

EU legislation and Asian CCPs / trading venues

May 2015

C L I F F O R D
C H A N C E



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Overview – extraterritorial impact of EU legislation for non-EU CCPs and exchanges

EMIR

- EU counterparties (including non-EU branches of EU entities) are not permitted to become clearing members of unrecognised non-EU CCPs
- EU counterparties subject to capital requirements under the CRR are required to hold significantly more capital against exposures to unrecognised non-EU CCPs
- Recognition process requires:
 - Application from non-EU CCP
 - Equivalence assessment for jurisdiction of CCP

MiFID2 / MiFIR

- EU trading mandate for OTC derivatives may be fulfilled on equivalent non-EU trading venues
- Non-discriminatory access for recognised non-EU CCPs to EU trading venues, and for equivalent non-EU trading venues to EU CCPs
- Mandatory exchange trading requirement for EU shares admitted to trading on EU trading venues
- Equivalence assessments to be conducted by European Commission
- No requirement for non-EU trading venues to apply for recognition

Extension of EMIR exemptions to Asian central banks likely to be dependent on equivalent treatment of EU central banks under local law



EMIR

EMIR – Impact on non-EU counterparties

Clearing

- Application to a non-EU entity that would have been an FC or NFC+ if established in the EU

Risk mitigation

- Possible application of margin to transactions with non-EU “NFC-s”

Reporting

- Reporting counterparties’ potential conflicts with local privacy or secrecy laws

Branches

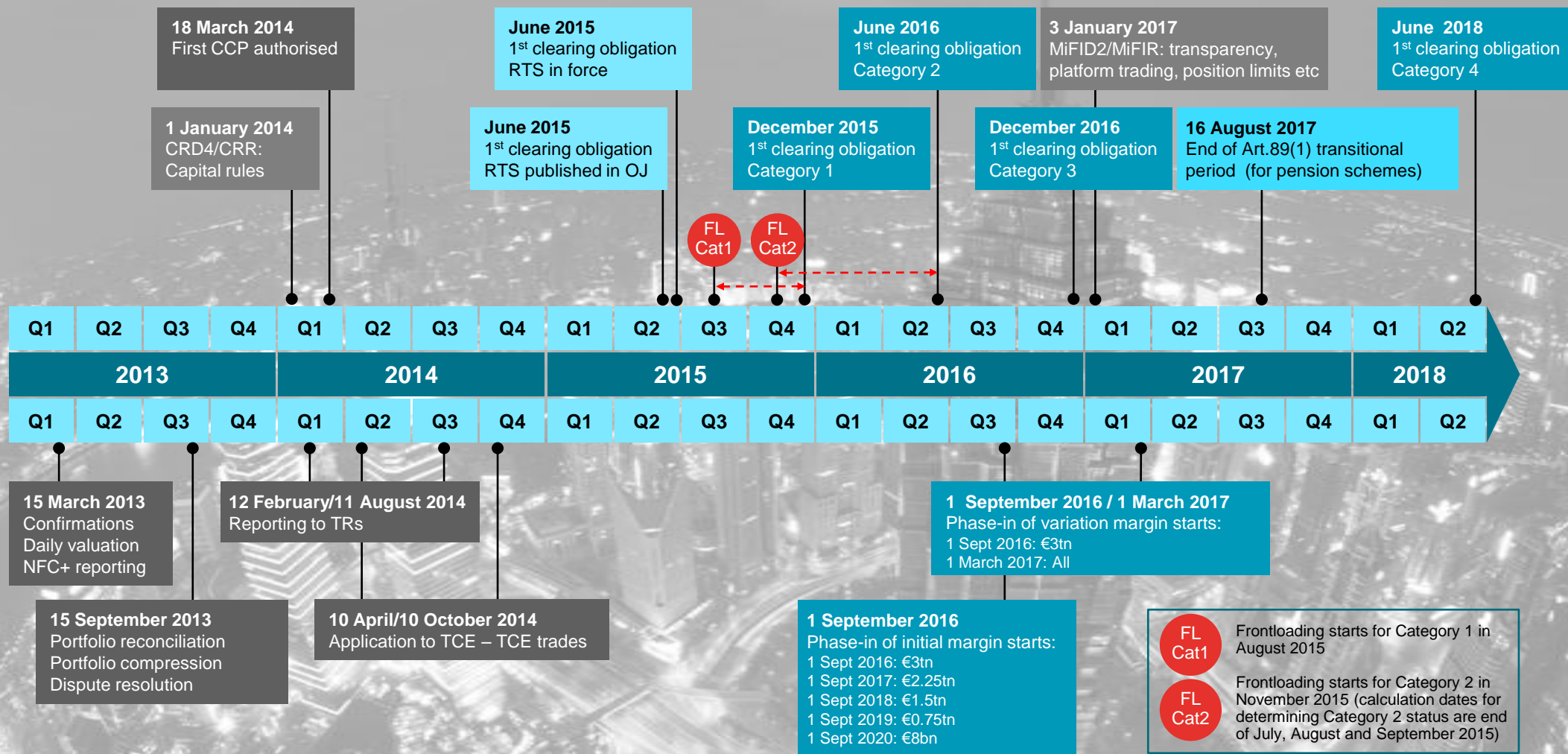
- Non-EU branches of EU entities
- EU branches of non-EU entities

Application to non-EU funds

Transactions between two non-EU entities

Note: Ongoing issues of counterparty classification of non-EU counterparties

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 – Impact on non-EU CCPs and exchanges

Access by EU
clearing
members /
trading venues

EU capital
requirements

EU clearing
mandate

Recognition

Equivalence

On-going
obligations for
recognised CCPs

Why should a non-EU CCP apply for recognition?

Access by EU clearing members / trading venues

- EMIR prohibits non-EU CCPs from providing **clearing services*** to EU clearing members / trading venues unless authorised
- “EU clearing members” includes non-EU branches of EU incorporated entities

EU clearing mandate

- EU and non-EU entities can use recognised non-EU CCPs to fulfil clearing obligation under EMIR

EU capital requirements

- EU entities subject to the EU regulation implementing Basel III benefit from preferential 2% risk weighting for exposures to recognised CCPs
- Impact on EU entities (including non-EU branches) and non-EU subsidiaries included in consolidation group

MiFID2 / MiFIR

- Non-discriminatory access to EU trading venues – EU trading venues will be required to provide trade feeds on a non-discriminatory basis to any recognised non-EU CCP that wishes to clear transactions in any financial instruments on that trading venue

* This applies to clearing services in relation to any financial instrument (including shares, bonds, exchange-traded derivatives, not just OTC derivatives). “OTC derivatives” include derivatives traded on a non-EU exchange located in a jurisdiction which has not been determined to be equivalent under MiFID 1.

Process for seeking recognition

Equivalence assessment

The European Commission may adopt an act determining that a non-EU jurisdiction has equivalent legislation regulating CCPs and provides an “effective equivalent system” for recognition of foreign CCPs



Co-operation agreement

ESMA shall establish co-operation agreements with non-EU competent authorities, including provisions for exchange of information and regulatory inspections



Equivalent anti-money laundering / counter terrorist financing legislation

Non-EU jurisdiction must be considered equivalent under the Third Money Laundering Directive



Application for recognition

Non-EU CCP needs to apply for recognition, demonstrating that it is authorised in its home jurisdiction and providing the other supporting information specified under EMIR

Current status of equivalence assessments / recognition process

Equivalence assessments granted

- Equivalence determinations and regulatory co-operation agreements under Art. 25 EMIR adopted for Australia, Hong Kong, Japan, Singapore on 31 October 2014

Equivalence assessments pending

- No other equivalence determinations have yet been adopted. ESMA has provided technical advice to the European Commission on equivalence of US, Canada, India, South Korea, Switzerland

CCP recognition granted

- On 27 April 2015, recognition was granted to 10 CCPs from Australia, Hong Kong, Japan and Singapore

Jurisdiction	Recognised CCP
Australia	ASX Clear (Futures) Pty Ltd.
	ASX Clear Pty Ltd.
Hong Kong	Hong Kong Securities Clearing Company Ltd.
	HKFE Clearing Corporation Limited
	OTC Clearing Hong Kong Limited
	The SEHK Options Clearing House Limited
Japan	Japan Securities Clearing Corporation
	Tokyo Financial Exchange, Inc.
Singapore	The Central Depository (Pte) Limited
	Singapore Exchange Derivatives Clearing Limited

Third-country CCPs awaiting recognition

The following non-EU CCPs have applied to ESMA for, and are still awaiting, recognition under Article 25 of EMIR to provide services in the EU and have agreed for their name to be published.

This list is not necessarily exhaustive and it remains subject to further updates by ESMA.



Third country	CCPs applying for recognition
Argentina	■ Argentina Clearing S.A.
Brazil	■ BM&FBOVESPA S.A.
Canada	■ Canadian Derivatives Clearing Corporation ■ ICE Clear Canada Inc. ■ Natural Gas Exchange Inc.
Dubai	■ Dubai Commodities Clearing Corporation DMCC ■ NASDAQ Dubai Limited
India	■ Indian Clearing Corporation Limited ■ MCX-SX Clearing Corporation Ltd. ■ National Securities Clearing Corporation Limited ■ The Clearing Corporation of India Ltd.
Israel	■ MAOF Clearing House Limited ■ Tel-Aviv Stock Exchange Clearing House Limited
Japan†	■ Japan Commodity Clearing House Co.

Third country	CCPs applying for recognition
Korea	■ Korea Exchange Inc. ■ Korea Securities Depository
Malaysia	■ Bursa Malaysia Derivatives Clearing Berhad (BMDC)
Mexico	■ Asigna Compensacion y Liquidacion
New Zealand	■ New Zealand Clearing and Depository Ltd.
Singapore†	■ Ice Clear Singapore
South Africa	■ JSE Clear (Pty) Ltd (previously the Safex Clearing Company (Pty) Ltd)
Switzerland	■ SIX x-clear Ltd.
Taiwan	■ Taiwan Futures Exchange Corporation
US	■ Chicago Mercantile Exchange Inc ■ Fixed Income Clearing Corporation ■ ICE Clear Credit LLC ■ ICE Clear U.S. Inc. ■ LCH.Clearnet LLC ■ Minneapolis Grain Exchange Inc. ■ National Securities Clearing Corporation ■ The Options Clearing Corporation

† On 31 October 2014, the Commission adopted equivalence determinations for the regulatory regimes of CCPs in Japan and Singapore (as well as Australia and Hong Kong). The Commission continues to work on assessing twelve additional jurisdictions, including the US.

Source: ESMA list dated 23 February 2015 which can be accessed here: <http://www.esma.europa.eu/page/Central-Counterparties>

Equivalence – what is the Commission assessing?

The Commission must determine whether the legal and supervisory arrangements of the non-EU state “ensure that CCPs authorised in that ... country comply with legally binding arrangements which are equivalent to the requirements laid down in Title IV [EMIR]”

Organisational requirements

- General governance and organisational requirements
- Senior management and the board
- Risk committee
- Prior regulatory approval of shareholders with qualifying holdings
- Conflicts of interest
- Business continuity
- Outsourcing

Conduct of business requirements

- Transparency requirements
- Segregation and portability arrangements

Prudential rules

- Exposure management
- Margin requirements
- Default fund
- Other financial resources
- Liquidity risk controls
- Default waterfall
- Collateral requirements
- Investment policy
- Default procedures
- Models, stress tests and back testing
- Settlement arrangements

What information is required for the application?

The application by a non-EU CCP to ESMA must contain at least the following information:

- Full name of the legal entity
 - Identities of the shareholders or members with qualifying holdings

Note: qualifying holdings are defined to mean a direct or indirect holding in a CCP representing 10% or more of the capital or voting rights in the CCP or which makes it possible to exercise a significant influence over the management of the CCP
 - A list of the Member States in which it intends to provide services
 - Classes of financial instruments cleared
 - Details to be included in the ESMA website in accordance with Article 88(1)(e) EMIR

Note: this article requires ESMA to include on its website details of non-EU CCPs authorised to offer services or activities in the EU, and of the services or activities which they are authorised to provide or perform, including the classes of financial instruments covered by their authorisation
 - Details of its financial resources, the form and methods in which they are maintained and the arrangements to secure them including default management procedures
 - Details on the margin methodology and for the calculation of the default fund
 - A list of the eligible collateral
 - A breakdown of values, in prospective form if needed, cleared by the applying CCP by each EU currency cleared
 - Results of the stress tests and back tests performed during the year preceding the date of application
 - Its rules and internal procedures with evidences of full compliance with the requirements applicable in that third country
 - Details of any outsourcing arrangements
 - Details on segregation arrangements and respective legal soundness and enforceability
 - Details on the CCP's access requirements and terms for suspension and termination of membership
 - Details of any interoperability arrangement, including the information provided to the third country competent authority for the purpose of assessing the arrangement
- (Source: Article 2 RTS adopted by the EU Commission in December 2012).

Impact of being recognised?

Recognition can be withdrawn if:

- Conditions for recognition no longer met
- Non-EU CCP doesn't use its recognition within 12 months, or has not been active for a period of 6 months
- Recognition was obtained through false statements
- CCP has seriously and systematically infringed any of the requirements of EMIR

Ongoing obligations for the CCP?

- Will need to apply to ESMA to extend its range of services provided to EU members / trading venues
- May be required to report transactions to a Trade Repository or to ESMA
- May be subject to other ongoing obligations applicable to CCPs under EMIR (e.g., facilitating indirect clearing)

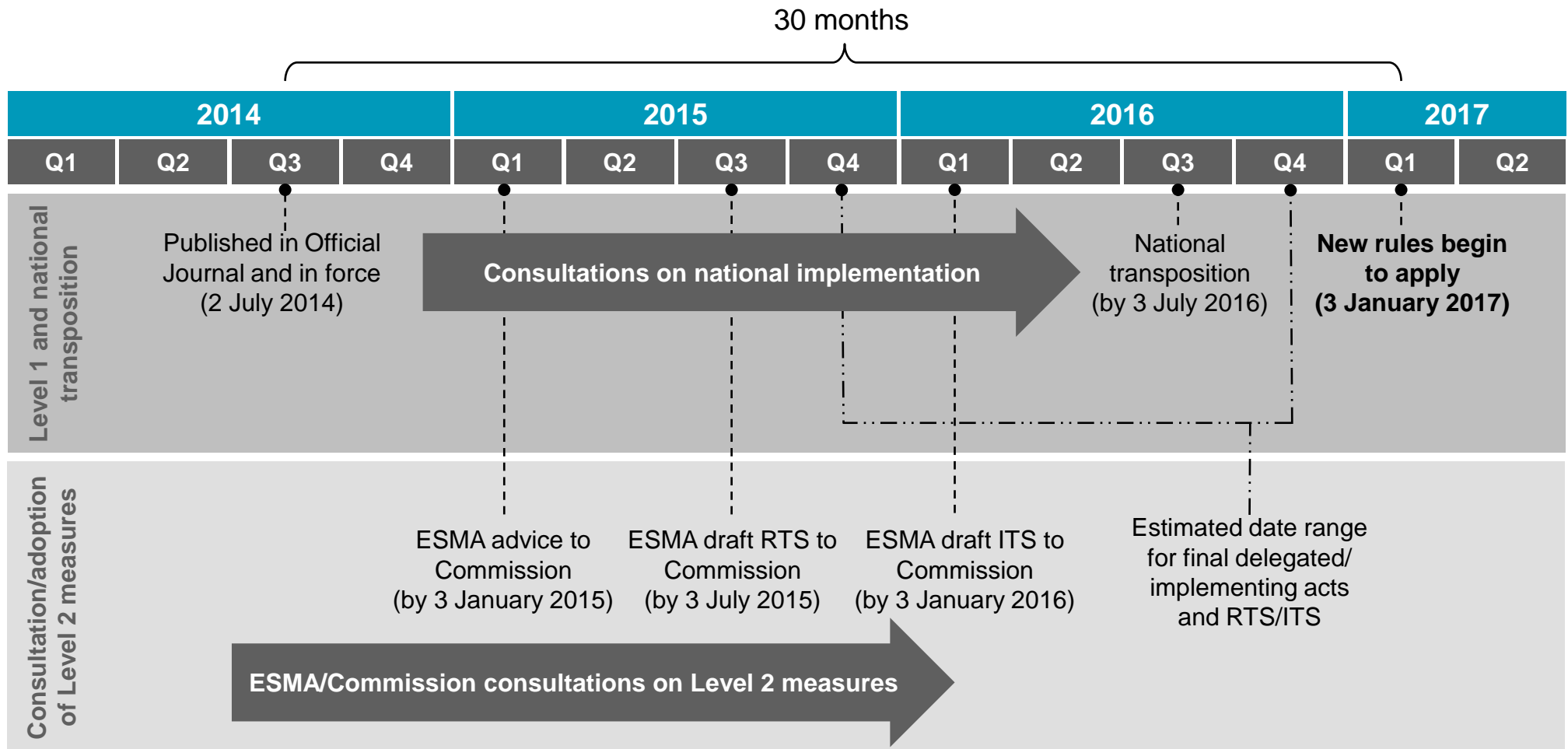
EU clearing mandate

- Once a non-EU CCP has been recognised, ESMA is required to consider whether any of the OTC derivatives that it clears should be subject to mandatory clearing in the EU
- If a recognised non-EU CCP clears any OTC derivatives already subject to the EU clearing mandate, EU counterparties can satisfy their obligation to clear using that non-EU CCP



MiFID2/MiFIR

MiFID2 and MiFIR: expected timeline



Notes:

- Very limited transitional provisions
- The Commission/ESMA may develop FAQs and guidelines
- Market Abuse Regulation starts to apply from 3 July 2016
- ESMA will likely also consult on RTS on OTC derivative trading mandate before new rules begin to apply
- Equivalence assessments required for third countries

MiFID2 and MiFIR: key elements of the reforms

Market structure

- Introduction of a new multilateral, discretionary trading venue, the Organised Trading Facility (OTF), for non-equity instruments.
- Expanded scope of Systematic Internaliser (SI) category with increased transparency requirements.
- Requirement for investment firms to trade listed equities on a Regulated Market (RM), Multilateral Trading Facility (MTF) or SI and effective limitation of “pure” over the counter business for cash equities.
- New systems and controls requirements for organised trading venues.
- Introduction of trading controls for algorithmic trading activities.
- Obligation to trade clearable derivatives on organised trading platforms.
- Introduction of a harmonised EU regime for non-discriminatory access to trading venues, CCPs and benchmarks.

Commodities

- Change in scope of regulatory perimeter for commodities business.
- Introduction of a harmonised position limits regime for commodity derivatives to improve transparency, support orderly pricing and prevent market abuse.

Transparency and transaction reporting

- Equity market transparency to be increased.
- New transparency requirements for fixed income instruments and derivatives with scope of requirements calibrated for liquidity.
- “Consolidated Tape” for trade data. Requirement to submit post-trade data and transaction reports to authorised providers.
- Widening scope of MiFID transaction reporting obligations.

Conduct, supervision and product scope

- Increased conduct of business requirements to improve investor protection.
- Regulatory perimeter extended to cover structured deposits.
- Strengthened supervisory powers with new powers to ban products or services that threaten investor protection, financial stability or the orderly functioning of markets.
- Strengthened administrative sanctions to ensure effectiveness and harmonisation.

Third countries

- Limited attempt to harmonise regime for access to EU markets by third country firms.

MiFID2 and MiFIR – Impact on non-EU CCPs and exchanges.

Expansion of
scope

Access to EU
CCPs / EU
trading venues

Indirect
clearing

Mandatory
venue trading

Equivalence

Impact on non-EU CCPs

Expansion of scope under MiFID2

- Some commodity derivatives will become subject to regulation for the first time – recognised CCPs clearing those instruments may need to update ESMA and extend their recognition to cover those instruments

Indirect clearing rules for non-EU exchange traded derivatives (ETDs)

- Indirect clearing esp. important for EU firms' access to non-EU exchanges
- New rules will apply to ETD traded on trading venues in "equivalent" non-EU states
- New rules could operate as effective ban on indirect clearing

Non-discriminatory access to EU trading venues

- EU trading venues will be required to provide trade feeds on a non-discriminatory basis to recognised non-EU CCPs who want to clear transactions in any financial instruments (not just OTC derivatives) that take place on that EU trading venue

Non-discriminatory access by EU trading venues

- A recognised non-EU CCP will be required to accept financial instruments for clearing from EU trading venues on a non-discriminatory basis (waiver available until 3 July 2019 for transferable securities and money market instruments)

Impact on non-EU trading venues

EU trading mandate for transactions in OTC derivatives

- ESMA to determine which classes of OTC derivatives should be subject to mandatory exchange trading (will be subset of clearing mandate)
- OTC derivatives subject to clearing mandate must be traded on EU trading venue or equivalent non-EU venue

Trading mandate for TCE-TCE trades in OTC derivatives

- Third country entities (TCEs) trading with each other subject to trading mandate for OTC derivatives
- Similar circumstances (and complexities) as clearing mandate for TCE-TCE trades under EMIR

Trading obligation for EU investment firms

- EU investment firms are required to ensure that any trades in instruments admitted to trading on an EU trading venue take place on an EU trading venue or equivalent non-EU trading venue

Non-discriminatory access to EU trading venues

- A non-EU trading venue established in an equivalent jurisdiction may request that an EU CCP provide clearing services for transactions executed on its platform on a non-discriminatory basis

Third country equivalence assessments under MiFID2 / MiFIR

	Relevance of equivalence assessment	Comment
Equivalent third country regulated markets (securities)	Investment firms may satisfy mandatory trading requirement for shares by execution on these markets (Article 23(1) MiFIR). Appropriateness requirements are waived for execution-only transactions in certain shares and bonds admitted to trading on these markets (Article 25(4)(a)(i) and (ii) MiFID2).	Under Article 25(4)(a) MiFID2, a third country market is considered equivalent to a regulated market for these purposes† if it is considered equivalent to a regulated market for the purposes of the rules on offers of securities to employees under Article 4(1) of Prospectus Directive. A competent authority must request an equivalence determination by Commission with respect to the third country (but no determinations have yet been made).
Equivalent third country trading venues (OTC derivatives)*	Counterparties may satisfy mandatory trading requirement for OTC derivatives by execution on venues established in an equivalent third country (Article 28(1)(d) MiFIR).	Commission determines equivalence of third country regime under Article 28(4) MiFIR.‡
Equivalent third country regulated markets (ETD)	Rules on indirect clearing under Article 30 MiFIR apply to ETD, which includes derivatives executed on third country venues equivalent to regulated markets.	Article 2(1)(32) MiFIR defines ETD to include derivatives traded on a third country market considered equivalent to a regulated market under Article 28 MiFIR (see above).
Duplicative and conflicting rules (derivatives)	Deemed compliance with rules on execution and clearing of derivatives in Articles 28 and 29 MiFIR where one counterparty is established in an equivalent third country and counterparties comply with rules in that country (Article 33 MiFIR).	Commission determines equivalence of third country regime under Article 33(2) MiFIR. Third country rules must be effectively applied and enforced in an equitable and non-distortive manner. Commission (with ESMA) must monitor third country rules and report annually to European Parliament and the Council.
Access rights for third country CCPs and trading venues*	Third country trading venues and CCPs have rights of access to EU CCPs, trading venues and benchmarks if they are established in equivalent third countries (Article 38 MiFIR).	Commission determines equivalence of third country regime under Article 38(3) MiFIR. Third country trading venues may only request access to CCPs if equivalent under Article 28 MiFIR and third country CCPs may only request access to EU trading venues if recognised under EMIR (Article 38(1) MiFIR).
Cross-border services*	Third country firms from equivalent jurisdictions must register with ESMA to provide cross-border services to eligible counterparties and per se professional clients on the basis of their home state rules (Article 46 MiFIR).	Commission determines equivalence of third country regime under Article 47(1) MiFIR. Firm must be authorised in the third country and additional criteria must also be satisfied under Article 46, including the existence of cooperation arrangements with ESMA.

- A reciprocity requirement applies, i.e. there must be an effective equivalent system for recognising or giving access to EU firms.

† When MiFID2 applies, a contract will also not be an OTC derivative contract under Article 2(7) EMIR if it is executed on a regulated market or a third country market considered to be equivalent to a regulated market under Article 25(4)(a) MiFID2 (not Article 28 MiFIR – contrast the definition of ETD in MiFIR).

‡ The exemption from the mandatory trading requirement for intragroup transactions involving third countries depends on an equivalence assessment under EMIR



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