

Clients & Friends Memo

ESMA Authorises Trade Repositories

8 November 2013

The European Market Infrastructure Regulation (including any implementing legislation, regulation, technical standards and guidance related thereto, "EMIR") was adopted on 4 July 2012 and entered into force on 16 August 2012¹ with the objective of increasing transparency and reducing risk in the European derivatives market. EMIR delegates direct responsibility to the European Securities and Markets Authority ("ESMA") for the registration, supervision, and recognition of trade repositories ("TRs") - entities that centrally collect and maintain the records of derivatives.

On 7 November 2013, ESMA authorised the following entities as the first four TRs under EMIR, covering all asset classes, including commodities, credit, foreign exchange, equity, interest rates and others:

- DTCC Derivatives Repository Ltd. (DDRL), based in the UK, covers OTC derivatives and exchange-traded derivatives for both cleared and uncleared contracts.
- Central Securities Depository of Poland (KDPW), based in Poland, covers concluded derivative contracts.
- Regis-TR S.A., based in Luxembourg and a joint venture between Clearstream and Iberclear, covers all asset classes.
- UnaVista Ltd., based in the UK and owned by the London Stock Exchange, covers all asset classes.

CME Group and IntercontinentalExchange, the US derivatives exchanges, have also submitted applications.

¹ OJ L 201, 27.7.2012, p. 1–59, Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, available in English at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>

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Reporting Requirements

EMIR requires the reporting of all derivatives to a trade repository authorised by ESMA. This includes over-the-counter (“OTC”) and exchange-traded derivatives, whether cleared or uncleared, as well as hedging transactions and intra-group trades. Originally, there had been an expectation, following a recommendation in a letter from ESMA dated 6 August 2013, that the reporting of exchange-traded derivatives may be postponed until 1 January 2015. However, on 7 November 2013, the European Commission rejected this proposal.

The reporting obligation therefore becomes effective, with respect to all derivatives, 90 days after registration of a trade repository supporting the particular derivative asset class.² Registration of the first four trade repositories will take effect on 14 November 2013. Therefore, EMIR reporting obligations will begin on 12 February 2014.

The detail of the reporting obligation is set out in the Annex to the Commission Delegated Regulation (EU) No 148/2012 of 19 December 2012³ which lays down implementing technical standards with regard to the minimum details of the data to be reported to a trade repository.

EMIR also provides for a historical reporting obligation, or “back-loading.” Contracts entered into before 16 August 2012 that remain outstanding on 12 February 2014 must be reported to the appropriate trade repository by 12 May 2014. Contracts entered into before 16 August 2012 that will not be outstanding on 12 February 2014 must be reported by 12 February 2017.

From 12 February 2014, all counterparties established in the EU must report details of their transactions to a trade repository by the next working day following the conclusion, modification, or termination of the relevant contract. As EMIR requires counterparties to report without duplication,⁴ counterparties are recommended to agree between themselves whether to report separately, to agree that one will report on behalf of both counterparties, or to delegate the reporting obligations to a third party. The counterparty retains the liability of a failure to report, even if it elects to delegate reporting obligations to a third party.⁵

² OJ L 352, 21.12.2012, p. 20–29, Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, available in English at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:352:0020:0029:EN:PDF>.

³ OJ L 52, 23.2.2013, p. 1–10, Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, available in English at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0001:0010:EN:PDF>

⁴ See Article 9(1) EMIR.

⁵ See ESMA Questions and Answers, Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), TR Question 7. Available in English at: <http://www.esma.europa.eu/system/files/2013-324.pdf>

Practical issues for market-players who must now comply with EMIR's reporting obligation include: back-office capability (the information to be reported to a trade repository has some 60 data fields in total), servicing standards where reporting has been delegated to a third party, and the retention of information. In addition, cleared trades are likely to bring about their own reporting issues, such as whether separate reports are required where the clearing process involves the creation of a bilateral trade followed by novation, the reporting of give-up trades, block trades and trades where a broker facilitates the transaction for a client on a principal basis.

Third Country Regulatory Equivalence – U.S.

ESMA provided the European Commission with technical advice on third country regulatory equivalence under EMIR on 1 September 2013.⁶ Overall, ESMA considers that trade repositories in the U.S., called swap data repositories (“SDRs”), are compelled to comply with legal requirements that are ‘broadly equivalent’ to the EU rules.

However, ESMA recognises certain dissimilarities between the EU and U.S. rules, which include the operational separation of ancillary services, details to be reported to trade repositories, the scope of the collected data, and the restrictions on foreign authorities’ access to trade repository data.⁷ The EMIR rules are much more stringent on these specific issues. ESMA finds that the absence of certain information will “severely limit”⁸ the ability of EU authorities to measure and reduce systemic risk in the derivatives market.

Although aspects of EU and U.S. rules regarding trade repositories are divergent in some areas, ESMA concludes that U.S. trade repositories can comply with the requirements set out in EMIR by creating legally binding internal policies, procedures and rules which are stricter than those required by the Commodity Futures Trading Commission (“CFTC”). ESMA will consider these internal policies, procedures and rules when assessing the applications of U.S. trade repositories for authorisation under EMIR.

The three U.S. swap data repositories that are “provisionally registered” by the CFTC and presently collect data are the DTCC, CME Group and ICE Trade Vault. Two other SDRs are pending authorisation. The DTCC and CME Group intend to become authorised under both regimes.

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⁶ See ESMA/2013/BS/1157, Final report on technical advice on third country regulatory equivalence under EMIR – US, 1 September 2013. Available in English at: http://www.esma.europa.eu/system/files/2013-1157_technical_advice_on_third_country_regulatory_equivalence_under_emir_us.pdf

⁷ Id., P 89, p. 22.

⁸ Id., Annex IV – Legally binding requirements which are equivalent to those for Trade Repositories under EMIR, p. 163.

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