147
L-1011 Luxembourg
Grand-Duché de Luxembourg
Tel +352 48 50 50 1
Fax +352 48 13 85

Madrid
Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
Tel +34 91 590 75 00
Fax +34 91 590 75 75

Milan
Clifford Chance
Piazzetta M.Bossi, 3
20121 Milan
Italy
Tel +39 02 806 341
Fax +39 02 806 34200

Moscow
Clifford Chance
Ul. Gasheka 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

Munich
Clifford Chance
Theresienstraße 4-6
80333 Munich
Germany
Tel +49 89 216 32-0
Fax +49 89 216 32-8600

New York
Clifford Chance
31 West 52nd Street
New York, NY 10019-6131
USA
Tel +1 212 878 8000
Fax +1 212 878 8375

Paris
Clifford Chance
9 Place Vendôme
CS 50018
75038 Paris Cedex 01
France
Tel +33 1 44 05 52 52
Fax +33 1 44 05 52 00

Perth
Clifford Chance
Level 7, 190 St Georges Terrace
Perth, WA 6000
Australia
Tel +618 9262 5555
Fax +618 9262 5522

Prague
Clifford Chance
Jungmannova Plaza
Jungmannova 24
110 00 Prague 1
Czech Republic
Tel +420 222 555 222
Fax +420 222 555 000

Rome
Clifford Chance
Via Di Villa Sacchetti, 11
00197 Rome
Italy
Tel +39 06 422 911
Fax +39 06 422 91200

São Paulo
Clifford Chance
Rua Funchal 418 15th Floor
04551-060 São Paulo SP
Brazil
Tel +55 11 3019 6000
Fax +55 11 3019 6001

Seoul
Clifford Chance
21st Floor, Ferrum Tower
66 Sooha-dong
Jung-gu, Seoul 100-210
Korea
Tel +82 2 6353 8100
Fax +82 2 6353 8101

Shanghai
Clifford Chance
40th Floor
Bund Centre
222 Yan An East Road
Shanghai 200002
China
Tel +86 21 2320 7288
Fax +86 21 2320 7256

Singapore
Clifford Chance
12 Marina Boulevard
25th Floor Tower 3
Marina Bay Financial Centre
Singapore 018982
Tel +65 6410 2200
Fax +65 6410 2288

Sydney
Clifford Chance
Level 16
No. 1 O'Connell Street
Sydney NSW 2000
Australia
Tel +612 8922 8000
Fax +612 8922 8088

Tokyo
Clifford Chance
Akasaka Tameike Tower, 7th Floor
17-7 Akasaka 2-Chome
Minato-ku, Tokyo 107-0052
Japan
Tel +81 3 5561 6600
Fax +81 3 5561 6699

Warsaw
Clifford Chance
Norway House
ul. Lwowska 19
00-660 Warszawa
Poland
Tel +48 22 627 11 77
Fax +48 22 627 14 66

Washington, D.C.
Clifford Chance
2001 K Street NW
Washington, DC 20006 - 1001
USA
Tel +1 202 912 5000
Fax +1 202 912 6000

Riyadh**
(Co-operation agreement)
Al-Jadaan & Partners Law Firm
Building 15, The Business Gate
King Khaled International Airport Road
Cordoba District, Riyadh, KSA.
P.O.Box: 3515, Riyadh 11481,
Kingdom of Saudi Arabia
T +966 1 250 6500
F +966 1 400 4201

* Clifford Chance's offices include a second office in London at 4 Coleman Street, London EC2R 5JJ.
**The Firm also has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.