Extraterritorial impact of EU regulation

April 2016

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CHANCE

Contents

EMIR

EMIR – overview

Regulation (EU) No. 648/2012 (EMIR)

- EU legislation implementing the G20 commitments on OTC derivatives regulation and the EU's equivalent of Dodd Frank
- Introduces risk mitigation, margin and clearing obligations for uncleared OTC derivatives and reporting obligations for all derivatives

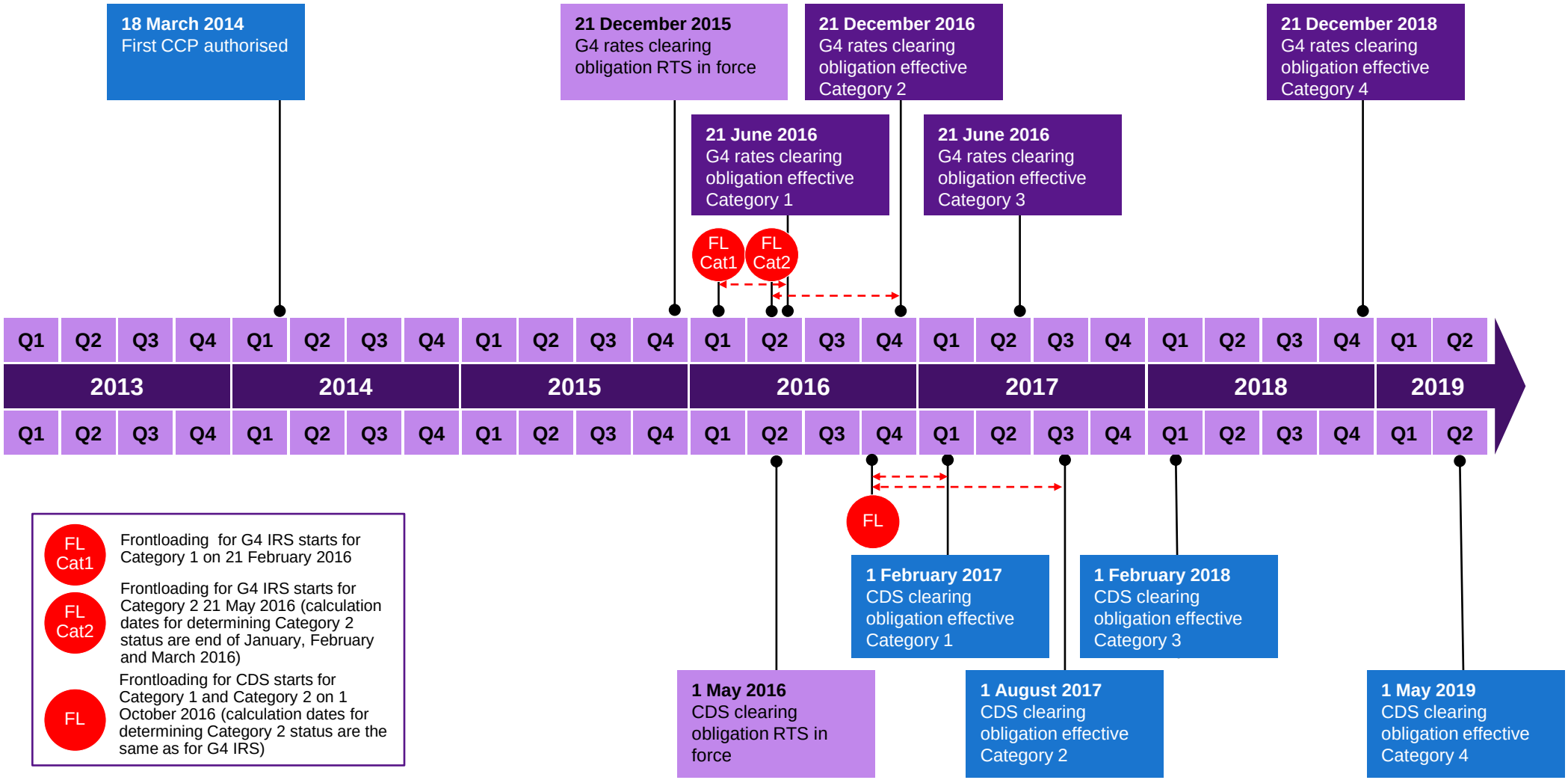
Current status and timing

- EMIR came into force on 16 August 2012
- The risk mitigation and reporting obligations are already in effect
- The margin obligation is expected to apply from 1 September 2016
- The first clearing obligations are expected to apply from:
  - 21 June 2016 for G4 IRS (frontloading begins 21 February 2016)
  - 1 February 2017 for CDS (frontloading begins 1 October 2016)

What are "OTC derivatives"?	A derivative contract that is not executed on an EU regulated market or a non-EU market that has been determined to be equivalent
Risk mitigation obligations	FCs and NFCs are required to have in place risk mitigation measures including: a) Timely confirmation; b) Portfolio reconciliation; c) Dispute resolution; d) Daily marking to market (FCs and NFC+s only)
Reporting obligation	FCs and NFCs are required to report any derivative transaction that they conclude, modify or terminate to an EU registered trade repository or a non-EU recognised trade repository
Margin obligation	FCs and NFC+s are required to exchange collateral with respect to uncleared OTC derivatives entered into on or after 1 September 2016 Intragroup exemption may be available Limited exceptions for certain product types (e.g., FX)
Clearing obligation	FCs and NFCs are required to clear uncleared OTC derivatives through an EU authorised CCP or a non-EU recognised CCP ESMA and the European Commission decide which OTC derivatives should be subject to clearing Intragroup exemption may be available

EMIR: illustrative implementation timeline

G4 IRS and CDS clearing obligations



Note: Prepared 4 March 2016. Assumes: the Parliament and the Council confirm that they do not object to the draft RTS on CDS and the RTS are published in the Official Journal and come into force in 1 May 2016.

Impact for non-EU entities

Margin requirements

- Practical issues: non-EU custodians, margin collection timing and non-netting jurisdictions
- Amendments to contracts and counterparty categorisation
- Exemption for transactions subject to duplicative or conflicting requirements

Clearing obligation

- Counterparty categorisation
- Exemption for transactions subject to duplicative or conflicting requirements
- Recognition of non-EU CCPs

Intragroup exemption

- Exemption only available where non-EU jurisdiction is deemed equivalent
- Transitional provisions in margin and clearing RTS

Securities Financing Transactions Regulation

Securities Financing Transactions Regulation – overview

EU Regulation on transparency of securities financing transactions (SFTs) and of reuse and amending Regulation (EU) No. 648/2012 (EMIR)

- Part of the EU's "shadow banking" agenda
- Amends EMIR definition of OTC derivatives to make it easier to recognise non-EU markets as equivalent to regulated markets

Current status and timing

- SFTR came into force on 12 January 2016
- Phased implementation – transitional provisions apply
- Level 2 started: ESMA Discussion Paper published 11 March 2016

Rights of reuse	Rights of counterparties to reuse **financial instruments** received as collateral subject to new conditions: a) Providing counterparty must have been informed in writing of the risks and consequences involved in granting consent to a right of use, or concluding a title transfer collateral arrangement; b) Providing counterparty must have granted its prior express consent to right of use or express agreement to title transfer; c) Financial instruments must be transferred from account of providing counterparty before exercise of right of reuse. Applies from 13 July 2016 (including for existing arrangements)
Transparency for collective investment schemes	EU UCITS and AIFMs must provide information on use of **securities financing transactions** and **total return swaps**: ▪ In periodical reports (from 13 January 2017); ▪ In prospectus or pre-contract information (new funds – from 13 January 2017; existing funds – from 13 July 2017) Applies from 13 January 2017
Reporting obligation	Counterparties (including EU and non-EU FCs and NFCs) to SFTs shall report details of any **securities financing transactions** they conclude, modify or terminate. Phased in from 12 months after entry into force of relevant L2
What are "securities financing transactions"?	a) Repurchase transactions; b) Securities or commodities lending or borrowing; c) Buy-sell back transactions / sell-buy back transactions; d) Margin lending transactions

Impact for non-EU entities

Rights of reuse – disclosure and prior express consent

- Will apply to non-EU entities if acting through an EU branch or receiving collateral from an EU counterparty
- Tailoring of EU standard disclosures to address issues affecting non-EU entity taking collateral

Reporting obligation

- Applies to EU branches of non-EU counterparties / non-EU branches of EU counterparties
- Counterparties will be required to report information to EU trade repositories
- Confidentiality waivers

Bank Recovery and Resolution Directive

BRRD – overview

Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD)

- EU reflection of FSB Key Attributes of Effective Resolution Regimes
- Introduces harmonised recovery and resolution measures across the EU and cross-border recognition within the EU

Current status and timing

- Article 55 came into effect on 1 January 2016 across all EU member states that have implemented BRRD
- Final RTS setting out the detail of the required wording were adopted by the Commission in March and are expected to come into force in Q2 / 3 2016
- UK only: limited waiver available for where it is "impracticable" to include Article 55 bail-in wording in a particular contract or class of contracts (e.g. trade finance instruments)

What does Article 55 BRRD require?	Certain contracts governed by non-EU law must contain a term recognising that liability is subject to bail-in powers, under which the other parties agree to be bound by any resulting reduction/cancellation/conversion of the claim
Which contracts are in scope?	Applies to all contracts entered into by in-scope entities creating any **liability** if governed by the law of a non-EU jurisdiction, unless the liability is an **excluded liability** or unless resolution authority determines that bail-in can be given effect under the foreign law or a binding agreement with non-EU jurisdiction In-scope entities: ▪ EU banks and qualifying investment firms ▪ EU holding companies of those banks/firms ▪ EU financial institution subsidiaries of the above
Are legal opinions required?	The relevant resolution authority may require legal opinion (neither the UK PRA nor FCA have required a legal opinion in their rules) Firms may be required to demonstrate that the decision of a resolution authority to write down MREL eligible liabilities governed by non-EU law would be effective (UK PRA and FCA require legal opinions for AT1 / T2 instruments)
Are any waivers or exemptions available?	The UK PRA and FCA have published a "modification by consent", permitting firms not to include the required wording where it would be "impracticable" to do so No other EU jurisdictions have taken a similar approach so far

Impact for non-EU entities

Amendment of contracts with EU counterparties

- EU in-scope counterparties will be required to amend non-EU law governed contracts to include the required wording

Method of amending contracts

- ISDA Protocol
- Other industry solutions?
- Bilateral agreements with counterparties?

Impact if barriers to amendment of contract

- EU counterparties may have to terminate contracts or may not be permitted to enter into contracts if the required wording cannot be included

UK rules on contractual recognition of stays

UK rules on contractual recognition – overview

UK PRA's "Stay in Resolution" rule

- Underpins the ISDA Resolution Stay Protocol and similar industry initiatives
- Part of co-ordinated effort between regulatory and resolution authorities in UK, France, Germany, Japan, Switzerland and US

Current status and timing

- The PRA consulted on the draft rules over summer 2015 and published its final rules in November 2015.
- Rules will be phased in by counterparty type from 1 June 2016

What does the PRA rule require?	Prohibits **BRRD undertakings** creating / materially amending an obligation under a **financial arrangement** governed by the law of a third country unless the counterparty has agreed in writing only to exercise termination rights to the extent it would be entitled to do so under the SRR A BRRD undertaking is a CRR firm; a financial holding company; or a mixed financial holding company (UK entity) BRRD undertakings must ensure that their subsidiary credit institutions, investment firms and financial institutions also comply (EU and non-EU entities)
Which contracts are in scope?	"**Financial arrangements**": ▪ Financial contracts as defined in Art 2(1)(100)(a) – (d) BRRD ▪ Derivatives as defined in EMIR ▪ Master agreements relating to financial contracts, derivatives or contracts for the sale, purchase or delivery of currency ▪ Governed by the law of a third country
Are legal opinions required?	No
Are any waivers or exemptions available?	▪ Contracts with designated systems, CCPs (authorised or recognised under EMIR), clearing houses, central banks and central governments ▪ Contracts not subject to stay (e.g., no termination provisions or subsidiary's obligations not guaranteed or supported by BRRD undertaking

Impact for non-EU entities

Requirement to amend contracts with UK counterparties

- UK in-scope counterparties will be required to amend non-EU law governed contracts to include the required wording

Requirement to amend contracts with in-scope subsidiaries

- UK in-scope counterparties will be required to ensure that relevant EU and non-EU subsidiaries also include the required wording

Method of amending contracts

- ISDA Protocol
- Other industry solutions?

Market Abuse Regulation

Market Abuse Regulation – overview

EU Regulation on market abuse (MAR)

- Repeals and replaces the existing market abuse directive
- Directly applicable so replaces much of the existing UK domestic market abuse regime
- Accompanied by EU Directive on criminal sanctions for market abuse (CSMAD) - UK has exercised its right to opt out of implementing this directive, although the UK already has a criminal market abuse regime

Current status and timing

- MAR came into force in April 2014
- Level 2 started: ESMA published final draft technical standards in September 2015. Some (but not all) of these have now been published in the Official Journal
- MAR applies from 3 July 2016

Expanded scope of instruments subject to market abuse regime	▪ Scope of instruments reflects expanded scope of MiFID2 ▪ Covers instruments traded on a regulated market, MTF or OTF ▪ Covers instruments not traded on a venue but whose price or value **affects** the price or value of an instrument traded on a venue, or whose price or value **depends** on the price or value of an instrument traded on a venue ▪ Covers spot commodities (market manipulation)
Insider dealing / market manipulation	▪ MAR covers attempted insider dealing / market manipulation ▪ Insider dealing: dealing in possession rather than dealing on the basis of inside information ▪ Clarification of information considered to be “inside information” in relation to commodities ▪ Manipulating benchmarks now a type of market manipulation ▪ UK implementation – much of the current guidance will be deleted
Defences	▪ Buy-back and stabilisation ▪ Market soundings (technical standards and guidance set out the detailed process that must be followed) ▪ UK implementation – proposed deletion of due diligence and reasonable belief defences ▪ Codification of other defences to insider dealing
Conduct of business obligations	▪ Issuer announcement obligations, insider lists, managers’ transaction reporting ▪ Suspicious transaction and order reports ▪ Investment recommendations

Impact for non-EU entities

What instruments are in scope?

- Includes instruments listed / offered outside the EU if also traded on an EU venue
- Includes securities or derivatives not listed or traded in the EU if they have an effect on the price or value of an EU traded instrument
- Limited public information on what is in scope

Insider dealing and market manipulation

- Rules apply to transactions outside the EU if the instrument is within scope
- Potentially more stringent standards than in non-EU states (e.g., strict liability)
- Market soundings regime – safe harbour or binding rules

Investment recommendations

- Territorial scope of investment recommendations regime
- Extension to cover “sales notes”

MiFID2 / MiFIR

MiFID2 / MiFIR – overview

EU Directive on markets in financial instruments (MiFID2) and EU Regulation on markets in financial instruments (MiFIR)

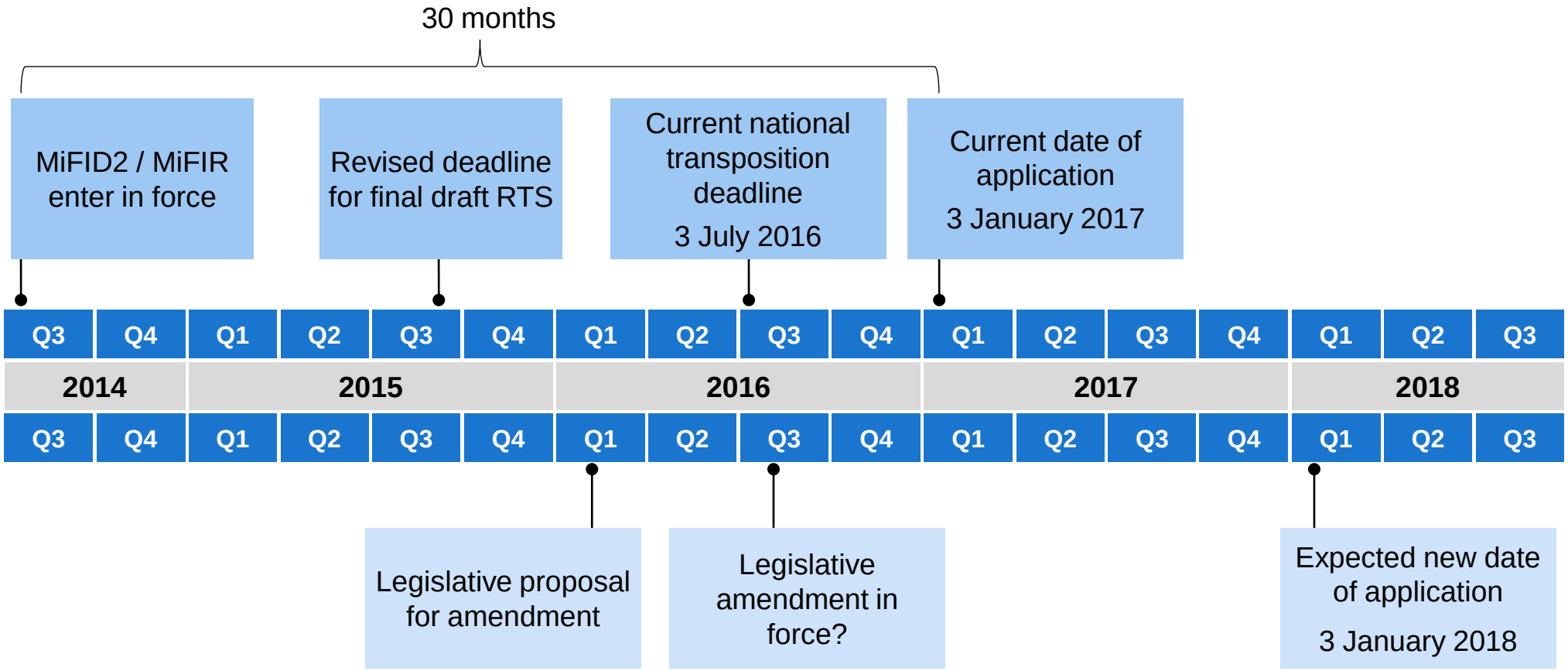
- Repeals and replaces existing directive (MiFID1)
- Introduces mandatory trading obligation for uncleared OTC derivatives

Current status and timing

- MiFID2 / MiFIR came into force in July 2014
- Proposed delays to implementation date – if adopted, MiFID2 / MiFIR will apply from 3 January 2018
- Level 2 started: ESMA published final draft technical standards in September 2015 – the Commission has asked ESMA to redraft three of these
- The Commission is also expected to publish and adopt delegated acts

What is the purpose of MiFID2?	▪ Broadens scope of financial instruments subject to regulation ▪ Narrows exemptions available from requirement to seek authorisation as an investment firm ▪ Updates regulation to address market changes since MiFID1
Obligations on EU investment firms	MiFID2 / MiFIR impose obligations on EU investment firms, including conduct of business obligations: ▪ Client and counterparty documentation requirements ▪ Obligations on firms engaged in high frequency trading ▪ Best execution obligations ▪ Pre and post transparency for all financial instruments traded on a venue ▪ Transaction reporting for all financial instruments traded on a venue ▪ New category of trading venue (“organised trading facility”)
Obligations with broader application	▪ Commodity derivative position limits / position management / reporting ▪ Obligation for FCs and NFC+s to execute transactions in OTC derivatives on an EU trading venue or recognised non-EU venue
Potential harmonised EU perimeter	Possibility for branch “passport” or harmonised branch / cross border regime for incoming non-EEU firms, if the relevant non-EU jurisdiction is found to be equivalent

MiFID2/MiFIR - Timing



Impact for non-EU entities

Impact on business with EU investment firms

- Changes to client documentation
- Changes to derivatives documentation to address mandatory trading
- Effects of pre- and post-trade transparency on counterparties

Impact on cross-border business into EU

- No immediate change required, but some jurisdictions may change their cross-border business regimes as part of implementation
- Potential changes if relevant non-EU jurisdiction is determined to be equivalent

Mandatory venue trading obligations

- Shares (dual listed shares)
- Derivatives
- EU recognition of equivalent non-EU venues

Commodity derivatives position limits / position reports

- Position limits apply at group level, including EU and non-EU entities
- Position reporting: EU firms are required to report positions of clients and clients of clients until the end client is reached

Benchmarks Regulation

Benchmarks Regulation – overview

Objectives

- Response to LIBOR and other benchmark manipulation cases
- Implementation of IOSCO Principles for Financial Benchmarks and Oil Price Reporting Agencies
- Harmonised regime for administration of, contribution to and use of benchmarks in EU
- Complement extension of market abuse regime to benchmarks and other EU legislation

Current status and timing

- December 2015 – Parliament and Council reached political agreement on text
- H1 2016 – Formal endorsement by Parliament and Council, final revision and translation
- Level 2 started: ESMA Discussion Paper
- Mid-2016 – Expected publication in the Official Journal and entry into force
- Q1 2018 – Expected date of application
- Expected 24 month transitional period for administrators of existing benchmarks

Scope	All published benchmarks 'used' in the EU in financial instruments/financial contracts or by fund managers
Administration	EU administrators must be authorised or registered Subject to differentiated rules on governance and administration of benchmarks, according to type and importance of benchmark
Contributors	Supervised entities directly subject to rules on governance and controls over contribution of input data Indirect regulation of other contributors by administrator's code of conduct
Use	Supervised entities must not 'use' benchmarks in the EU unless benchmark is provided by an authorised/registered EU administrator or is a qualifying non-EU benchmark
Third country regime	Allows non-EU benchmarks to be 'used' in EU if: ■ administrator supervised under an 'equivalent' non-EU regime ■ non-EU administrator 'recognised' in EU or ■ benchmark is 'endorsed' by an EU supervised entity

Impact for non-EU entities

Benchmarks produced by non-EU benchmark administrators

- Restriction on EU supervised entities trading derivatives, issuing securities, acting as calculation agent
- Impact for funds

Third country regime

- Equivalence, recognition, endorsement

Impact on contracts

- Potential discontinuance, modification or increased costs of existing indices
- Supervised entities required to have a contingency plan in place and reflect this in their agreement with clients

Alternative Investment Fund Managers Directive

AIFMD – overview

Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD)

- Harmonised EU regulation of non-UCITS funds
- Provides an internal market for AIFMs, and requires regulation of all activities within the EU of EU and non-EU AIFMs

Current status and timing

- AIFMD came into force on 21 July 2011
- Deadline for transposition into national law was 22 July 2013. A transitional period ended on 22 July 2014.
- 2018: marketing passport may become available for non-EU AIFMs
- January 2019: European Commission to decide whether or not to terminate existing national private placement regimes

What is an "AIF"?	Defined as any collective investment undertaking which raises capital from a number of investors with a view to investing in accordance with a defined investment policy which does not require authorisation under the UCITS Directive Includes non-UCITS funds, hedge funds, private equity, real estate funds
Territorial scope	AIFMD applies to: ▪ EU AIFMs ▪ Non-EU AIFMs which market AIFs in the EU (whether EU AIFs or non-EU AIFs)
Exemptions	Exemptions for entities including: ▪ Holding companies ▪ Securitisation SPVs ▪ Institutions for occupational retirement provision ▪ Supranational institutions, central banks
Authorisation	EU AIFMs are required to obtain authorisation from their home-state regulator in order to carry on their portfolio and/or risk management activities. An EU AIFM can get a passport to market AIFs to professional investors in other EU member states. Non-EU AIFMs must rely on the private placement regime under AIFMD (where implemented into national law), or existing national private placement regimes The Commission may adopt a delegated act which would permit non-EU AIFMs to obtain authorisation and to benefit from a passport to market their funds in the EU

Impact for non-EU entities

Marketing in the EU by non-EU AIFMs

- Non-EU AIFMs must comply with the AIFMD marketing regime as implemented in each relevant EU member state
- Some member states have introduced gold plating requirements, so regime is not perfectly harmonised across the EU
- Specific notification or registration requirements may apply in some member states
- Not all member states have implemented the AIFMD marketing regime (e.g., Italy) so marketing may only be done by reverse enquiry in these member states

Extension of marketing passport to non-EU managers

- ESMA opinion on marketing by AIFMs established in certain non-EU jurisdictions
- Unclear whether Commission delegated act must make passport available to all non-EU AIFMs or only those in certain jurisdictions
- Commission decision delayed until ESMA has assessed additional jurisdictions (including Japan) – deadline of 30 June 2016

Brexit

Brexit – overview

UK referendum on whether or not the UK should remain within the EU

- Previous referendum in 1975 – 67% of voters voted to stay in the EEC (as it was then)
- If the UK votes to leave, potential impact on UK financial services and non-EEA entities which use a UK subsidiary to provide services within the EU

Current status and timing

- Referendum date set for 23 June 2016
- Recent opinion polls suggest “leave” vote has a narrow lead but many voters still undecided
- If UK votes to leave the EU, no immediate change in UK status or EU rules
- UK and EU would seek to negotiate an agreement for withdrawal of the UK
- If no agreement is reached within 2 years, the EU treaties will automatically cease to apply to the UK (unless unanimous agreement to extend 2 year period)
- UK and EU may also separately negotiate on longer term free trade or other agreement

If the UK votes to leave, what are its options?	a) Remain part of the EEA (like Norway, Iceland, Liechtenstein). EU legislation adopted by the EEA Joint Committee would apply to the UK, but the UK would not be involved in drafting the legislation b) Separate free trade agreement with the EU. Unlikely to be negotiated quickly, and also unlikely to provide similar levels of freedom of provision of services to those that exist under EU legislation
Potential impact for non-EU entities with UK subsidiaries	If the UK is unable to negotiate rights to provide cross-border services, the UK subsidiary will no longer benefit from the passport to establish branches or provide cross-border services in other EU jurisdictions Existing non-UK EU branches may need to seek local authorisation and will not be able to passport their services to other EU jurisdictions UK subsidiaries (and their EU branches) will need to comply with any requirements on cross-border provision of services in each relevant jurisdiction UK may seek to take advantage of EU legislation permitting cross-border activities by entities from “equivalent” jurisdictions, but uncertainty and political constraints on availability of these regimes to the UK
Potential impact for non-EEA entities with UK and other EU branches	Unlikely to be an impact on status of UK or other branches – continue to comply with local branch regulation May be other impacts resulting from Brexit (e.g., visa requirements for non-UK EU employees)

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