

Financial
Markets
Law
Committee

EUROPEAN MARKET INFRASTRUCTURE REGULATION

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EMIR – Some Implementation Issues

- EMIR requires major changes to clearing houses and has consequential knock on effects for clearing house members and their customers.
- Implementation date for Regulation is 31 December 2012
- Some key issues and requirements:
 - Art 4 clearing obligation: for OTC derivative contracts. Must be cleared through a CCP. Firm must be CCP member or clear indirectly through one.
 - Deciding which contracts must be cleared. ESMA register.
 - Non-financials' contracts to manage commercial risk.
 - Intra-group derivatives.

EMIR – Implementation the role of EU and governments

- Regulation – not Directive so no formal national implementation
- Bigger role, therefore, for EU Commission and ESMA. ESMA Feb '12 DP and June '12 CP
- ESMA to present proposed technical standards to Commission by 30 September 2012
- UK traditionally gave considerable guidance and input to industry through FSA Approach Documents e.g. MIFID and Payment Services Directive implementation (2007 and 2009)
- No such member state help anticipated this time – chilling effect of pan-EU level on levels of support for national implementation. Increased importance of EU level guidance, FAQs. ESMA CP is a start.

EMIR implementation – cascade effect

- While all affected entities have to implement at same time some are dependent on others before they can start certain modifications.
- CCPs will modify their own clearing arrangements – CCP members will have to adapt.
- CCP members will modify their terms for dealing with their clients e.g. fund managers, pension funds, banks who are not clearing members. Clients will have to adapt.
- Indirectly clearing clients – clients who clear through a client of a clearing member. ESMA draft Standard envisages they can obtain an individual client account direct with the clearing member but not with CCP.

Some areas of uncertainty or concern: UK

Banks (ISDA, BBA, AFME, ASSOSIM submission)

- Inflexibility of the ESMA approach for indirect clients at clearing member level: poses significant problems. Disincentivises clearing membership.
- Public Register – vital to distinguish contracts subject to mandatory clearing from those that are not. More clarity needed.
- Non-financials – hedges of transport, storage, commodity, credit and equity risk should not be counted.
- Financials should be able to rely on assertions of non-financials that they have not crossed the clearing thresholds.
- SPVs used for securitisations should be able to rely on the non-financials thresholds
- Guidance required quickly on "practical and legal impediments".

Some areas of uncertainty or concern: UK

Clearing House (LCH submission)

- ESMA proposal that CCP should use 50% of own resources before calling on non-defaulting members to cover default is too high and disincentivises other members from assisting managing default. Should be 10% of risk capital.
- Should not need a separate CCP board where it is part of a group.
- Margin requirements are too prescriptive and could prevent more risk sensitive approaches to risk management.
- ESMA's proposal unduly limits a CCPs scope to use derivatives. Should be able to use them for FX and interest rate risk management, not just default management.



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