Sea of Change
Regulatory reforms – reaching new shores

EMIR: illustrative implementation timeline

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Contents

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Introduction

The timing of the last stages of the EU derivatives reforms remains uncertain.

It is still unclear when the Commission will adopt the Regulatory Technical Standards (RTS) imposing the first clearing obligation under the EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR).

- ESMA has delivered its opinion on the Commission's amended draft RTS imposing the clearing obligation on interest rate derivatives, which differed from the Commission's draft on the treatment of intra-group transactions and the method for categorising investment funds.
- However, the remaining difficulties in reaching agreement with the US on recognition of CCPs under EMIR may also be delaying adoption of the RTS.
- Even when the Commission adopts the RTS, the RTS cannot be published in the Official Journal (OJ) unless and until the European Parliament and the Council have indicated that they have no objection to the proposed RTS (or the objection period has expired).
- There is a diminishing likelihood that the first clearing obligation will be in effect (even for dealers) by the end of 2015 as, under the current proposals for a phase-in, this would require the RTS to be published in the OJ in early June so that they come into force by the end of 2015.
- MiFIR requires ESMA to deliver to the Commission draft RTS on the mandatory platform trading of mandatorily cleared OTC derivatives within 6 months of the adoption by the Commission of RTS imposing the clearing obligation (but the first platform trading obligation will not take effect until 3 January 2017).

In March 2015 the Basel Committee on Banking Supervision (BCBS) and the International Organisation of Securities Commissions (IOSCO) announced a delay in the start of the requirements to margin uncleared OTC derivatives and a phase in of the requirements for variation margin.

- The European Supervisory Authorities (ESAs) are expected to propose an alignment of the EU timetable for margining uncleared OTC derivatives under EMIR with the revised BCBS-IOSCO framework. However, it is not yet clear when the ESAs will publish a new consultation document or revised proposals under EMIR.

There continues to be uncertainty as to when ESMA will recognise any non-EU CCPs under Article 25 EMIR and if and when there will be any determinations of the equivalence of non-EU states' transactional rules under Article 13 EMIR (which is important e.g. for the EMIR intragroup exemption).

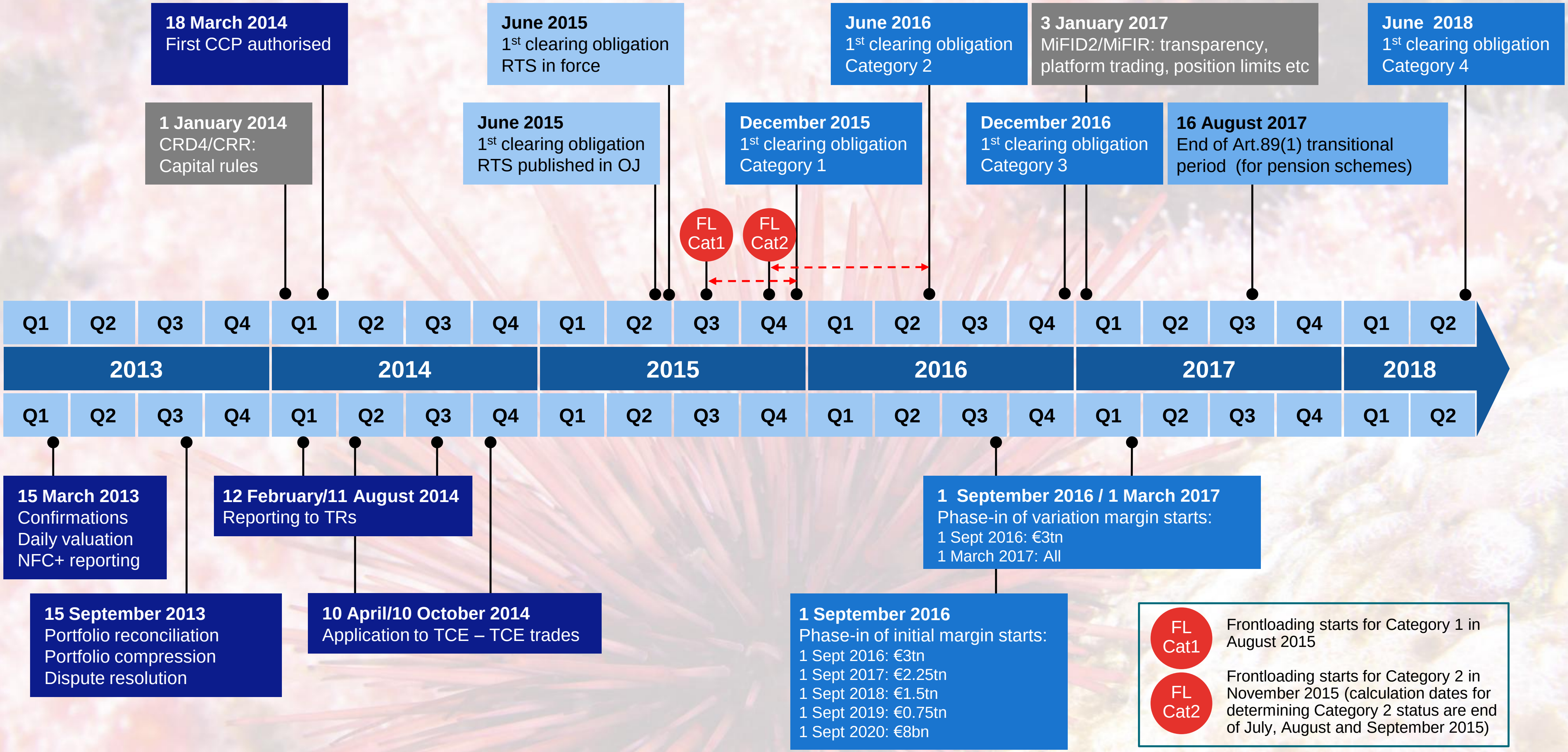
- The Commission may decide to extend the transitional recognition of non-EU CCPs as QCCPs under CRR (expiring on 15 June 2015) for a further six months .

The following chart shows an updated illustrative implementation timeline for EMIR.

The timeline assumes that:

- The Commission adopts the draft RTS on interest rate derivatives without further amendment by early May 2015, the Parliament and the Council confirm that they do not object and the RTS are published in the OJ and come into force in June 2015 (even though this may now be unlikely).
- The Commission extends the Article 89(1) EMIR transitional period for pension schemes for a further two years until 16 August 2017.
- The ESAs amend the implementation timetable in the draft margin RTS to align with BCBS-IOSCO's March 2015 revised framework.

EMIR: illustrative implementation timeline



Note: Assumes: (i) the Commission adopts the draft RTS on IRS without further amendment by early May 2015, the Parliament and the Council confirm that they do not object and the RTS are published in the OJ and come into force in June 2015; (ii) the Commission extends the Article 89(1) EMIR transitional period for pension schemes for a further two years until 16 August 2017; and (iii) the ESAs amend the implementation timetable in the draft margin RTS to align with BCBS-IOSCO's March 2015 revised framework.

EMIR: some expected developments

Q2 2015	Commission to adopt delegated acts under Art. 85(2) EMIR extending the exemption from the clearing obligation for pension scheme arrangements for a further two years (in accordance with its recommendation published in February 2015)
	Adoption and publication in the OJ of the first clearing obligation RTS (but this may be delayed)
	Commission to publish annual report on possible systemic risks and cost implications of interoperability arrangements pursuant to Art. 85(4) EMIR
	ESMA to present annual report on penalties imposed by NCAs pursuant to Art. 85(5) EMIR
	Commission expected to publish further equivalence decisions under Art. 25 EMIR throughout 2015
	Expected authorisation of additional EU CCPs throughout 2015 and first recognition of non-EU CCPs, triggering additional consultations on clearing obligations
	ESAs may publish second consultation on RTS for margining uncleared OTC derivatives
	Art. 497 CRR transitional period for QCCP status of non-EU CCPs expires on 15 June 2015 (but may be extended again by a further 6 months)
H2 2015	NCAs expected to start accepting applications for the intragroup exemption to the clearing obligation (after RTS for first clearing obligation enter into force)
	ESMA to deliver to the Commission final draft regulatory technical standards under MiFID2/MIFIR by 3 July 2015
	Commission to publish general report on EMIR implementation pursuant to Art. 85(1) EMIR by 17 August 2015
	Additional third-country central banks may be added to list of exempted entities in Art. 1(4) EMIR (before first clearing obligation effective)
	ESMA to publish reports under Art. 85(3) EMIR in relation to, amongst others, the application of the clearing obligation and the Art. 39 segregation requirements
	ESMA to consult on mandatory platform trading obligation under MiFIR for OTC derivatives subject to first clearing obligation under EMIR (ESMA must deliver draft RTS within 6 months of adoption of RTS on mandatory clearing)
2016	ESMA to deliver to the Commission final draft implementing technical standards under MiFID2/MiFIR by 3 January 2016
	ESMA to list pension arrangements specifically exempted from the clearing obligation by NCAs (before first clearing obligation effective for Category 2)
	Start of phase-in of margin requirements for uncleared OTC derivatives from September 2016 in line with the amended BCBS-IOSCO framework
2017	Deadline for reporting to TRs pre-existing contracts that were not outstanding on the reporting start date (12 February 2017)

Phase-in of the clearing mandate

ESMA has proposed mandatory clearing for certain classes of IRS and CDS. It does not propose, at this stage, to mandate clearing of FX NDFs, interest rate futures and options, equity products or single name credit products.

The development of RTS on the clearing obligation for IRS is the most advanced. ESMA has delivered its opinion on the Commission's proposed amended draft RTS. The amended draft RTS envisage the following phase-in of the clearing obligation and application of the frontloading obligation.

Phase-in of the clearing obligation

The amended draft RTS would apply the clearing obligation subject to a phase-in, based upon the categories of counterparties:

- **6 month phase-in period for Category 1 counterparties**: counterparties which, on the date of entry into force of the RTS, are clearing members for at least one of the classes of OTC derivatives listed in Annex 1 of the RTS, of at least one of the CCPs authorised before that date to clear at least one of the classes of OTC derivatives listed in Annex 1 of the RTS.
- **12 month phase-in period for Category 2 counterparties**: FCs and NFC+ AIFs which are not included in Category 1 which belong to a group whose aggregate month-end average notional amount of non-centrally cleared derivatives for [*3 months following publication of the RTS in the OJ, excluding the month of publication*] is above €8 billion.
- **18 month phase-in period for Category 3 counterparties**: FCs and NFC+ AIFs which are not included in Category 1 or 2.
- **3 year phase-in period for Category 4 counterparties**: NFC+ not included in Category 1, 2 or 3.

The longest phase-in period will apply where the counterparties to a contract fall into different categories.

Application of the frontloading obligation

The amended draft RTS provide for a more limited application of the frontloading obligation than envisaged in Art. 4(1)(b)(ii) of EMIR:

- **No frontloading for NFC+:** contracts where at least one counterparty is an NFC+ (in any Category) are not subject to frontloading.
- **No frontloading for Category 3:** the minimum remaining maturity (MRM) for contracts entered into with Category 3 counterparties has been set at the maximum maturity of each class subject to the clearing obligation.
- **Frontloading applies for Category 1 and Category 2:**
  - The frontloading period for FCs in Category 1 begins two months after the RTS enter into force and begins for FCs in Category 2 five months after the RTS enter into force.
  - Contracts entered into or novated after the relevant start date and before the end of the relevant phase-in period will be subject to frontloading if they have a MRM higher than 6 months at the end of the phase-in period.

Phase-in of margin requirements

The ESAs consulted on proposals for draft RTS for the margining of uncleared OTC derivatives broadly in line with the final policy framework published by BCBS-IOSCO in September 2013. However, it is expected that the ESAs will revise their proposals in line with the amendments to the framework published in March 2015 by BCBS-IOSCO.

Variation margin (VM)

- Requirement to collect VM applies from 1 September 2016 (for counterparties over the €3 trillion IM trigger level) and from 1 March 2017 (for all other counterparties).
- Zero threshold for transfer of VM.*

Initial margin (IM)

- Requirement to collect IM phased in from 1 September 2016.
- IM must be collected on gross basis and segregated (without rehypothecation).
- FCs may agree with their FC or NFC counterparties on a margin threshold of €50m covering all IM to be exchanged between consolidated groups.*

Scope

- Requirements to collect margin apply to FCs and NFC+s.
- FCs/NFC+s may agree not to collect VM or IM from NFCs under EMIR clearing threshold and counterparties exempt from EMIR.†
- Counterparties may agree not to collect IM for physically settled foreign exchange forwards/swaps (or exchange of principal on currency swaps).

Rules apply prospectively

- Margin requirements apply to new transactions entered into after the specified dates.

* Counterparties may agree a minimum transfer amount of €500,000 covering all VM and IM.
† The ESAs' draft RTS contemplated that FCs/NFC+s would be required to collect VM and IM from all non-EU counterparties.

Phase-in timetable for initial margin

From 1 September:	Trigger level for consolidated groups:
2016	€3 trillion
2017	€2.25 trillion
2018	€1.5 trillion
2019	€0.75 trillion
2020 onwards	€8 billion

Notes:

A counterparty is required to collect initial margin where both counterparties belong to consolidated groups having total gross notional values of uncleared OTC derivatives (including foreign exchange forwards/swaps) over the trigger level (based on average notional amounts for March, April and May before 1 September of the year in question).

This summary assumes that the ESAs' April 2014 consultation proposals are amended to reflect the March 2015 amendments to the BCBS-IOSCO policy framework.

Detailed key

Obligation	EMIR	Adopted RTS/ITS	Applies to[1]	Dealing with[1]	Product	Comment
Frontloading	Art. 4(1)(b)(ii)	Draft RTS	FC[2]	FC, TCE[2]	OTCD	OTCD entered into after a CCP is authorised may later become subject to mandatory clearing
Clearing obligation	Art. 4	Draft RTS	FC, NFC+[2]	FC, NFC+, TCE[2]	OTCD	Current draft RTS envisage phase-in of clearing obligation
TR reporting	Art. 9	RTS/ITS on TR reporting	FC, all NFCs[3]	Any	OTCD and ETD	Applies from 12 February 2014 (reporting of valuations/collateral from 11 August 2014)
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	FC, all NFCs, TCE[4]	Uncleared OTCD[5]	Applies from 15 March 2013, subject to a compliance schedule expiring 31 August 2014
Portfolio reconciliation	Art. 11(1)	Rec. 28-29, Art. 13 RTS	FC, all NFCs	FC, all NFCs, TCE[4]	Uncleared OTCD[5]	Applies from 15 September 2013
Portfolio compression	Art. 11(1)	Rec. 30, Art. 14 RTS	FC, all NFCs	FC, all NFCs, TCE[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	FC, all NFCs, TCE[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)	Consultation proposal	FC, NFC+	TBD	Uncleared OTCD[5]	Proposed to apply from 1 September 2016, in line with amended BCBS-IOSCO framework, subject to phase-in
Clearing member obligations	Arts. 37(3), 38(1), 39(4)-(7)	n/a	CCP clearing members	n/a	Cleared transactions	

1. Art. 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). The clearing obligation and the risk mitigation obligations in Art.11.also apply to certain transactions between TCEs which have a direct, substantial and foreseeable effect in the EU or necessary to prevent evasion as specified in RTS.
2. There are transitional exemptions for certain pension funds (Arts.85(2) and 89(1) and (2) EMIR). ESMA has indicated that frontloading does not apply to NFC+s.
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 Art. 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 Art. 11 EMIR indicates that it applies to uncleared OTCD, although some of its provisions and the related RTS might appear to have broader scope.

Glossary

- **BCBS-IOSCO:** Basel Committee on Banking Supervision and International Organisation of Securities Commissions
- **CCP:** central counterparty
- **CDS:** credit OTC derivatives
- **Commission:** the European Commission
- **Clearing obligation:** requirement to clear at a CCP all OTC derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation in accordance with the procedure in Art. 5(2) EMIR
- **Council:** the Council of the European Union
- **CRD4/CRR:** the Capital Requirements Directive and Regulation implementing Basel III in the EU
- **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
- **ETD:** exchange traded derivatives
- **EU:** European Union
- **FC:** financial counterparty as defined in EMIR, i.e. an investment firm, credit institution, insurance/reinsurance undertaking, UCITS, 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
- **Frontloading:** the obligation under Art. 4(1)(b)(ii) of EMIR to clear OTC derivatives (pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation) that are entered into after the notification referred to in Art. 5(1) EMIR and before the date of application of the clearing obligation
- **FX NDF:** foreign exchange non-deliverable forwards
- **IRS:** interest-rate OTC derivatives
- **MiFID:** the EU Markets in Financial Instruments Directive
- **MiFID2 and MiFIR:** the EU directive and regulation repealing and replacing MiFID
- **MRM:** minimum remaining maturity as referred to in Art. 4(1)(b)(ii) EMIR
- **NCA:** the national authority designated by a Member State as responsible for carrying out functions under an EU regulation or directive
- **NFC:** non-financial counterparty as defined in EMIR, i.e. an undertaking established in the EU which is not a financial counterparty or a 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:** over-the-counter derivative as defined in EMIR, i.e. a derivative executed outside a regulated market or equivalent non-EU market
- **Parliament:** the European Parliament
- **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 entity
- **TR:** trade repository
- **UCITS:** undertaking for collective investment in transferable securities as defined in Art. 1(2) UCITS Directive
- **UCITS Directive:** 4th directive on undertakings for collective investment in transferable securities

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