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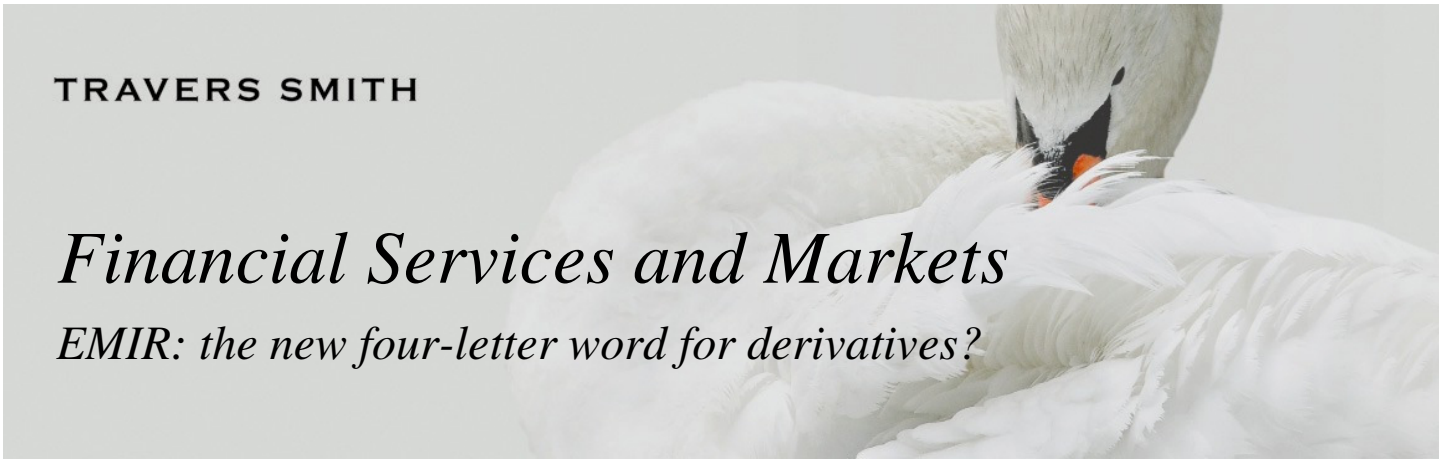

Financial Services and Markets

EMIR: the new four-letter word for derivatives?

On 4 July 2012, the European Council announced that it had adopted the Regulation on OTC derivative transactions, central counterparties and trade repositories (commonly known as the "**European Market Infrastructure Regulation**" or "**EMIR**"). It published the text on 8 July 2012 (here). The Regulation will be in force by the end of 2012. Since its genesis back in the G20 commitments to centralised clearing of standardised OTC derivatives transactions declared in Pittsburgh in September 2009, the progress of the Regulation has felt laboured and tortuous. This reflects the complexity of the systemic issues addressed by it, as well as the declared intention to minimise duplication and conflict with other international initiatives forged in the fires of the Steel City. However, whatever one's views as to the pros and cons of the initiative and where the journey has led us, the process is at last approaching its final phases. Are you ready for it?

Amongst others, EMIR will catch (through various phases of transition): MiFID investment firms, credit institutions, insurers, UCITS funds, occupational pension schemes and those alternative investment funds (and their managers) that are soon to be subject to the Alternative Investment Fund Managers Directive, in each case as regards, in particular, their OTC derivatives trading activities. It also has the potential to catch entities outside the financial sector which use derivatives. Some of the most important details are only now just emerging as we enter the final – and in many ways the most critical – stage of the legislative process: the development of detailed delegated legislation by the European Securities Authorities. When adopted as implementing measures by the Commission later this year, these technical standards will – it is hoped – provide the level of granular detail necessary to ensure that EMIR actually works in practice. Uncertainties will inevitably remain.

Affected firms and their trade associations should carefully consider the consultation papers and respond. Consultation is being held over the summer holiday season and the deadlines for responses are extremely tight.

The obligations which EMIR imposes in relation to risk mitigation for all OTC derivative contracts that are not subject to central clearing will come into force a good deal sooner than the other requirements of the Regulation and firms must ensure that they are prepared for this.

This briefing note provides an overview of some of the key elements of EMIR and explains what the market is currently focusing on.

Headlines

- **Mandatory clearing unlikely to become effective until 2014 at the earliest.**
- **But risk mitigation requirements for OTC derivatives will hit much sooner – during 2013.**
- **Occupational pension schemes will be caught by risk mitigation requirements.**
- **Reporting obligation will apply in relation to all derivatives.**
- **Detailed draft implementing measures now being consulted upon – only a few weeks to respond.**

What does EMIR do?

EMIR is the EU's legislative response to the Pittsburgh commitment that all standardised OTC derivatives should be cleared through CCPs by the end of 2012 at the latest and that derivatives (whether exchange-traded or OTC) should be reported to trade repositories.

The concept of an **"OTC"** derivative or derivative contract is at the core of the Regulation. It is a derivative contract which is executed otherwise than on an EU or equivalent regulated market. An OTC derivative contract, therefore, includes such transactions executed not only bilaterally (e.g. through a systematic internaliser), but also through multilateral trading venues which are MTFs or (when they commence operation) OTFs.

However, firms should be aware that in certain key respects the provisions of the Regulation extend beyond OTC derivatives - for example, the reporting obligation covers *any* derivative transaction; and, indeed, beyond derivatives - for example, the prudential and conduct of business requirements applicable to CCPs cover their activities both in relation to derivatives and other contractually-based investments, as well as transferable securities and money market instruments (see, for example, Recital (73) of the Regulation).

In broad terms, EMIR is structured to apply to three separate groups, each with a distinct set of obligations, but whose interrelationship is essential to give full effect to the Regulation's overall aim of addressing perceived flaws in the derivatives markets and the clearing infrastructure.

Therefore, EMIR applies to:

- ***Financial counterparties*** and ***non-financial counterparties*** – to whom the following obligations will apply:
    - *The clearing obligation* – i.e. the obligation to ensure that all standardised OTC derivatives, which are subject to a mandate of compulsory clearing from the Commission, are cleared through a CCP (the clearing obligation only applies to a non-financial counterparty if its OTC derivatives trading activity exceeds a certain threshold – see below);
    - *The reporting obligation* – i.e. the obligation to ensure that all OTC derivatives (including non-centrally cleared transactions and market transactions) are reported to a trade repository; and
    - *The risk mitigation obligations* – i.e. a raft of detailed requirements in relation to risk mitigation (including provisions on marking-to-market/marking-to-model, margin, collateral and confirmations) that will apply in relation to all OTC derivatives that are not subject to the clearing obligation – because the clearing obligation will not become effective immediately upon EMIR coming into force, this will mean that from the outset all OTC derivatives will be subject to the risk mitigation obligations. Some of these risk mitigation requirements (for example, those relating to timely confirmation, reconciliation, portfolio compression and dispute resolution) will apply to all non-financial counterparties, even if their OTC derivatives transactions activity has not exceeded the clearing threshold. However, the collateral and related requirements will only apply to those non-financial counterparties that exceed the clearing threshold. Financial counterparties will be caught by all of the requirements.
- The ***central counterparties (CCPs)*** through which all standardised mandated OTC derivatives must be cleared – the Regulation specifies (amongst other things) requirements in relation to: authorisation, organisational arrangements, conduct of business (including segregation of client assets) and, prudential arrangements. Further details are to be specified in Technical Standards (the draft of which appears in ESMA's June CP).
- The ***trade repositories*** to which CCPs, financial counterparties and non-financial counterparties must report – the Regulation specifies (amongst other things) requirements in relation to: registration, organisational and governance arrangements, operational reliability, confidentiality of information and transparency and data availability; as well as the form, content and frequency of trade reports and the use of third parties to enable CCPs and counterparties to perform their reporting obligation. Further details are to be specified in Technical Standards (the draft of which appears in ESMA's June CP).

In this outline briefing note we look at the requirements as they will apply to the counterparties to derivative transactions. We do not look at the requirements that will apply to CCPs and trade repositories.

The current status

The text of the Regulation

On 4 July 2012, the European Council announced that it had adopted EMIR and published the text as adopted on 8 July (here). In its press release the Council confirmed that the Regulation would apply "from the end of 2012". It will enter into force 20 days after publication in the Official Journal. As a Regulation it will be directly applicable law in Member States – no UK legislation will be required.

In the meantime, the process of consultation on the detailed delegated legislation (implementing Technical Standards and Regulatory Technical Standards) which the Regulation calls for is underway:

- On 15 June 2012, the European Banking Authority (EBA) published a consultation paper on draft Regulatory Technical Standards on Capital Requirements for CCPs - the paper is here;
- On 25 June 2012, the European Securities and Markets Authority (ESMA) published a consultation paper on draft Technical Standards on a wide range of issues (the "**June CP**") – the paper is here;
- Following their high level discussion paper issued in March, ESMA, EBA and the European Insurance and Occupational Pensions Authority (together, the "**ESAs**") will shortly issue a joint consultation paper focusing specifically on the margin and collateral requirements of the Regulation as part of the risk mitigation obligations for OTC derivative contracts not cleared by a central counterparty ("**CCP**") (see below).

Will my firm be subject to EMIR?

Financial counterparties

Your firm will be caught if it transacts in derivatives (see below) and is a financial counterparty.

A "financial counterparty" is defined as:

- An investment firm authorised in accordance with the Markets in Financial Instruments Directive (MiFID);
- A credit institution authorised in accordance with the Banking Consolidation Directive (BCD);
- An insurance, assurance or reinsurance undertaking authorised in accordance with the relevant EU Directive (i.e. First Non-Life, the recast Life and the Reinsurance Directives respectively);
- An undertaking for collective investments in transferable securities (UCITS) and its manager(s) in accordance with the UCITS Directive;
- An institution for occupational retirement provision with the meaning of the Occupational Pension Funds Directive – this will catch UK occupational pension schemes (subject to certain, but not absolute, transitional relief); and
- An alternative investment fund (AIF) managed by an alternative investment fund manager (AIFM) authorised or registered under the Alternative Investment Fund Managers Directive (AIFMD) – it is important to note that this will catch EU and non-EU AIFs where they are managed by AIFMs who are authorised or registered under AIFMD. We take "registered" in this context to mean those EU AIFMs whose assets under management do not exceed certain specified *de minimis* thresholds (broadly EUR 500 million in respect of unleveraged AIFs where no redemption rights are exercisable for 5 years following investment and EUR 100 million for leveraged AIFs) and who are therefore exempt from the Directive and registered by their home state regulator under Art. 3(3) AIFMD.

If your firm is a "financial counterparty" as defined, and if it is contracting from a branch or other establishment in the EU, it is within the scope of EMIR and will be subject to the clearing or risk mitigation obligations, as applicable, and to the reporting obligations (subject to an exemption for intra-group arrangements in certain circumstances). There is no "clearing threshold" as there is for non-financial counterparties so the requirements will apply regardless of the scale of activities undertaken or the purposes for which trades are entered into.

It remains unclear whether the clearing, risk mitigation and reporting obligations under the Regulation will apply to a financial counterparty (or, indeed, a non-financial counterparty) where it enters into an OTC or other derivative transaction through a branch or other establishment located outside the EU. The better view is that these obligations should *not* apply, unless (as regards the clearing or risk mitigation obligations) the contract has a "direct, substantial and foreseeable effect" within the EU or where the imposition of such an obligation is "necessary or appropriate to prevent the evasion of any provision" of the Regulation (see, for example, Articles 4(1)(a)(v) and 11(12)).

Conversely, assuming that view is correct, if a financial counterparty (or a relevant non-financial counterparty), which is incorporated or otherwise formed under the laws of a jurisdiction outside the EU, enters into a derivatives contract through a branch or other establishment within a Member State, it will be within the scope of the Regulation (subject, where applicable, to satisfaction of any relevant threshold requirement).

However, guidance on these fundamental scope and related issues is still awaited from ESMA and the other ESAs.

Non-financial counterparties

A "non-financial counterparty" means an undertaking established in the European Union, other than a financial counterparty. This therefore has the potential to capture any number of commercial or other organisations which use derivatives as part of their business or other activities.

Non-EU entities

An entity "established" (see above) in a non-EU state may find itself caught by the EMIR clearing or other relevant obligations to the extent that it would be subject to the obligation if it were established in the EU. We consider this further, in the context of compulsory clearing, under "The clearing obligation" below. However, it should be noted that the risk mitigation obligations could, equally, apply to two non-EU entities contracting through a branch outside the EU, if the "direct, substantial and foreseeable effect" or "evasion" tests examined further below are satisfied.

What derivatives will be within the scope of EMIR?

A derivative contract is a financial instrument set out in paragraphs (4) to (10) in Section C of Annex I to MiFID – this encompasses an extremely wide range of derivative instruments, including: options, futures, swaps, forward rate agreements and "any other derivative contracts" in relation to securities, currencies, interest rates, financial indices; commodities derivatives (both cash-settled and physically-settled); credit risk derivatives; CFDs; and numerous types of "exotic" derivatives (e.g. relating to climatic variables, freight rates and emission allowances). This excludes spot FX transactions and FX forward agreements. It broadly covers credit derivatives, equity derivatives, interest rate derivatives, FX derivatives and commodity derivatives.

An OTC derivatives transaction will not, however, be subject to the *clearing obligation* unless:

- the parties to the contract are subject to the clearing obligation (see "The clearing obligation" below); and
- the relevant transaction is of a class or type that has been mandated by the Commission as being subject to the clearing obligation in accordance with the procedure set out in Article 5 of the Regulation (see further below).

Conversely, an OTC derivative transaction, which is not cleared through a CCP, may be subject to the relevant risk mitigation obligations. In this context, we consider that a transaction which is cleared through *any* CCP (even if it is not authorised or recognised under the Regulation) would be outside the scope of the risk mitigation obligations. Further, it would seem that the risk mitigation obligations only apply (subject to the "direct, foreseeable and substantial effect" or "evasion" provisions of Article 11(12) where *both* counterparties are established outside the EU) where a financial counterparty established in the EU contracts with a relevant non-financial counterparty which is also established in the EU. However, clarification on these points is yet to be provided by ESMA and the other ESAs.

The clearing obligation

From the perspective of a financial counterparty

Broadly speaking, if you are a financial counterparty and you propose entering into an OTC derivative that has been declared subject to the clearing obligation and your counterparty is another financial counterparty or a non-financial counterparty which has exceeded the clearing threshold (see below), that contract must be centrally cleared through a CCP which is authorised or recognised under the Regulation.

The same will apply if your proposed counterparty is an entity established outside the EU, but would be subject to the clearing obligation if it were established here – i.e. it would be a financial counterparty, as defined, or a non-financial counterparty which has exceeded the clearing threshold.

Non-financial counterparties

Non-financial counterparties as defined are not automatically caught by the clearing obligation. They will only become subject to it as and when they exceed a certain "clearing threshold". The values of the relevant clearing thresholds are to be set by way of technical standards (in the June CP, ESMA proposes five asset classes and sets the thresholds at a relatively high level by reference to the average notional amount of outstanding OTC derivatives contracts in the relevant asset class over a rolling period of 30 working days). It is proposed by ESMA that the clearing obligation would apply to all relevant derivative transactions executed by a non-financial counterparty if the threshold is exceeded for one or more asset class). Importantly however, it is recognised that such counterparties use OTC derivatives to hedge risks – rather than for speculative trading purposes. Consequently, in calculating its positions in OTC derivatives, a non-financial counterparty only needs to include those contracts entered into by it (or by other non-financial entities within its group) which are "not objectively measurable as reducing risks directly relating to the commercial activity or financial activity" of that non-financial counterparty (or of its group).

In its June CP, ESMA has set out detailed draft technical standards as to the calculation of the clearing threshold and the criteria for establishing which contracts are objectively measurable as reducing risk directly related to commercial activity or treasury financing. These will be critical in determining to what extent EMIR will have an impact on the non-financial services sector.

Non-EU counterparties

A non-EU counterparty which would be subject to the clearing obligation if it were established in the EU will find itself caught by the EMIR clearing obligation to the extent that its counterparty is an EU financial counterparty or an EU non-financial counterparty which has exceeded the clearing threshold – this will mean that the contract will have to be cleared through a CCP authorised or recognised under EMIR.

EMIR also provides that the clearing obligation will apply to two non-EU counterparties that would be subject to the clearing obligation if they were established in the Union "provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of the Regulation". On the face of it, this is a provision with breathtaking extraterritorial scope, although the European Commission has referred to it as an "anti-avoidance clause" to prevent market participants who would otherwise be caught by EMIR from deliberately structuring a contract outside the EU. We await for further guidance from ESMA and the other ESAs as the scope of this "anti-avoidance" provision.

See the table in the Annex to this briefing note, which summarises the different permutations in which the clearing obligation will arise.

Exemption for intra-group transactions

Intra-group transactions (as defined) will not be subject to the clearing obligation (and they may also be exempt from certain provisions of the risk mitigation obligation.) The detailed requirements that would have to be satisfied for this exemption to apply are beyond the scope of this overview. A non-EU firm (referred to in the Regulation as a "third country entity") would be able to avail itself of the intra-group exemption if, broadly speaking, the Commission has adopted an implementing act in respect of the relevant third country declaring the legal, supervisory and enforcement arrangements in that country as "equivalent".

Transitional relief for occupational pension schemes

As mentioned above, occupational pension schemes are, by definition, financial counterparties. During the negotiation of EMIR concerns were raised by industry participants that pension funds would face significant difficulties in meeting the initial margin and cash variation margin requirements of CCPs. (There are also issues with regards to the amount of margin that pension funds would be required to post.) Unless and until the CCPs are geared up to accept alternative collateral (such as government bonds), pension funds would have to hold significant amounts of cash in order to meet their margin requirements to CCPs. In the light of these concerns, a temporary "stay of execution" from the clearing obligation was won for the pension fund sector. Broadly, the clearing obligation will not apply for three years after the Regulation comes into force in relation to OTC derivative contracts that are "objectively measurable as reducing investment risks directly relating to the solvency of pension scheme arrangements". Furthermore, subject to the outcome of a report which the Commission will conduct over the next couple of years (in consultation with ESMA and EIOPA) into the development of technical solutions for the transfer of non-cash collateral, the transitional relief may be extended for a further two to three years. That said, a recital to the Regulation makes it clear that the "ultimate aim...is central clearing as soon as this is tenable".

However, despite this transitional relief, occupational pension schemes *will* be subject to the risk mitigation obligations and the reporting obligation in relation to the derivative contracts they enter into with counterparties. The trade associations have expressed concern that the requirements for OTC risk mitigation presently under consideration by the ESA, might inappropriately re-introduce the initial margin and cash margin requirements that the transitional relief from the clearing obligation had won for pension funds.

How will contracts be declared subject to the clearing obligation?

This will be subject to a detailed procedure, for which technical standards are required. ESMA is currently consulting on drafts of these technical standards which must be submitted to the Commission by 30 September 2012.

Broadly speaking, there are two methods by which OTC derivatives may eventually be declared as being subject to the clearing obligation. First, under the so-called "bottom up" approach, CCPs will need to apply for authorisation to clear a particular class (or classes) of OTC derivatives. The competent authority for the CCP will notify ESMA which will then have six months to submit draft technical standards to the Commission which will determine, amongst other things, which classes of OTC derivatives should be subject to the clearing obligation. The Commission will then have up to three months to decide on the technical standards. The second method, the so-called "top down" approach would involve ESMA, on its own-initiative (and subject to the requirement to consult beforehand), specifying which classes of derivatives should be subject to the clearing obligation but for which no CCP has yet received authorisation.

In developing its technical standards for determining whether contracts should be centrally cleared, ESMA will take into account the degree of standardisation of the relevant class of OTC derivatives, the volume and liquidity of that class and the availability of fair, reliable and generally accepted pricing information. The current consultation sets out in detail the criteria that ESMA proposes to adopt in future when assessing these key factors.

ESMA will be required to set up and maintain a register on its website which will identify the classes of derivatives which it has declared should be subject to the clearing obligation – this will contain, amongst other things, the identity of the CCPs authorised or recognised to clear the derivatives and the dates from which the clearing obligation takes effect (including details of any phased-in implementation). That said, it is clear that it will not be possible to rely on the register as an "early warning system" in relation to contracts that will become subject to the clearing obligation in future. Counterparties should receive advance notice of contracts that will be subject to the clearing obligation because ESMA will publish a consultation when it prepares its draft technical standards in relation to a particular class of OTC derivatives. It is possible that under the so-called "frontloading" process, contracts entered into before the relevant clearing obligation is mandated by the Commission will become subject to the clearing obligation. This will be determined by whether the remaining maturity of the contract exceeds the minimum remaining maturity for that asset class specified by the Commission in the technical standard endorsed or adopted by it.

What will this mean in practice?

If you are a counterparty subject to the clearing obligation, in order to comply with that obligation you will need to be (or become) a clearing member of an authorised or registered CCP or a "direct" client of such a clearing member, or establish what the Regulation calls "indirect clearing arrangements with a clearing member" – this means that you will need to establish contractual arrangements under which you become a client of a "direct" client of a clearing member. Such "indirect clearing arrangements" are designed to enable non-clearing brokers or other non-clearing members ("NCMs") to provide clearing services to their own clients, without needing to put those clients into a direct clearing relationship with a clearing member. Those indirect clearing arrangements must not increase counterparty risk and must ensure that the assets and positions of the counterparty benefit from "equivalent" protections offered by the provisions regarding segregation, portability and default procedures. In ESMA's view this means that an indirect client should be protected from the default of the direct client (NCM), and from any losses resulting from the default of other direct clients of the clearing member. In other words, the features (and costs) of central counterparty clearing will be passed down the chain to the end user.

When will mandatory clearing start?

This will not start when the Regulation comes into force. The CCPs will first have to apply for authorisation or recognition under EMIR. Since EMIR will not come into force until later in 2012 (and potentially as late as the end of December), it will not be possible for applications to begin until early 2013. Even then, by virtue of a transitional provision, many CCPs will have six months from the date on which various regulatory technical standards have come into force in which to apply for authorisation under EMIR.

After applications have been submitted, the process of authorisation or recognition will be subject to specific timing provisions – meaning that in the case of CCPs within the EU, a final decision may not be forthcoming until up to six months after the application was first submitted. Following authorisation there will be a separate process by which OTC derivatives are assessed and determined as being subject to the clearing obligation (see above) – a process which in itself could take up to nine months.

For these reasons we are not expecting clearing of any class of OTC derivatives to become mandatory until early 2014 at the earliest.

The risk mitigation obligations (clearly EMIR is not just about clearing)

However, before you let out a sigh of relief, the risk mitigation obligations – which will apply in relation to all OTC derivative contracts not cleared through a CCP – will not be subject to the same elongated timetable.

In outline, EU financial counterparties and EU non-financial counterparties that enter into a non-centrally cleared OTC derivative contract will be required to ensure that there are appropriate procedures and arrangements in place to measure, monitor and mitigate operational counterparty credit risk. These procedures and arrangements must include, at least:

- timely confirmation of trades;
- formal reconciliation processes;
- closing out of gross positions which net (portfolio compression);
- (for financial counterparties and non-financial counterparties above the clearing threshold) daily marking-to-market (or where this is not possible, prudent and reliable marking-to-model);
- procedures requiring segregated exchange of collateral (and, in the case of a financial counterparty, an appropriate and proportionate amount of capital to the extent that risk is not covered by collateral).

The June CP sets out detailed draft technical standards regarding the majority of these measures. A separate consultation paper is expected from the joint ESAs shortly – this will deal with the specific regulatory technical standards regarding the provision of margin and collateral as part of the risk mitigation obligation applicable to OTC derivative contracts between a financial counterparty and a non-financial counterparty exceeding the clearing threshold. It is possible that the ESAs will take into account international initiatives in this area (for instance the Basel Committee on Banking Supervision and the Board of the International Organisation of Securities Commissions (IOSCO) published a joint consultation on margin requirements for non-centrally cleared derivatives on 6 July 2012 (here).

There is some uncertainty as to when these risk mitigation obligations will come into force. It could be as early as the beginning of 2013. In its June CP ESMA recognises these concerns. It says it is currently consulting with the European Commission as to whether the application date of the technical standards could be delayed so as to allow counterparties time to prepare for the new requirements.

The reporting obligation

Financial counterparties and non-financial counterparties are required to ensure that the details of any derivative contract they have concluded (and of any modification or termination of the contract) are reported to a duly registered trade repository (or, where one is not available, to ESMA – see below). These details should be reported no later than the working day following the relevant conclusion, modification or termination of the contract.

There are some significant points to note about the scope of this obligation:

- it applies to all derivative contracts (see definition above) regardless of whether they are on-exchange or OTC and regardless of whether or not they are subject to mandatory clearing;
- as well as applying to all financial counterparties, it also applies to all non-financial counterparties (regardless of whether or not they have exceeded the clearing threshold); and
- it may have retrospective effect as regards contracts entered before the date on which the Regulation comes into force and which are still outstanding.

The reporting obligation will be imposed upon *both* counterparties to a derivative contract; in the context of centrally-cleared contracts the relevant CCP interposed between the trading counterparties will itself be a counterparty, and therefore subject to the reporting obligation. A counterparty or a CCP may delegate the reporting of the details of derivative contracts to a third party; and is under an obligation to ensure that the reporting occurs without duplication.

Draft Regulatory Technical Standards as regards the EMIR reporting obligation are included in ESMA's June CP. One of the problems which ESMA acknowledges (although cannot resolve at this stage) is the fact that reporting to trade repositories under EMIR will be more burdensome than the current transaction reporting requirement under MiFID, and even where reported under EMIR many of the same trades will still have to be reported under MiFID. There will therefore be a burden for many firms in having to comply with two sets of requirements which are inconsistent in parts, and duplicative in others. ESMA says that it will continue to work towards the objective of a common reporting mechanism, but there is no indication of how long it will take to reach this objective.

There is uncertainty as to when firms will actually find themselves having to report under EMIR. In theory, this could be as early as the beginning of next year. However, this is not likely. In the June CP ESMA recognises "the need to begin reporting as soon as practicable" but suggests that, in practice, this ought to be within a certain fixed period *after authorisation of a relevant trade repository* to receive transaction reports for the relevant asset class – with an ultimate long-stop date of two years after EMIR and its technical standards come into force, at which time, if there is no trade repository available, reports would have to be sent to ESMA. Clearly ESMA is keen to avoid the position whereby, in accordance with the fall-back position in the Regulation, it will find itself being the recipient of a large number of reports submitted to it in the absence of an authorised trade repository – it does not have the operational or IT structures to deal with this.

What next?

- **Mid to late July 2012** - we are expecting a joint consultation paper from the ESAs on draft regulatory technical standards specifically on margin and collateral arrangements for non-centrally cleared OTC derivatives.
- **5 August 2012** – the consultation period for the June CP closes. It is important for firms that will be affected by EMIR to respond to the consultation, either themselves or through their trade associations – this will be the last chance to lobby ESMA on these detailed provisions.
- **August 2012** (possibly) – the joint consultation paper from the ESAs on margin/collateral arrangements for non-centrally cleared OTC derivatives closes.
- **30 September 2012** – the deadline for delivery of the draft technical standards and regulatory technical standards to the Commission.
- **End of 2012 at the latest** – Commission must adopt technical standards/regulatory technical standards delivered by ESMA and the other ESAs.
- **End of 2012** – EMIR will come into force.
- **Early 2013** – CCPs may start applying for authorisation or recognition.

- **Mid 2013** – existing CPPs (as at end of 2012) must have applied for authorisation or recognition.
- **At some point in 2013** (to be confirmed) – risk mitigation obligations come into force.
- **Early 2014** – mandatory central clearing of OTC derivatives begins (subject to potential phasing-in provisions).

For further information on how we can help you prepare for EMIR, please contact one of the following partners in our Financial Services and Markets Department or your usual contact at Travers Smith.

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ANNEX

European Market Infrastructure Regulation (EMIR)

Counterparties Subject to the Clearing Obligation – the permutations (Art.4[1])

Clearing obligation applies if you are one of these types of counterparty:	**… and you transact an OTC derivative (of a class that has been declared subject to the clearing obligation) with:**
Financial counterparty	**Financial counterparty**
	Non-financial counterparty (only where it has exceeded clearing threshold)
	Non-EU entity (that would be subject to the clearing obligation if it were established in the EU)
Non-financial counterparty (only if you have exceeded clearing threshold)	**Financial Counterparty**
	Non-financial Counterparty (which has <u>also</u> exceeded the clearing threshold)
	Non-EU entity (that would be subject to the clearing obligation if it were established in the EU)
Non-EU entity (that would be subject to the clearing obligation if it were established in the EU)	**Financial counterparty** **Non-financial counterparty** (only where it has exceeded clearing threshold)
Non-EU entity (that would be subject to the clearing obligation if it were established in the EU)	**Non-EU entity** (that would be subject to the clearing obligation if it were established in the EU)[2]

[1] As per text of Regulation adopted by Council on 4 July 2012 and published on 8 July 2012 (PE-CONS 8/1/12)

[2] N.B. this permutation will only apply if "contract has a direct, substantial and foreseeable effect in EU or where such obligation is necessary or appropriate to prevent evasion of the Regulation". The Commission has described this as an "anti-avoidance provision".