EMIR: Q&A

12th September 2013

Good afternoon, and welcome to the EMIR Regulation Question and Answer Session.

The speakers today are:

- **Anne Faucheux,** Head of Capital Market initiatives covering implementation of EMIR from an IT and operations perspective
- **Aline De Leener,** Fixed Income Trading Business Manager, Co-ordinating EMIR implementation for Fixed Income
- **Nicolas Mehta,** Head of Derivatives Policy and Development within CIB Legal, covering EMIR Legal implementation and documentation
- **Antony Hainsworth,** Senior Lawyer in BNPP's Regulatory & Advisory team within CIB Legal, covering EMIR Regulatory and Advisory

The following Q&A session reflects BNP Paribas' views on the topics addressed, but we must stress that this does not constitute legal or regulatory advice and we recommend you address legal or regulatory concerns to your own advisors.

18th September 2013

Regulation | **EMIR**

Further information

If you wish to discuss further, please contact the BNP Paribas European Regulatory Reforms team (Regreform.eu@uk.bnpparibas.com) or your BNP Paribas Relationship Manager or Sales Representative.

Substitute Compliance and Third Party Countries

1. Within a group, are non-European entities subject to EMIR? What if they only trade with a local bank?

EU and non-EU branches of BNPP SA are always subject to EMIR obligations because of the single entity doctrine even if the facing non-EU counterparty is not subject to EMIR. Non-European branches of European entities are subject to EMIR because of the single entity doctrine. As the obverse of the first statement, all non-European entities dealing with European entities are indirectly subject to EMIR. EMIR would however not apply to trades between an non-EU subsidiary and a local bank (absent any guarantee from an EU FC).

2. What happen with US entities that are already subject to DFA?

US based entities trading swaps are subject to DFA. By trading derivatives with BNP Paribas, they will also be subject to EMIR and we should in theory apply both regulations. However, the regulators are currently looking at this aspect to agree on equivalences, also called substitute compliance. We would then be able to comply with one set of rules only which have been recognised as "equivalent".

3. When we compute the clearing thresholds, should we include intragroup transactions? To whom do we need to communicate our classification once defined and how?

When a non-financial counterparty computes the clearing threshold, intragroup transactions should be included. However, the deals done within the same legal entity, by example between two different desks of the same legal entity or its branches, are not included.

Under EMIR, a non-financial counterparty established in the EU is required to notify its relevant national competent authority and ESMA if, on any given day, it exceeds one of the clearing thresholds. As ESMA confirms in its FAQ, a notification will also be required "as soon as possible" when the average position over 30 working days no longer exceeds any of the clearing thresholds.

Although you do not have a regulatory obligation to notify us, it is important that BNP Paribas is notified about your status as quickly as possible, simply because your status under EMIR determines the obligations that apply to the derivatives trading relationship between us. We can obtain this information from you, for example, via the ISDA 2013 EMIR NFC Representation Protocol or alternatively you can choose to notify us directly without adhering to an industry standard Protocol. We may also contact you directly to ask you to confirm your status.

LEI

4. What is a LEI and how do I obtain one? Do we need a LEI when trading between 2 entities of the same group?

LEI stands for Legal Entity Identifier and is designed to create and apply a single, universal standard identifier to any organization or firm involved in a financial transaction internationally. LEI's are based on entities country of incorporation.

This link indicates the pre-LOUs which are authorised to issue LEIs. http://www.leiroc.org/publications/gls/lou_20130318.pdf

If the specified country does not yet provide LEIs, you should apply for a CICI via website : https://www.ciciutility.org/index.jsp where this can be obtained irrespective of country of incorporation.

A LEI is also needed for trades booked between an entity and its subsidiaries but not for trades booked between different branches of the same legal entity.

Timely Confirmation

5. What constitutes a "confirmation"? Can an electronic confirmation constitute a "confirmation"?

The key test of an effective confirmation is whether the intended method would amount to a legally binding agreement between the parties confirming the terms of the relevant OTC derivative contract. Not only is electronic confirmation permissible, but it is actively encouraged by the Regulation, which specifies that parties should confirm their transactions by electronic means "where available." This could include, for example, confirmation through electronic confirmation platforms such as MarkitSERV or SwapsWire, where both parties are members of the relevant platform. According to interpretive guidance issued by ISDA, this obligation does not imply an obligation for counterparties to ensure that they are able to confirm via electronic means in relation to all types of transaction they may enter into where electronic means of confirmation may be possible. A party may, in practice, have legitimate commercial and other reasons for not being a member of a confirmation platform. At this stage at least, we are not aware of any regulators requiring counterparties to sign up to electronic confirmation platforms as a means of meeting their confirmation obligations, although this will be something to review in the future, as the market develops and the use of confirmation platforms becomes more prevalent.

6. Regarding timely confirmation, portfolio reconciliation and dispute resolution, what kind of reporting to regulators will have to be done? And by whom?

Each regulator will determine its own reporting. For timely confirmation, the bank will have to report transactions for which we've not achieved the deadlines to the relevant national competent authority. The relevant competent authority will be able to examine our procedures and arrangements and determine whether or not sufficient efforts have been made to achieve the deadlines. under the portfolio reconciliation and dispute resolution obligations, we will also have to report to regulators on those disputes of

more than €15m that are outstanding for more than 15 business days. In this context, the name of the counterparty will be disclosed to the regulators.

Portfolio Reconciliation, Dispute Resolution and Portfolio Compression

7. In order to meet the Portfolio Reconciliation and Dispute Resolution Risk Mitigation Techniques under EMIR coming into force on September 15th 2013, is it sufficient to adhere to the appropriate ISDA Protocol?

The ISDA PR/DR Protocol is designed to meeting the "written arrangements"/"agreed detailed procedures and processes" requirement under EMIR in relation to PR and DR respectively, but I would note that this needs to be aligned with the operational requirements which are the major focus, particularly in relation to PR.

More specifically, the FAQs on the ISDA website spell out the workings of the Protocol: in terms of PR, there are two alternate methods provided:

1. The first of these is the "Exchange of Portfolio Data" approach. Under this approach, both parties send to the other a data set containing the key terms of the relevant transactions between them. The parties then undertake a comparison of their own records against the data received; if any discrepancy is identified, the party making the comparison is entitled to notify the counterparty of the discrepancy, and then the parties consult with each other to try to resolve the discrepancy or discrepancies identified.
2. The other approach is the "One-way delivery of Portfolio Data", under which one party only sends the other party the information, for that receiving party to reconcile against its own records and to raise discrepancies for further investigation. Under this approach, if the receiving party does not raise any discrepancies within a five joint business day time horizon, it is deemed to have affirmed the data received.

There is one caveat to be borne in mind – if both parties identify themselves are receiving entities, then either one (or both) of the parties would have to agree to act as a data sending entity; otherwise an alternative portfolio reconciliation method will have to be agreed bilaterally. However, since BNP Paribas will be a data sending entity, this concern will not arise for our counterparties.

One final point – one or both parties can use a third party such as TriOptima to undertake the portfolio reconciliation with the other party's agreement (which may be existing – for instance, where both parties have already signed up to the relevant TriOptima service).

On the DR side, the protocol sets out a method for the identification, monitoring and resolution of disputes without overriding existing dispute resolution methods the parties have already agreed (for instance, the dispute mechanics under the Credit Support Annex). The requirement for a specific process for disputes not already resolved within 5 business days is also covered in the Protocol wording. But it is also to be kept in mind that parties can attempt to resolve disputes at an operational, relationship or other level, and that other issues such as the actual recording and monitoring of disputes will have to occur as a practical matter.

8. Can a Non-Financial Counterparty which does not have a Master Agreement in place, adhere to the Protocol?

The Protocol is wide enough to cover Long Form Confirmations in place between the parties (for instance, those referencing the "ISDA Form"). However, adherence would arguably not cover further non-ISDA LFCs after adherence by both parties, so bilateral contractual provisions would need to be considered for those transactions (which could be included in a Master Agreement subsequently put in place).

9. Putting yourself in the shoes of a NFC client, if a Financial Counterparty does not adhere, what should we then do?

In those circumstances, and as with any other counterparty, it would be necessary to agree the necessary details and documentation on a bilateral basis (or perhaps seek to persuade a counterparty to adhere to avoid this need).

10. Is the ISDA Protocol limited to ISDA documentation, or can it be used where we have other Derivative Agreements in place?

The ISDA Protocol is wide enough to cover not only ISDA documentation, but also what is termed a "Covered Other Agreement". This is an agreement which sets out or governs the terms and conditions of a transaction in Derivatives. However, the term also

excludes non-ISDA Master Agreements which have similar terms already in them – an example would be existing FBF documentation where an Additif Technique addresses the Risk Mitigation Techniques requirements under EMIR.

It is worth noting that the Protocol only covers master agreements which have been entered into prior to the "Implementation Date", which is the date on which ISDA accepts the adherence letter of the second of the two parties involved, to adhere to the protocol. These adherence acceptance dates are reflected on the ISDA website.

One final point on this topic – Agreements which have third party guarantees are also excluded from the coverage of the Protocol – unless the guarantor has given any necessary consents (or has itself adhered to the Protocol). This is designed to avoid the situation where the effect of the parties to the agreement making amendments without the consent of the guarantor, may be to discharge the guarantee.

11. Please could you explain how the Revocation provisions of the Protocol work?

Once a party adheres to the Protocol, the terms of the Protocol apply to the covered agreements which that party has with any other adhering party.

A party can however stop this process by giving a Revocation Notice to ISDA between 1 October and 31 October in any year, and the impact of giving that notice that the party is that the terms of the Protocol will not apply between the party, and another party whose adherence is effective after 31 December of that year. It will still be bound in relation to parties whose adherence is effective before that date (even if the Revocation Notice has been given in the October).

12. Please could you explain the impact of the Confidentiality Waiver clause in the Protocol?

The confidentiality waiver in the Protocol is designed to assist parties in complying with regulatory requirements under EMIR, without being in breach of confidentiality restrictions they may otherwise be under. Whilst there is a general "carve-out" for transaction reporting under Article 9(4) of EMIR (which will address the issue from that perspective where both counterparties are EU entities), this does not address the reporting requirement in respect of (for instance) timely confirmation timelines or disputes that are more than EUR15m and which have been outstanding for at least 15 Business Days. However, the ISDA FAQs also mention that the waivers, consents and acknowledgements in this clause are not necessarily sufficient to overcome any prohibition or impediment to disclosure under the laws of every jurisdiction, and recommend that parties should consult with their own advisers on this.

13. If we have not signed up to ISDA Protocol or otherwise put in place a bilateral agreement relating to PR/DR with you by 15th September, what is the impact?

The strict reading of the regulatory requirements under EMIR in this regard is that the relevant agreements and procedures must be in place to enable trading to continue post 15 September. That being said, a very important consideration here is the view taken by the regulator of the party in question. As a general matter, there seem to be some informal views being expressed by certain European regulators that the focus must be on getting the necessary agreements in place as soon as possible even if trading is to continue after this date without the agreement in question being in place. From our perspective, whilst as a general matter BNP Paribas will be prepared to maintain our trading relationships with counterparties after 15th September, we would wish to have the agreement in place (which may be best achieved via the PR/DR) to enable the formal requirements to be met, or to understand what is still needed from our counterparty's perspective, for such an agreement to be put in place.

14. What is the difference between a discrepancy and a dispute?

The difference is all in the context. A "discrepancy" could include any difference identified by the portfolio reconciliation process. The PR/DR Protocol does not require a party to notify its counterparty of any discrepancy identified through the portfolio reconciliation process unless such discrepancy is material to the rights and obligations of the parties under the relevant transactions. Some discrepancies, for example in the valuations that the respective parties conduct on their transactions, could have non-material differences. A material discrepancy that is not resolved to the satisfaction of one or other of the parties, and which they wish to pursue further under a more formal procedure could, in contrast, form the basis of a dispute.

15. Is there a specific financial threshold over which a discrepancy becomes a dispute?

The reporting threshold of EUR15m for 15 days may be a useful guideline; however, this does not prevent parties raising disputes in relation to smaller value discrepancies (noting that, as the market moves, what could be a small discrepancy one day could be a larger discrepancy on a another day). With this in mind, counterparties can of course determine different internal thresholds above which they may choose to raise a dispute, which need not match.

16. If both parties have already adhered to the ISDA portfolio reconciliation and dispute resolution protocol, is there anything else to do in order to comply with portfolio reconciliation and dispute resolution obligations?

By adhering to the protocol, both parties have agreed on the arrangements under which they will undertake portfolio reconciliation. BNP Paribas will then be able to trigger the first reconciliation before the end of the agreed reconciliation period. No further action is required from our clients in that case. Refer also to question 7 above.

17. What are the fields that will be reconciled?

BNP Paribas intend to follow the operational guidelines agreed in the ISDA Portfolio Reconciliation Operational Working Group. The documents specify that the reconciliation is centred on the MtM valuation, the legal entity name and the unmatched trade details. Other relevant details will be used to identify each particular OTC contract. In this regard, the Minimum Market Standard (MMS) will be considered as the best practice template for the industry.

18. What happen if we already reconcile our portfolio with you?

BNP Paribas operational team will first check if the parameters of the reconciliation currently processed match EMIR requirements as described in the contractual agreement that is in place between us. If the frequency used is different from the one required under EMIR, we would either change it if the current frequency is lower than EMIR frequency, keep it if the current frequency is higher than EMIR frequency, or set up a separate reconciliation if the client requires it.

19. What is a UTI and why do we need it?

The UTI is the Unique Trade Identifier that will be used by the industry to report and match trades under EMIR. As the UTI format is very similar to the USI format, the USI used for CFTC trades covered by DFA obligations can be used as UTI for EMIR obligations.

20. Who is in charge of generating it and how is it done? How is it communicated to the counterparty?

BNP Paribas intend to follow key principles set out in the ISDA white paper available on the ISDA website. The basic principles are:

- as explained before, if each party is a Swap Dealer / Major Swap Participant and the trade is also DF eligible and has a USI, this USI would become the UTI
- if the trade is done through an electronic execution platform, or middleware (ex Markitwire / DS Match), this platform will generate the UTI and distribute it to both parties on the transaction
- in other cases (voice trade – paper confirmation), parties will follow what is called "tiebreaker rules" which are specific to each asset class and determine which party should generate and communicate the UTI will be communicated if possible by electronic means, if not, through the confirmation. If the other party cannot import the UTI prior to the reporting deadline, it should be able to report using an internal trade reference. Once the UTI is received, it will report again the transaction with the internal trade reference and the UTI. The internal trade reference will allow the TR to recognize this trade and relate it to the trade reported earlier to avoid duplication. The trade with UTI can then be paired by the TR with the transaction reported by the counterparty.

21. Does BNP Paribas also have an internal procedure around dispute resolution?

Yes. BNP Paribas already maintains procedures for the reasonable and prompt handling of counterparties, complaints and keeps records of such complaints and their resolution. These arrangements are, in effect, complementary to those under EMIR. In the event that a client is, for whatever reason, dissatisfied with the service they receive they should in the first instance discuss this with their regular contact at BNP Paribas, for example their relationship manager. If you are not satisfied with the way your complaint is dealt with by your contact or wish to elevate any particular issue you should contact our Compliance Department.

22. Are hedging transaction exempted under EMIR? More specifically, do we have to reconcile and report hedging transactions?

Hedging transactions are only exempted from the calculation of clearing threshold. All other EMIR obligations remain valid for hedging transactions including portfolio reconciliation, dispute resolution, compression and trade reporting requirements.

Trade Reporting

23. Do I need to include both cleared and uncleared trades in terms of reporting?

Yes. The reporting requirements will extend to all derivatives transactions entered into by parties subject to the Regulation, including both cleared and non-cleared trades and exchange-traded and OTC negotiated trades. Note, however, that the phase-in of reporting requirements may differ depending on the type of contract in question. Whilst, for example, mandatory reporting of at least some OTC trades such as interest rate swaps and credit default swaps is due to be phased in February next year, ESMA have recommended a potential postponement of reporting of exchange-traded derivatives until 1st January 2015. It will be important to monitor developments in this area, including in particular whether the proposed postponement of reporting for ETD accepted to the commission.

24. Have some Trade Repositories already been authorised? Do I need to report to a Trade Repository in my own jurisdiction?

Several trade repositories have applied to be authorised by ESMA but, for the moment, none has been authorised. We expect that ESMA will publish a first list of trade repositories authorised in November. This would trigger the start of the trade reporting obligations (90 days after the publication). We do not know how many trade repositories ESMA would validate. We however expect that a minimum of two TRs will be authorised from the beginning.

To fulfil your trade reporting obligations, you have the right to choose any trade repository that has been authorised by ESMA. This choice is not limited to the trade repository registered in your own jurisdiction.

25. Do reporting obligations apply to non-financial counterparties under the clearing threshold? Do we need to report intra-group transactions? Can you report on our behalf?

Yes if you are an European non-financial counterparty below the clearing thresholds, you have to report your derivatives transactions to an authorised TR. This includes intra-group transactions i.e. transactions executed between an entity and one of its affiliates. Reporting obligations would not apply to non-European entities (but do apply to EU entities facing non-EU entities).

BNP Paribas will be able to offer to report OTC derivative trades entered into with BNP Paribas (or a BNP Paribas affiliate company) on your behalf to DTCC.

To take advantage of the BNP Paribas reporting service, you would be required to:

- Provide a Legal Entity Identifier (LEI) which eliminates the need to complete a number of counterparty-specific reporting fields
- Agree terms relating to the provision of the reporting service by BNP Paribas and in the case that you require full reporting (i.e. reporting of valuation and collateral data), the terms on which such data is reported
- Provide static counterparty data to BNP Paribas and advise BNP Paribas immediately of any data changes; and
- On-board on to DTCC if you wish to reconcile common/counterparty data against the trade report submitted by BNP Paribas

For the moment, BNP Paribas considers that this is part of the service offered when executing a trade with us and will not charge the client a fee.

Thank you all for attending the Emir Regulation Call. Distribution of this Q&A will follow shortly together with a request for feedback.