International regulation of OTC derivatives markets – recent developments
Chris Bates
November 2014
G20 agenda for OTC derivatives

- Reporting of derivatives to trade repositories
- Central clearing of standardised derivatives and authorisation of CCPs
- Basel 3 framework: CVA and exposures to CCPs
- BCBC-IOSCO framework for margin for uncleared trades
- Trading of derivatives on organised trading platforms and associated transparency requirements
Progress on the agenda

19 FSB jurisdictions:
- Not planned
- Rules in process
- Rules fully/partially effective

Source: 8th FSB progress report (November 2014)
Sea of Change
Regulatory reforms – reaching new shores

Key issues

Reporting
- Availability of TRs
- Legal barriers to reporting
- Access to data
- Usability of data

Central clearing
- Limited asset classes
- Cross-jurisdiction access to CCPs
- CCP recovery/resolution

Capital
- Progress on bank exposures to CCPs

Margin
- Early stages towards implementation
- Proposals for other operational risk mitigation

Platform trading
- No agreed framework
- Differing approaches to transparency
Cross-border implementation issues
OTC derivatives regulators group

Identified issues

Treatment of branches and affiliates
- Extension of jurisdiction to guaranteed affiliates
- Possible gaps/overlaps on treatment of branches

Organised trading platforms
- Timing differences and lack of clarity of rules
- Different approaches to regulation
- Splitting of liquidity

How deference will work in practice

Existing understandings

Equivalence/substituted compliance
- Flexible outcomes based approach
- Recognition actions in EU, US, Canada, Australia

Clearing determinations
- Framework for consultation being used

Margin requirements
- Active consultation on implementation of BCBS IOSCO

Data in trade repositories and reporting
- Letter to FSB on barriers to reporting
- Direct access to data
Developing issues

Derivatives in resolution
- FSB Key Attributes of Effective Resolution Regimes
- Exercise of resolution powers should not trigger termination rights provided substantive obligations continue to be performed
- Resolution authorities should have the power temporarily to stay termination rights at the outset of resolution
- Key ISDA resolution protocol

Bank structural reform
- US Volcker rule, UK Vickers regime, German/French actions, proposed EU directive

Regulation of benchmarks
- IOSCO principles for financial benchmarks: differential implementation

Commodities and derivatives
- Position limits, position management and reporting
- Regulatory boundary between financial and physical trading

Conduct issues
EMIR – clearing mandate
EMIR: illustrative implementation timeline

15 March 2013
Confirms Daily valuation
NFC+ reporting

18 March 2014
First CCP authorised

1 January 2014
CRD4/CRR: Capital rules

February 2015
1st Clearing Obligation
RTS in force

January 2015
1st Clearing Obligation
RTS published in OJ

Period A
(long MRM)

Period B
for Cat 1 & Cat 2
(6 month MRM)

Period B
for Cat 3
(long MRM)

August 2015
1st Clearing Obligation:
Category 1

August 2015
1st Clearing Obligation:
Category 3

August 2016
1st Clearing Obligation:
Category 4

February 2018
1st Clearing Obligation:
Category 4

2013
Q1 Q2 Q3 Q4

2014
Q1 Q2 Q3 Q4

2015
Q1 Q2 Q3 Q4

2016
Q1 Q2 Q3 Q4

2017
Q1 Q2 Q3 Q4

2018
Q1

12 February/11 August 2014
Reporting to TRs

10 April/10 October 2014
Application of TCE – TCE trades

16 August 2015
End of Art.89(1)
transitional period
(for pension schemes)

1 December 2015
Variation margin applies and
phase-in of initial margin starts:
1 Dec 2015: €3tn
1 Dec 2016: €2.25tn
1 Dec 2017: €1.5tn
1 Dec 2018: €0.75tn
1 Dec 2019: €8bn

3 January 2017
MiFID2/MiFIR:
transparency, platform
trading, position limits etc

Note: Assumes (i) the Commission endorses the RTS on IRS without amendment in November 2014, the Parliament and the Council do not object to the RTS and do not extend their objection period and the RTS are published in the OJ in January 2015, and (ii) the proposed Margin RTS is adopted in its current form.
The final draft RTS on IRS proposes to subject the following classes to the clearing obligation:

<table>
<thead>
<tr>
<th>Type</th>
<th>Reference Index</th>
<th>Settlement Currency</th>
<th>Maturity</th>
<th>Settlement Currency Type</th>
<th>Optionality</th>
<th>Notional Type*</th>
<th>Authorised CCPs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Eurex</td>
</tr>
<tr>
<td>Basis</td>
<td>Euribor</td>
<td>EUR</td>
<td>28D-50Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>GBP</td>
<td>28D-50Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>JPY</td>
<td>28D-30Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>USD</td>
<td>28D-50Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td>Fixed-to-float</td>
<td>Euribor</td>
<td>EUR</td>
<td>28D-50Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>GBP</td>
<td>28D-50Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>JPY</td>
<td>28D-30Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>USD</td>
<td>28D-50Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td>FRA</td>
<td>Euribor</td>
<td>EUR</td>
<td>3D-3Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>GBP</td>
<td>3D-3Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>Libor</td>
<td>USD</td>
<td>3D-3Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td>OIS</td>
<td>EONIA</td>
<td>EUR</td>
<td>7D-3Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>FedFunds</td>
<td>USD</td>
<td>7D-3Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
<tr>
<td></td>
<td>SONIA</td>
<td>GBP</td>
<td>7D-3Y</td>
<td>Single currency</td>
<td>No</td>
<td>Constant or Variable</td>
<td>✔</td>
</tr>
</tbody>
</table>

* Recital 4 of the final draft RTS on IRS indicates that contracts with conditional notional amounts will not be subject to the clearing obligation. In particular, the recital acknowledges that a distinction exists between variable notional amounts (notional amounts which vary over the life of the contract in accordance with a predetermined schedule) and conditional notional amounts (notional amounts which vary over the life of the contract in an unpredictable way).
Categories, phase-in periods and application of the frontloading obligation

<table>
<thead>
<tr>
<th>Category</th>
<th>Counterparties covered</th>
<th>Phase-in period (from entry into force)</th>
<th>Frontloading (from publication in OJ)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>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 subject to the clearing obligation of at least one of the CCPs authorised or recognised before that date to clear at least one of those classes</td>
<td>6 months</td>
<td>Yes*</td>
</tr>
<tr>
<td>2</td>
<td>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 [November 2014, December 2014 and January 2015] is above EUR 8 billion</td>
<td>12 months</td>
<td>Yes*</td>
</tr>
<tr>
<td>3</td>
<td>FCs and NFC+ AIFs which are not included in Categories 1 or 2</td>
<td>18 months</td>
<td>No**</td>
</tr>
<tr>
<td>4</td>
<td>NFC+ which are not included in Categories 1, 2 or 3</td>
<td>3 years</td>
<td>No*</td>
</tr>
</tbody>
</table>

* NFC+ (regardless of which category they fall into) are not subject to frontloading
** The MRM for contracts entered into with Category 3 counterparties is set such that no contracts will be in scope for frontloading

**Category 2 / 3 threshold**

- **Alignment with Margin RTS**: ‘For the purpose of calculating the group aggregate month-end average notional amount, all of the group’s non-centrally cleared derivatives, including foreign exchange forwards, swaps and currency swaps, shall be included’.
- **Snap-shot**: ESMA intends to use the same three month period (i.e. November 2014, December 2014 and January 2015) in all subsequent RTS, such that a counterparty cannot move between Categories 2 and 3.

**Frontloading**

- **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 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**:  
  - Contracts entered into or novated after the RTS are published in the OJ and up to the end of the relevant phase-in period (Period B) will be subject to frontloading if they have a minimum remaining maturity higher than 6 months.
  - Contracts entered into or novated before the RTS are published in the OJ (Period A) will not be subject to frontloading.
# Application of the clearing obligation to different counterparty combinations

<table>
<thead>
<tr>
<th>Category 1</th>
<th>Category 2</th>
<th>Category 3</th>
<th>Category 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 month phase-in period.</td>
<td>12 month phase-in period.</td>
<td>18 month phase-in period.</td>
<td>3 year phase-in period.</td>
</tr>
<tr>
<td>6 months plus 20-day frontloading period (unless one or both counterparties are NFC+, in which case there is no frontloading obligation).</td>
<td>12 months plus 20-day frontloading period (unless one or both counterparties are NFC+, in which case there is no frontloading obligation).</td>
<td>No frontloading obligation.</td>
<td>No frontloading obligation.</td>
</tr>
<tr>
<td>12 month phase-in period.</td>
<td>12 month phase-in period.</td>
<td>18 month phase-in period.</td>
<td>3 year phase-in period.</td>
</tr>
<tr>
<td>12 months plus 20-day frontloading period (unless one or both counterparties are NFC+, in which case there is no frontloading obligation).</td>
<td>12 months plus 20-day frontloading period (unless one or both counterparties are NFC+, in which case there is no frontloading obligation).</td>
<td>No frontloading obligation.</td>
<td>No frontloading obligation.</td>
</tr>
<tr>
<td>18 month phase-in period.</td>
<td>18 month phase-in period.</td>
<td>18 month phase-in period.</td>
<td>3 year phase-in period.</td>
</tr>
<tr>
<td>3 year phase-in period.</td>
<td>3 year phase-in period.</td>
<td>3 year phase-in period.</td>
<td>3 year phase-in period.</td>
</tr>
</tbody>
</table>
Treatment of third-country entities

Whilst the clearing obligation affects transactions with and between third-country entities, the final draft RTS do not specifically address the treatment of third-country entities (not even by way of a recital).

It its final report, however, ESMA does make a number of statements relating to contracts concluded between one EU counterparty and one third-country counterparty:
- The obligation to clear lies with the counterparty established in the EU.
- In order for the EU counterparty to determine (i) the clearing application date (i.e. what the relevant phase-in period is) and (ii) whether frontloading applies, the EU counterparty will need to know which category its third-country counterparty falls into. On this point, ESMA has stated that third-country entities belong to the category of counterparty to which they would belong if they were established in the EU.

No special treatment for contracts entered into with third-country entities.

ESMA rejects calls from some respondents to introduce a longer phase-in period for transactions entered into with third-country entities and/or a longer phase-in period for intragroup transactions concluded with third-country entities (potentially linked to the date on which the third country becomes equivalent).

ESMA is ‘sympathetic’ to the reasons put forward for a longer phase-in period, namely the lack of any equivalence determinations and the difficulties EU entities may face persuading their third-country counterparties to clear transactions. However, ESMA is of the view that preserving fair competition in the market between EU and third-country counterparties is of the ‘utmost importance’.

Transactions between third country entities may be subject to clearing.

The clearing obligation will apply if the counterparties would have been subject to the clearing obligation if established in the EU and if the transaction has a direct, substantial and foreseeable effect in the EU or it is appropriate for the rules to prevent avoidance of EMIR – as specified in the relevant RTS on third country entities which are now fully in effect.
ESMA is due to deliver final draft RTS on CDS to the Commission for endorsement by 22 November 2014.

The first CCP clearing CDS contracts (LCH.Clearnet SA) was authorised two months later than the first CCP clearing IRS. ESMA therefore has additional time to consider the responses to Consultation Paper No.2. ESMA is expected, however, to adopt the same approach to counterparty classification, phase-in periods and the application of the frontloading requirement as set out in the final draft RTS on IRS.

In Consultation Paper No. 2, ESMA proposed to subject the following classes of CDS to the clearing obligation:

<table>
<thead>
<tr>
<th>Type</th>
<th>Sub-Type</th>
<th>Geographical Zone</th>
<th>Reference Index</th>
<th>Settlement Currency</th>
<th>Series</th>
<th>Maturity</th>
<th>Authorised CCPs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Index CDS</td>
<td>Untranched Index</td>
<td>Europe</td>
<td>iTraxx Europe Main</td>
<td>EUR</td>
<td>11 onwards</td>
<td>5Y</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>Untranched Index</td>
<td>Europe</td>
<td>iTraxx Europe Crossover</td>
<td>EUR</td>
<td>11 onwards</td>
<td>5Y</td>
<td>✓</td>
</tr>
</tbody>
</table>

* ESMA expects that ICE Clear Europe will be authorised before the entry into force of the RTS on CDS.
Consultation Paper No. 3 sets out ESMA's proposed draft RTS establishing a clearing obligation for certain FX NDFs.

ESMA will treat cash settled and physically settled contracts as belonging to distinct classes for the purposes of the clearing obligation. Consultation Paper No. 3 only addresses cash-settled (i.e. non-deliverable) contracts.

- Cash settled are non-deliverable contracts i.e. contracts that cannot result in physical delivery of currency (exchange of principal) under any circumstances.
- Physically settled are deliverable contracts i.e. contracts that can result in physical delivery of currency (exchange of principal) if participants wish, whether by intention at inception or by subsequent election.

ESMA proposes to subject the following classes of FX NDF to the clearing obligation:

<table>
<thead>
<tr>
<th>Type</th>
<th>Currency Pair</th>
<th>Settlement Currency</th>
<th>Settlement Type</th>
<th>Maturity</th>
<th>Authorised CCPs*</th>
</tr>
</thead>
<tbody>
<tr>
<td>NDF</td>
<td>BRL / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>CLP / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>CNY / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>COP / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>IDR / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
</tr>
<tr>
<td></td>
<td>INR / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
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<td>KRW / USD</td>
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<td>Cash settlement</td>
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<td>✓</td>
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<td></td>
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<tr>
<td></td>
<td>TWD / USD</td>
<td>USD</td>
<td>Cash settlement</td>
<td>3D-2Y</td>
<td>✓</td>
</tr>
</tbody>
</table>

* ESMA expects that at least one other European CCP will be available to clear these classes before the clearing obligation for FX NDF comes into effect. ESMA is aware that CME Clearing Europe and Nasdaq OMX Clearing are developing FX NDF clearing offerings and it expects ICE Clear Europe (which currently offers a FX NDF clearing service) to be authorised in the near future. There are also a number of third-country CCPs offering FX NDF clearing services.
EMIR – margin rules
Who do the margin requirements apply to?

- Financial counterparties (FCs) and non-financial counterparties over the clearing threshold (NFC+s) must collect margin from all their counterparties unless a specific exemption applies.
- The EU proposal only contemplates exemptions for the following types of counterparties:
  - Non-financial counterparties under the clearing threshold (NFC-s)
  - Entities exempted under Article 1(4) and (5) of EMIR
  - Covered bond issuers or cover pools (subject to conditions)
- EUR 8 billion IM threshold: there is also an additional exemption from the initial margin requirements for members of groups which fall under an EUR 8 billion threshold (subject to a phase-in period).
- No exemption for transactions with third country entities (TCEs) even if the TCE would not have been an FC or NFC+ if established in the EU.

“The RTS impose an obligation on EU entities to collect margin in accordance with the prescribed procedures, regardless of whether they are facing EU or non-EU entities. EU entities would have to collect margin from all third-country entities, unless specifically exempted by the EMIR or under the EUR 8 billion threshold, even those that would be classified as non-financial entities below the threshold if they were established in the EU.”

- The draft RTS seem to envisage the collection of margin from individuals and entities which are not “undertakings” as well as EU sovereigns (when acting in a capacity not covered by Article 1(4)(a)) and non-EU sovereigns, central banks and multilateral development banks not exempted by Article 1(4) or 1(5) or EMIR.

All carve-outs from the general obligation to collect IM and VM for all non-centrally cleared derivatives must be agreed to by both counterparties in an agreement in writing or through other equivalent permanent electronic means.

Which transactions do the margin requirements apply to?

- The margin requirements will apply to all non-centrally cleared derivatives except:
  - indirectly cleared derivative transactions that are intermediated through a clearing member or through an indirect clearing arrangement so long as the client or the indirect client is (i) subject to margin requirements of the CCP or (ii) provides margin consistent with the relevant corresponding CCP’s margin requirements.
  - IM may not be collected in respect of physically settled foreign exchange forwards, physically settled exchange swaps or the exchange of principal under a currency swap.

- EUR 50 million threshold: FCs may agree with their FC and NFC+ counterparties that IM does not need to be exchanged, and capital will be held against the exposure instead, if the total IM to be exchanged for non-centrally cleared OTC derivatives between counterparties at group level is equal to or lower than EUR 50 million.

- Minimum transfer amount: where the total collateral amount, based on all OTC derivative transactions between two counterparties, is equal to or lower than EUR 500,000 FCs and NFC+s may agree not to exchange collateral. If the total collateral amount owed is over EUR 500,000 the collateral taker must collect the full total collateral amount, without any deduction for the minimum transfer amount.
Phase-in of requirements

Variation margin
- Requirement to exchange variation margin applies from 1 December 2015.

Initial margin
- Aim is to ensure that larger and most systemically risky firms are subject to initial margin requirement at an earlier stage.
- FCs and NFCs may agree not to exchange IM if at least one of the counterparties to a transaction belong to a group whose aggregate month-end average notional amount of non-centrally cleared derivatives for a three month period is below a specified level.
- The trigger level will initially be set at EUR 3 trillion and will gradually be reduced to EUR 8 billion.
- Trigger levels calculated by averaging month-end positions of the consolidated group for June, July, August preceding relevant 1 December.
- The effect of this requirement is that IM will only need to be exchanged where both parties to the transaction meet or exceed the specified level.

Rules apply prospectively
- Recital 17 of the draft margin RTS states that "in order to avoid any retrospective effect the margin requirements apply to new contracts not cleared by a CCP entered into after the relevant phase-in dates."
- Whilst the majority of rules in the draft margin RTS are expressed to apply from 1 December 2015, there is no explicit statement in the operative provisions of the RTS that the obligations to collect margin only apply prospectively from this date (in the case of VM) or the end of any applicable phase-in period (in the case of IM).

Phase in for IM:

<table>
<thead>
<tr>
<th>From 1 December:</th>
<th>Trigger level for consolidated group</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>€3 trillion</td>
</tr>
<tr>
<td>2016</td>
<td>€2.25 trillion</td>
</tr>
<tr>
<td>2017</td>
<td>€1.5 trillion</td>
</tr>
<tr>
<td>2018</td>
<td>€0.75 trillion</td>
</tr>
<tr>
<td>2019 onwards</td>
<td>€8 billion</td>
</tr>
</tbody>
</table>

Note: based on total gross notional value of uncleared derivatives of the consolidated group (including FX forwards and swaps).
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