DERIVATIVES LAWS AND REGULATIONS FOR ALTERNATIVE ASSET MANAGERS

COMPARATIVE ANALYSIS AND JURISDICTIONAL INSIGHTS

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Overview

Introduction

Overview of the Derivatives Market in England and Wales

London is home to one of the world’s most significant derivatives markets, characterised by a vast range of financial instruments including swaps, futures, options, and forwards. The market supports various asset classes such as equities, interest rates, commodities, and foreign exchange, making it a critical component of the global financial ecosystem. The London derivatives market is known for its depth, liquidity, and the presence of sophisticated market participants, including banks, hedge funds, and institutional investors. Post-Brexit, the regulatory landscape has evolved, with the UK forging its own path separate from the European Union, impacting how derivatives are traded and regulated in the London market.

There are broadly two categories of derivatives transactions: "over-the-counter" (OTC) derivatives transactions and exchange traded derivatives transactions. OTC derivatives transactions are derivatives transactions that are customised to the needs of the parties, whereas exchange traded derivatives transactions are standardised products that are traded on a regulated exchange between market participants anonymously. Unless expressly stated otherwise, the focus of this chapter is on the OTC derivatives market.

Derivatives transactions are used by alternative asset managers broadly for either investment (or speculative) purposes or for risk management purposes. In the case of the former, funds can use derivatives transactions in the active pursuit of investment return. Conversely, derivatives transactions can be used to mitigate the economic impact of a particular risk faced by the fund.

Historical Context and Market Evolution in England and Wales

London’s prominence as a derivatives hub is rooted in its history as a global financial center. From the establishment of the London Metal Exchange (LME) in 1877 to the development of the International Swaps and Derivatives Association (ISDA) Master Agreement in the 1980s, the City's legal and financial infrastructure has driven global innovation. The aftermath of the 2008 financial crisis further shaped the market, with regulatory reforms like the European Market Infrastructure Regulation (EMIR) being introduced across the EU in response to the systemic risk posed by derivatives trading. This change affected London significantly as the UK was still in the EU at that point.

Regulatory Framework

1. Primary Laws and Regulations Governing Derivatives Transactions

The UK's onshored version of EMIR, UK EMIR, is the foundation of its derivatives regulatory regime. Its three pillars—clearing, reporting, and risk mitigation—aim to promote transparency and reduce systemic risk. Other key regulatory frameworks include the Financial Services and Markets Act 2000 (FSMA) and the UK Markets in Financial Instruments Regulation (UK MiFIR).

2. Regulatory Bodies Overseeing the Derivatives Market

The Financial Conduct Authority (FCA) is primarily responsible for overseeing participants in the derivatives market, in addition to regulating conduct and ensuring market integrity.

The Prudential Regulation Authority (PRA) oversees the financial stability of major financial institutions such as banks.

The wider Bank of England also plays a key role in monitoring systemic risks and financial market infrastructures, including the financial market infrastructures supporting derivatives trading, such as central counterparties (CCPs).

3. Recent Legislative Changes or Proposals Affecting Derivatives

Since Brexit, the UK has introduced modifications to its regulatory framework, including adjustments to clearing obligations, reporting requirements, and risk mitigation for non-cleared derivatives transactions. There are ongoing discussions about further divergence from EU regulations to enhance the UK’s competitive position while maintaining robust market oversight.

Authorization and Licensing

1. Licensing Requirements for Entities Engaging in Derivatives Trading

Entities involved in derivatives trading are often required to obtain an authorisation from the FCA (and, in more limited circumstances, the PRA as well). This requires firms to meet stringent criteria, including having adequate financial resources, effective risk management systems, and governance structures that comply with regulatory standards.

2. Exemptions Available for Certain Types Entities or Transactions

Exemptions from authorisation may apply to certain types of entity, such as central banks. Similarly, entities engaging in derivatives transactions purely for hedging purposes may avoid the requirement to obtain authorisation. These exemptions are outlined under FSMA and associated statutory instruments and regulation.

3. Process for Obtaining a License or Authorization

The licensing process involves submitting a comprehensive application to the FCA (and PRA, if necessary), which includes detailed information on the firm’s business model, financial standing, and compliance mechanisms. The review process can be rigorous, with the regulators assessing the firm’s ability to meet ongoing regulatory obligations.

Trading and Execution

1. Key Requirements for Executing Derivative Transactions

For OTC derivatives transactions, there are no specific execution requirements, but firms must comply with regulatory obligations under UK EMIR, including reporting and risk mitigation standards (discussed in more detail below). Conversely, exchange traded derivatives transactions must comply with certain execution set out under FSMA and UK MiFIR (described in more detail below).

Where an FCA-authorised firm executes derivatives transactions on behalf of its clients, that firm must take all sufficient steps to ensure 'best execution' of those derivatives transactions. Broadly, this requires the FCA-authorised firm to take into account factors such as price, costs, speed, and likelihood of execution and settlement in order to achieve the best possible result for the relevant client.

2. Specific Platforms or Exchanges Required for Trading Derivatives

Trading platforms such as regulated markets, multilateral trading facilities (MTFs), or organised trading facilities (OTFs) are mandatory for specific interest rate and credit derivatives transactions when the counterparties are regulated financial institutions or maintain substantial derivatives trading volumes. These venues ensure a higher degree of transparency, standardisation, and regulatory oversight.

Generally, exchange traded derivatives transactions are traded on regulated markets. Prominent exchanges like ICE Futures Europe offer standardised derivatives transactions that foster liquidity and market integrity.

Clearing and Settlement

1. Clearing Requirements for Derivative Transactions

Broadly, UK EMIR requires counterparties that are regulated financial institutions or have significant volumes of derivatives transactions to clear certain interest rate and credit OTC derivatives transactions through authorised CCPs.

The clearing requirement was introduced in the aftermath to the 2008 financial crisis, which exposed the vulnerabilities of bilateral OTC derivatives trading and the risk of counterparty defaults. For example, the collapse of Lehman Brothers left numerous counterparties to Lehman Brothers exposed to uncollateralised counterparty credit risk.

Clearing mitigates this counterparty credit risk by the introduction of the CCP as an intermediary in the event of a default by a counterparty. Legally, the clearing of derivatives transactions is effected by an immediate novation of the original transaction between the counterparties to the CCP. The original transaction between the counterparties is then immediately terminated. Counterparties therefore face the CCP instead of their counterparty.

Further, CCPs have rules that require counterparties to post highly liquid collateral (i.e. cash) to cover their derivatives positions and maintain default management procedures in the event of a counterparty default.

2. Designated Central Counterparties (CCPs)

The FCA and PRA oversee CCPs operating in England and Wales, with LCH Ltd being a key CCP for clearing interest rate swaps and other types of derivatives transactions.

Post-Brexit, the recognition of third-country CCPs has become critical for ensuring continuity in cross-border derivatives trading. Transitional arrangements allow certain third-country CCPs to continue servicing UK clients. The Bank of England’s recognition of third-country CCPs underscores the UK’s reliance on global CCPs for cross-border derivatives trading.

3. Settlement Processes and Timelines

Settlement of derivatives transactions typically occurs through CCPs, with specific timelines depending on the specific type of derivatives transaction. The UK's onshored version of the Central Securities Depositories Regulation (UK CSDR) governs settlement practices, emphasising timely and efficient processing to minimise settlement failures.

Whilst the UK has not implemented the 'settlement discipline regime' introduced under the EU version of the Central Securities Depositories Regulation (CSDR), UK CCPs use mechanisms to help ensure that trades are settled with minimal disruption. In addition, market participants entering into transactions with EEA CCPs will be exposed to the settlement discipline regime under CSDR. This enables EEA CCPs to incentivise settlement: among other resources, EEA CCPs can issue cash penalties on parties that cause settlement failures, or subject transactions to a 'buy-in' process.

Additionally, the use of blockchain technology is emerging as a potential game-changer in the settlement of derivatives transactions. Blockchain settlement platforms have been developed by a number of market participants with a view to reduce operational inefficiencies and settlement failure.

Reporting and Disclosure

1. Reporting Obligations for Derivative Transactions

Under UK EMIR, all derivatives transactions must be reported to a registered trade repository, ensuring regulatory oversight and market transparency. This includes the reporting of new transactions, the reporting of subsequent substantive modifications to the terms of the derivatives transactions, and the termination of the derivatives transaction. The objective is to provide regulators, such as the FCA, with accurate and timely information on the derivatives transactions that have been entered into in the jurisdiction over which the regulator has purview, which enables regulators to monitor the build-up of potential systemic risks.

Whilst the changes to the reporting requirements under EMIR (including the new penalty regime) have not yet been incorporated into UK EMIR, the FCA still have powers to penalise counterparties that fail to report derivatives transactions accurately. For example, in 2017, Merrill Lynch International were fined £34.5 million by the FCA for failing to report around 68.5 million exchange traded derivatives transactions. This underscored the critical importance of ensuring robust internal systems for trade reporting to avoid discrepancies and penalties.

Exceptions to the reporting obligation are limited, but are available for certain intragroup transactions. For example, a corporate group using derivatives transactions to hedge risks faced within the group may seek to avail itself to this exemption. However, counterparties looking to rely on this must first apply to the FCA and demonstrate to the FCA that, among other matters, the group is subject to appropriate centralised risk evaluation, measurement and control procedures.

2. How Derivative Positions and Exposures Must Be Disclosed

Counterparties exceeding certain thresholds in derivatives trading volumes are required to notify the FCA immediately and establish clearing arrangements shortly thereafter. These thresholds are calculated based on the average aggregate notional amount of derivatives transactions for that counterparty in a particular asset class over the previous 12 months. Exceeding those thresholds may trigger certain obligations under UK EMIR (including the requirement to clear certain OTC derivatives transactions, and the mandatory collateralisation of non-centrally cleared derivatives transactions).

Equity derivatives transactions carry additional bespoke disclosure requirements. An exercise of an option to acquire or dispose of shares listed on a regulated market may require a public disclosure to be made, depending on whether the acquisition or disposal of such shares causes the option holder to acquire or lose a certain percentage of shareholder voting rights in the underlying issuer. Further, even cash-settled equity derivatives transactions (i.e. equity derivatives transactions that only give a counterparty synthetic economic exposure to an issuer, rather than voting rights) may also need to be disclosed to the market, depending on the level of economic exposure held by the counterparty. These rules are particularly relevant in the context of activist investor strategies, where the accumulation of voting rights could influence corporate governance. These rules are critical in fostering transparency in financial markets, preventing hidden accumulation of control in listed entities, and ensuring market participants can make informed decisions.

3. Specific Formats or Systems for Reporting

Transaction reports must adhere to specific prescribed formats under UK EMIR to ensure consistency and accuracy. These reports are required to include extensive details such as (among other matters) the unique trade identifier (UTI), legal entity identifier (LEI) of the counterparties, notional amounts, underlying assets, and transaction timestamps. Compliance with these formats is essential to avoid penalties and facilitate effective regulatory oversight.

Trade repositories like DTCC, a registered trade repository under UK EMIR, play a pivotal role in enabling firms to meet their reporting obligations. These repositories record transaction data, ensuring that regulators can reconcile information across counterparties and identify systemic risks.

Risk Mitigation

1. Risk Mitigation Requirements for Derivatives Transactions

UK EMIR mandates that firms implement risk mitigation techniques for non-centrally cleared derivatives transactions, including trade confirmations, portfolio reconciliation, and dispute resolution processes. These measures are essential for reducing counterparty risk and ensuring that firms can manage their exposures effectively. UK EMIR mandates that counterparties to derivatives transactions implement risk mitigation techniques for non-centrally cleared derivatives transactions, including timely confirmation, portfolio reconciliation, and dispute resolution processes. Counterparties that are regulated financial institutions or have significant volumes of derivatives trading must also calculate the mark-to-market value of derivatives transactions entered into on a daily basis (unless market conditions prevent marking-to-market, in which case they must mark-to-model). These measures are aimed at reducing counterparty risk and ensuring that firms can manage their exposures effectively.

2. Circumstances Requiring the Exchange of Regulatory Collateral

Regulatory requirements under UK EMIR stipulate that counterparties that are regulated financial institutions or have significant volumes of derivatives trading must exchange collateral with their counterparty in respect of their non-centrally cleared OTC derivatives transactions.

This will include the daily exchange of variation margin (i.e. collateral reflecting changes in the underlying mark-to- market value of the derivatives transactions) and may, in more limited circumstances, also include initial margin (i.e. the posting of collateral before the commencement of trading to a separate segregated account in order to cover the losses that could arise in between the last exchange of variation margin and the liquidation of the positions).

Further, as noted above, CCPs will impose collateral requirements on derivatives transactions cleared through a CCP.

3. Forms of Credit Support That Can Be Used

Acceptable forms of collateral include cash, government securities, and high-quality corporate bonds. These assets must meet stringent criteria to be eligible as collateral, ensuring they can be liquidated quickly in the event of a counterparty default. CCPs will typically look to accept the most highly liquid collateral (i.e. cash).

Contractual Framework

1. How Derivatives Are Documented in England and Wales

The ISDA Master Agreement is the predominant contractual framework used for documenting OTC derivatives transactions in England and Wales. It provides a standardised set of terms governing aspects such as netting, collateral, and default procedures, reducing legal risks and promoting market efficiency. The terms of the ISDA Master Agreement will be made bespoke in the Schedule to the ISDA Master Agreement to reflect the agreed contractual position between the parties. In addition, collateral arrangements will be documented under appropriate credit support documentation. If the counterparties are in-scope of regulatory collateralisation requirements under UK EMIR, a variation margin credit support annex and (potentially) a suite of initial margin documents will need to be entered into.

2. Application of Close-Out Netting and Set-Off

English law legal opinions have been given as to the recognition and enforceability of the ISDA close-out netting mechanics, allowing parties to terminate and net obligations in the event of a counterparty default.

3. Specific Terms to Incorporate into Derivatives Documentation

Derivatives transactions in England and Wales typically include terms required by UK EMIR and other regulations, such as those related to reporting obligations and collateral arrangements. ISDA documentation is often customised to meet specific regulatory and transactional needs.

Conduct & Compliance

1. Conduct Rules Applying to Entities Involved in Derivatives Trading

As noted above, entities involved in derivatives trading are often required to obtain an authorisation from the FCA unless an exemption is available.

2. Prevention and Addressing of Market Abuse and Manipulation

All counterparties to derivatives transactions are subject to the UK Market Abuse Regulation (UK MAR). This provides a framework to prevent and address insider trading, market manipulation, and other forms of market abuse in respect of issuers of securities or in respect of certain financial instruments (including, broadly, derivatives transactions). Financial instruments fall within the scope of UK MAR where the instrument is traded on a regulated market, an MTF or an OTF, or its price or value depends on another financial instrument that is traded on a regulated market, MTF or OTF. This most obviously impacts those equity derivatives transactions that relate to listed shares, as the value of such transactions will be determined by the price of the shares.

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Taxation

1. Taxation of Derivatives in England and Wales

The taxation of derivatives transactions in England and Wales varies depending on the type of derivatives transaction and the nature of the transactions.

Income and gains from derivatives transactions are generally subject to corporation tax for corporates, although that depends on the accounting treatment of the relevant transaction.

Under the derivatives contracts regime, the tax treatment of derivatives transactions follows their accounting treatment. Broadly, transactions that are accounted as derivatives transactions will fall within the derivatives contracts regime.

Specific rules may apply to ensure that counterparties to certain hedging transactions are able to disregard movements in the fair value of the derivatives transactions for tax purposes.

2. Tax Incentives or Exemptions for Derivative Transactions

Direct tax incentives for derivatives trading are limited, but certain exemptions exist, particularly for hedging transactions. For example, companies engaging in risk management activities, such as using currency forwards to hedge exchange rate exposure on overseas investments, may benefit from tax exemptions. These transactions are treated as an integral part of the company’s overall business operations rather than speculative trading.

3. Withholding Tax Implications for Cross-Border Transactions

Cross-border derivatives transactions often raise questions about withholding tax, particularly for payments that resemble interest. Under UK tax law, payments arising from derivatives contracts are generally exempt from withholding tax if they fall within the derivatives contracts regime. This exemption ensures that derivatives used for legitimate hedging or investment purposes are not unduly taxed.

The applicability of withholding tax often depends on double taxation treaties (DTTs) between the UK and the counterparty's jurisdiction. For instance, if a UK-based company enters into a cross-border swap agreement with a U.S. counterparty, payments under the swap may be exempt from withholding tax due to the provisions of the UK-U.S. tax treaty. However, where no treaty applies, withholding tax may still be levied, creating a potential cost for the transaction.

A prominent example is the Treaty Shopping case involving Swiss derivatives dealers (2015), where firms sought to benefit from favorable withholding tax rates under treaties by routing transactions through intermediary entities. This case highlighted the importance of economic substance in cross-border derivatives transactions and led to increased scrutiny by tax authorities to prevent abuse.

Additionally, the rise of ESG-linked derivatives transactions, such as sustainability-linked swaps, introduces new considerations for withholding tax. Payments tied to environmental or social outcomes may not fit neatly into traditional tax classifications, prompting regulators and firms to seek clarification on how these instruments are treated under international tax treaties.

Cross-Border Considerations

1. Regulation of Cross-Border Derivative Transactions

Following Brexit, cross-border derivatives transactions involving UK and EU counterparties are now subject to two distinct regulatory regimes. Counterparties must navigate differences between UK and EU regulations and be mindful of the regulation applying to derivatives transactions where counterparties are based in different jurisdictions.

A specific instance of cross-border regulatory challenges arose following Brexit. The European Commission granted temporary equivalence to UK-based CCPs, such as LCH Ltd, to allow them to continue clearing euro-denominated derivatives transactions for EU clients. Without this arrangement, EU counterparties would have been forced to relocate their clearing activities to EU-based CCPs, potentially disrupting the global derivatives market. This temporary equivalence of UK CCPs has been extended until June 2025.

More generally, counterparties should be aware of derivatives regulation in different jurisdictions, as these requirements may bite in particular circumstances. For example, an English entity that enters into derivatives transactions with a US bank will need to be cognisant of certain aspects of the Dodd-Frank regime that may apply to the derivatives transaction. Whilst the English entity itself will not likely be directly subject directly to Dodd-Frank, it may be required by its US bank counterparty to take certain actions to facilitate the US bank's compliance with Dodd Frank.

2. Restrictions or Additional Requirements for Foreign Entities

Foreign entities engaging in derivatives transactions with UK counterparties face regulatory requirements that may necessitate establishing a UK presence or obtaining specific authorisations. For example, under FSMA, non-UK firms wishing to execute derivatives transactions in the UK may need to apply for permission to do so from the FCA unless they qualify for an exemption, as they will be carrying on an activity in the UK falling within the regulatory perimeter of FSMA.

The FCA's Temporary Permissions Regime (TPR) allowed EU firms to continue operating in the UK in the immediate aftermath of Brexit. However, it was expected that, to the extent that the firm wished to carry on conducting its business in the UK post-Brexit, it would apply for full authorisation from the FCA. The TPR ended on 31 December 2023.

This regulatory shift has led many EU-based firms to reassess their operational models, with some establishing subsidiaries in London to maintain market access.

3. Implications of Third-Country Regulatory Standards

The divergence of UK regulations from EU standards post- Brexit has implications for firms trading derivatives transactions across borders. UK counterparties must consider the impact of third-country regulations on their operations, particularly in relation to CCP recognition, margin requirements, and (in the case of exchange traded derivatives transactions) on appropriate trading venues.

Dispute Resolution

1. Common Methods for Resolving Disputes in Derivatives Transactions

Disputes in derivatives transactions that are not settled are typically resolved through arbitration, mediation, or litigation. English law ISDA Master Agreements are commonly drafted on the basis that disputes will be litigated in the courts of England and Wales, but arbitration is also a frequently used method for dispute resolution purposes due to its confidentiality and the potential specialised knowledge of arbitrators in financial markets.

2. Specific Courts or Tribunals for Derivatives-Related Disputes

There are no specific courts or tribunals for all derivatives-related disputes. However, significantly large disputes relating to derivatives transactions may be heard in the Financial List within the High Court of England and Wales. This is specifically designed to handle complex financial disputes, including those related to derivatives transactions. The court offers expedited procedures and the expertise of judges with deep knowledge of financial markets, making it a preferred venue for resolving significant disputes in the derivatives market.

Market Trends

Key Market Trends in the Derivatives Market in England and Wales Affecting Asset Managers

The derivatives market in London is experiencing several significant trends that are shaping the strategies of asset managers:

Growth of ESG-Linked Derivatives Transactions: environmental, social, and governance (ESG) factors are increasingly being integrated into derivatives transactions. The rise of ESG-linked derivatives, such as sustainability-linked swaps, is driven by growing investor demand for sustainable investment options. These products offer asset managers opportunities to align their portfolios with ESG criteria while managing risks effectively.

Macroeconomic Trends: whilst interest rates remain relatively high against general post financial crisis levels, rates are beginning to soften. Further, political uncertainty abounds. These factors have significant impact on the pricing of derivatives transactions and the hedging strategies that asset managers may wish to avail themselves to.

Technological Innovation: the adoption of fintech solutions, including blockchain technology, has the potential to transform derivatives trading and settlement processes. These innovations may offer increased efficiency, reduced counterparty risk, and enhanced transparency. Asset managers are exploring the use of smart contracts and distributed ledger technology to streamline operations and improve risk management.

Regulatory Change: in the EU, certain changes to EMIR have now been implemented. This will change the way in which certain counterparties calculate their derivatives exposures. It is uncertain as to the extent to which these changes will be replicated into UK EMIR.

Operational Resilience and Cyber security: in response to heightened concerns about operational risks and cyber security threats, there is a growing emphasis on strengthening the resilience of financial market infrastructures (such as CCPs) and other participants in the derivatives market. Regulatory initiatives are focused on ensuring that firms can withstand and recover from disruptions.

Increased Focus on Reporting: regulatory requirements for data reporting and transparency continue to evolve, with a particular focus on improving the accuracy and timeliness of reported information. Recent changes to the reporting obligation under EMIR enhance the sanctions regime applicable to counterparties that misreport or fail to report derivatives transactions and increase the number of data fields that need to be reported. UK alternative investment fund managers that manage alternative investment funds based in the EU that enter into derivatives transactions to hedge exposures faced by the relevant alternative investment fund (either directly or through a European-established special purpose vehicle) should be mindful of this.

These trends highlight the dynamic nature of the derivatives market in London and underscore the need for asset managers to stay informed and agile in their strategies. By understanding and adapting to these developments, asset managers can better navigate the complexities of the market and capitalise on emerging opportunities.

Author Biography

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Jonathan is a partner and Head of our Derivatives & Structured Products Group. He is also a member of the firm's ESG and Impact Group.

Jonathan Gilmour is a top expert in derivatives and structured products, serving major UK financial institutions and pension schemes. He is recognized as a 'Leading Individual' by Chambers and Legal 500 and 'Highly Regarded' by IFLR. Gilmour Inegotiates ISDA, GMRA, and GMSLA documentation and advises on sustainability-linked derivatives to manage market risks. He is a member of the Panel of Recognised International Market Experts in Finance (P.R.I.M.E. Finance) and involved with key organizations like ISDA and ICMA. A sought-after speaker, he contributes to the International Comparative Legal Guide on ESG and Derivatives Laws. Gilmour also chairs several committees, including the Association of Pension Lawyers' Investment Sub-Committee, and engages in pro bono work with the Impact Investing Institute. He leads the firm's Diversity & Inclusion Board, promoting an inclusive workplace culture.

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Firm Biography

Travers Smith LLP

At Travers Smith, it’s never just about the law—it’s about people. We believe our success comes from bringing together talented individuals from all backgrounds and empowering them to be their best. By creating a supportive, inclusive and collaborative environment where everyone’s unique perspectives are valued, we deliver the highest quality work for our clients and make a real impact in our community.