





Reply form for the Discussion Paper on the trading obligation for derivatives under MiFIR

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Discussion Paper on the trading obligation for derivatives under MiFIR, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA_ QUESTION_MIFID_TO_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider.

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_MiFID_TO_NAMEOFCOMPANY_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA_MiFID_TO_ESMA_REPLYFORM or

ESMA_MiFID_TO_ESMA_ANNEX1

Deadline

Responses must reach us by **21 November 2016**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.



Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_MIFID_TO_0 >

The German Banking Industry (GBIC) [die Deutsche Kreditwirtschaft] is grateful for the opportunity to comment on ESMA's discussion paper on the trading obligation for derivatives under MiFIR.

As the clearing obligation is not yet fully applicable, GBIC would strongly recommend deferring implementation of the trading obligation. This would enable ESMA as well as the market to better assess the implications the clearing obligation has for the market and, thus, ensure a better and smoother phase-in of the clearing obligation. In particular, the questions relating to how many market participants, market makers and trading venues should be available could be assessed by relying on a broader data basis.

In order to avoid operational risks, the trading obligation for frequent traders should not apply before 2019 and for infrequent traders not before 2021. Very small financial institutions should actually be exempted due to the considerable effort required on their part and for proportionality reasons.]

< ESMA_COMMENT_MIFID_TO_0 >

Q1. Do you agree that the level of granularity for the purpose of the trading obligation should apply at the same level as the one used for calibrating the transparency regime of non-equity instruments? If not, which level of granularity for the TO would you recommend and why? Would that differ by asset class and type of instrument?

<ESMA_QUESTION_MIFID_TO_1>

[We disagree, as GBIC strongly believes that classification for the TO should be much more granular since on a high level like the criteria for the clearing obligation not all variations might be tradeable (or at least with sufficient liquidity) on a trading venue. ESMA should run an analysis of trading venues, like for the CO, to determine which products and specifications can be traded. A matrix should be published with the detailed specifications and applicable trading venues ; otherwise, if the whole derivatives class were subject to the TO, any (new) product variation would fall under the scope too and not be allowed to trade at all if no trading venue is able to offer this new variation.]

<ESMA_QUESTION_MIFID_TO_1>

Q2. Do you agree that all derivatives currently subject to or considered for the CO are admitted to trading or traded on at least one trading venue? If not, please explain which classes of derivatives are not available for trading on at least one trading venue.

<ESMA_QUESTION_MIFID_TO_2>

[In principle, we agree. However, at present we do not yet have a full overview of all product variations available on trading venues. As stated in our reply to Q1, we believe that ESMA should run an analysis of specifications available with applicable trading venues. Based on the results of this analysis, a detailed matrix should be published forming the basis for the TO]

<ESMA_QUESTION_MIFID_TO_2>

Q3. How should ESMA determine the total number of market participants trading in a class of derivatives? Do you consider it appropriate to carry out this assessment with TR data or would you recommend other data sources?

<ESMA_QUESTION_MIFID_TO_3>

[Generally, yes. Data available to TRs should best reflect the distribution of trades among various venues. In addition, data available from the Bank for International Settlements (BIS), i.e. semi-annual OTC derivatives statistics, might be used.

No additional data reference/data basis tools should be established.]

<ESMA_QUESTION_MIFID_TO_3>

Q4. In your view, what should be the minimum total number of market participants to consider the following classes of derivatives as sufficiently liquid for the purpose of the trading obligation? i) OTC interest rate derivatives denominated in EUR, USD, GBP and JPY; ii) OTC interest rate derivatives denominated in NOK, PLN and SEK; iii) Credit default swaps (CDS) indices? Should you consider that this assessment should be done on a more granular level, please provide your views on the relevant subsets of derivatives specified in 1.-3.

<ESMA_QUESTION_MIFID_TO_4>

[The assessment should be performed on the basis of each sub-class of derivatives subject to the trading obligation, i.e. differentiated by type of derivative such as forward or swap as well as the tenors.

Two market participants seems definitely too low as oligopolies might develop and bottleneck situations might occur. It should at least be ensured that enough market makers/liquidity providers are available in order to satisfy market demand for liquidity in a certain product.

As for the granularity, it should be ensured that the liquidity described above is available in each sub-class of derivatives subject to the trading obligation. Only products with defined specifications and available for trading on venues should at any rate fall under the scope of a TO. |

<ESMA_QUESTION_MIFID_TO_4>

Q5. Do you agree with this approach? Do you consider alternative ways to identify the number of trading venues admitting to trading or trading a class of derivatives as more appropriate?

<ESMA_QUESTION_MIFID_TO_5>

|See our reply to Q3. TR data as well as data available from BIS should be taken into consideration. |

<ESMA_QUESTION_MIFID_TO_5>

Q6. On how many trading venues should a derivative or a class of derivatives be traded in order to be considered subject to the TO?

<ESMA_QUESTION_MIFID_TO_6>

|Even if not many market participants are active in a certain sub-class of derivatives subject to the trading obligation, i.e. demand for liquidity is not very high, having only one trading venue available should be avoided. This would entail a systemic risk for these contracts (IT system failure, defaults, etc.) that must be avoided. Conversely, there should be no requirement for market participants to have access to several trading venues. |

<ESMA_QUESTION_MIFID_TO_6>

Q7. What would be in your view the most efficient approach to assess the total number of market makers for a class of derivatives? Where necessary, please distinguish between: i) The phase prior to the application of MiFID II (i.e. before January 2018); ii) The phase after the application of MiFID II (i.e. after January 2018).

<ESMA_QUESTION_MIFID_TO_7>

|See our preliminary comments. We consider it wise to wait until the clearing obligation for the relevant derivatives has been established for most market participants. Therefore, from a timeline perspective, the trading obligation for frequent traders should not apply before 2019 and for infrequent traders not before 2021. By that time, data under MiFID II should be available. Very small FIs should actually be exempted due to the considerable effort required on their part and for proportionality reasons. |

<ESMA_QUESTION_MIFID_TO_7>

Q8. How many market makers and other market participants under a binding written agreement or an obligation to provide liquidity should be in place for a derivative or a class of derivatives to be considered subject to the TO?

<ESMA_QUESTION_MIFID_TO_8>

|TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_8>



Q9. Do you agree with the proposed approach or do you consider an alternative approach as more appropriate?

<ESMA_QUESTION_MIFID_TO_9>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_9>

Q10. Do you agree that the criterion of average size of spreads, in particular in case of absence of information on spreads, should receive a lower weighting than the other liquidity criteria? If not, please specify your reasons

<ESMA_QUESTION_MIFID_TO_10>
[Yes.]
<ESMA_QUESTION_MIFID_TO_10>

Q11. Which sources do you recommend for obtaining information on the average size of spreads by asset class?

<ESMA_QUESTION_MIFID_TO_11>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_11>

Q12. What do you consider as an appropriate proxy in case of lack of information on actual spreads?

<ESMA_QUESTION_MIFID_TO_12>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_12>

Q13. Do you agree with the suggested approach? If not, what approach would you recommend?

<ESMA_QUESTION_MIFID_TO_13>
[We understand that the trading obligation applies only to market participants subject to the clearing obligation (i.e. above the clearing threshold).]
<ESMA_QUESTION_MIFID_TO_13>

Q14. Do you agree that trades above the post-trade large in scale threshold should not be subject to the TO? If not, what approach would you suggest? Should transactions above the post-trade LIS threshold meet further conditions in order to be exempted from the TO?

<ESMA_QUESTION_MIFID_TO_14>
[Yes, we agree. Trades above the LIS threshold should not be subject to the TO.]
<ESMA_QUESTION_MIFID_TO_14>

Q15. How highly should ESMA prioritise the alignment of the TO with transparency? What would be the main consequences for the market if some instruments are covered by transparency and not by the TO or vice versa? If the two are not fully aligned, would a broader scope for the TO or for transparency be preferable, and why? In case of a broader or narrower scope for the TO (compared with transparency), how should the two liquidity thresholds relate to each other?

<ESMA_QUESTION_MIFID_TO_15>

As stated above (see preliminary remarks and reply to question 7), we recommend waiting for the clearing obligation as well as the pre-trade transparency regime under MiFID II/MiFIR to be implemented in order to obtain empirical data needed to align the trading obligation with these two regimes. We expect needless and avoidable misalignments if the launch of the trading obligation is rushed.

We strongly recommend providing for a swifter approach to amending the trading obligation in the event of a drop in liquidity (cf. para. 112 of the discussion paper). If the trading obligation cannot be suspended quickly, it will exacerbate the liquidity problem.

As we have already explained numerous times in the context of ESMA's consultations with respect to the clearing obligation, we are still concerned about the fact that the scope of the classes of derivatives subject to the trading obligation is to be defined by means of a Commission Delegated Regulation. It will therefore not be possible to quickly exclude a class of products which has become ineligible for trading from the trading obligation (de-listing of no longer tradeable products). Consequently, it is necessary to establish processes which allow immediate "de-listing" of products that are no longer tradeable so that counterparties are not effectively forced to stop entering into transactions pertaining to products which are legally still subject to a trading obligation but are no longer tradeable. It should at least be made clear that suspension from trading will automatically lead to suspension of the trading obligation.

As regards the less straightforward cases of a drop in liquidity, pragmatic and workable solutions need to be established. This could, for example, be achieved by a declaration of suspension of regulatory enforcement of the trading obligation in a situation where counterparties subject to the trading obligation intend to enter into transactions in the timespan between the point in time where it has become apparent that a product is no longer tradeable and the point in time of its eventual "de-listing" by means of a revised Commission Delegated Regulation. From a practical standpoint, derivatives classes should not be declared subject to the TO as a whole as new or existing product variations may not be tradeable yet on an approved trading venue, so this should not hinder trading at all. |

<ESMA_QUESTION_MIFID_TO_15>

Q16. Do you agree with the proposed methodology to eliminate duplicated trades or would you recommend another approach? Do you agree with selecting Option 2?

<ESMA_QUESTION_MIFID_TO_16>

We recommend using Option 3. It should be assumed that the field "cleared" will be duly populated by the counterparties (taking into account applicable sanctions). Consequently, the correct data basis will be achieved and is easily decipherable. |

<ESMA_QUESTION_MIFID_TO_16>

Q17. Do you agree with the approach taken with regard to calculating tenors?

<ESMA_QUESTION_MIFID_TO_17>

We do not consider it appropriate to include contracts with a maturity of +/- X days outside the benchmark dates in the trading obligation. For each date, ESMA would have to conduct individual liquidity assessments – in particular, to make sure that enough trading possibilities/venues are available. Any deviation from standard tenors, e.g. due to special business day rules because of client needs or any other



short/long first or last period of a transaction, should not fall under the “standard” tenor as liquidity is not sufficiently available. While putting them into the same bucket for overview/aggregation reasons might be fine, this is not accurate enough for the TO.]

<ESMA_QUESTION_MIFID_TO_17>

Q18. Do you agree with the reasons mentioned above or is there another explanation for the significant number of trades outside of benchmark dates?

<ESMA_QUESTION_MIFID_TO_18>

[Product variations are typically based on client needs, e.g. if a client decides some time later to hedge an underlying loan or bond, matching the exact payment dates, this may result in a short first swap period and therefore a total maturity which is not exactly equal to the proposed standard tenors.]

<ESMA_QUESTION_MIFID_TO_18>

Q19. Does this result reflect your assessment of liquidity in fixed-float IRS? If not, please explain on which subclasses you disagree and why.

<ESMA_QUESTION_MIFID_TO_19>

[OTC derivatives can have small deviations from the “standard/frequent” trade specifics and therefore may look only to fall under a “common class” of parameters but actually deviate in pricing and may not be considered liquid enough.]

<ESMA_QUESTION_MIFID_TO_19>

Q20. What thresholds would you propose as the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

<ESMA_QUESTION_MIFID_TO_20>

[TYPE YOUR TEXT HERE]

<ESMA_QUESTION_MIFID_TO_20>

Q21. What further specifications (e.g. payment frequency, reset frequency, day count convention, trade start type) would you consider necessary for specifying the trading obligation for fixed-float IRS? How would you determine these additional specifications?

<ESMA_QUESTION_MIFID_TO_21>

[Since IRS can be flexibly geared to the needs of our clients, there can be multiple specifications and combinations thereof, which may make this product variation less liquid/not tradeable. To add a few more specifications, we would consider at least, for example, the notional amount too as this may be customized, e.g. due to annuities in the underlying loan/bond]

<ESMA_QUESTION_MIFID_TO_21>

Q22. Does this result reflect your assessment of liquidity in OIS? If not, please explain on which subclasses you disagree and why.

<ESMA_QUESTION_MIFID_TO_22>

[TYPE YOUR TEXT HERE]



<ESMA_QUESTION_MIFID_TO_22>

Q23. What thresholds would you propose for the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

<ESMA_QUESTION_MIFID_TO_23>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_23>

Q24. What further specifications (e.g. payment frequency, reset frequency, day count convention, trade start type) would you consider necessary for specifying the trading obligation for OIS? How would you determine these additional specifications?

<ESMA_QUESTION_MIFID_TO_24>
[See our response to Q21]
<ESMA_QUESTION_MIFID_TO_24>

Q25. Do you agree that due to the specificities of the FRA-market, FRAs should not be considered for the TO? Do you agree that the majority of FRAs transactions serve post-trade risk reduction purposes rather than actual trades.

<ESMA_QUESTION_MIFID_TO_25>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_25>

Q26. In case you consider FRAs should be considered for the TO, which FRA sub-classes are in your view sufficiently liquid and based on which criteria? How should a TO for FRAs best be expressed? Should it be based on the first (effective date) or the second period (reference date)? Apart from the tenor, which elements do you consider necessary for specifying the TO for FRAs and why?

<ESMA_QUESTION_MIFID_TO_26>
[Both are relevant and, what is more, just looking at the combination of both will show if a FRA variant is frequently traded with sufficient liquidity, e.g. 3M/6M, 6M/6M or 6M/12M]
<ESMA_QUESTION_MIFID_TO_26>

Q27. Would you consider the two index CDS as sufficiently liquid for being covered by the TO?

<ESMA_QUESTION_MIFID_TO_27>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_27>

Q28. Do you agree that the TO for CDS should cover the on-the-run series as well as the first thirty working days of the most recent off-the run-series? If not, please explain why and propose an alternative approach.

<ESMA_QUESTION_MIFID_TO_28>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_MIFID_TO_28>

Q29. Apart from the tenor, which elements do you consider indispensable for specifying the TO for CDSs and why?

<ESMA_QUESTION_MIFID_TO_29>
[For example, type (single name, index or basket), default payout profile (e.g. fixed or floating), events when a default occurs including calculation until a default occurs, e.g. in the case of tranches with individual attachment/detachment points, or in the case of baskets (first-to-default, nth-to-default, etc.)]
<ESMA_QUESTION_MIFID_TO_29>

Q30. Do you agree with the proposed application dates? If not, please provide an alternative and explain your reasoning.

<ESMA_QUESTION_MIFID_TO_30>
[See our preliminary remarks and replies to questions 7 and 15. We strongly recommend implementing the trading obligation once sufficient data from the clearing obligation and pre-trade transparency requirements is available. Any premature introduction of the trading obligation would entail needless misalignments and complications.]
<ESMA_QUESTION_MIFID_TO_30>

Q31. Do you consider necessary to provide for an additional phase-in for the TO for operational purposes and to avoid bottlenecks? If yes, please provide a proposal on the appropriate length of such a phase-in for the different categories of counterparties and explain your reasoning.

<ESMA_QUESTION_MIFID_TO_31>
[GBIC strongly supports a phase-in which could be based on, for example, the same counterparty categories as for the CO. However, small financial institutions should be exempted due to the considerable effort required on their part and for proportionality reasons.]
<ESMA_QUESTION_MIFID_TO_31>

Q32. Which types of package transactions are carried out comprising components of classes of derivatives that are assessed for the purpose of the TO, i.e. IRD and/or CDS? Please describe the package and its components as well as your view on the liquidity of those packages.

<ESMA_QUESTION_MIFID_TO_32>
[There are all kinds of combinations, i.e. components of the same asset class mixed with each other (often IRD with IRD), just as there are (although quite less frequently) combinations of components across asset

classes like, for example, an fx derivative with an IRD derivative, or IRD with CDS, IRD with EQD, commodities with IRD, and so on. Packages are typically less liquid and their components may vary slightly in some terms compared to the single product. Package transactions where not all components of the package are classified as liquid and therefore qualify for the TO would subsequently mean that the entire package should also be exempt from the TO. <ESMA_QUESTION_MIFID_TO_32>

Q33. Are there packages that only comprise components of classes of derivatives that are assessed for the purpose of the TO? Do you consider those package transactions to be standardised and sufficiently liquid?

<ESMA_QUESTION_MIFID_TO_33>

Yes, there are packages that may consist only of components that would fall as such under the TO. However, as these have been designed based on client needs and may contain small deviations from standard products like single payments, they may look alike as belonging to a certain sub-class but are usually not liquid enough and not tradeable on a trading venue. |

<ESMA_QUESTION_MIFID_TO_33>

Q34. Do you agree that package transactions that are comprised only of components subject to the TO should also be covered by the TO or should the TO only apply to categories of package transactions that are considered liquid? If not, please explain.

<ESMA_QUESTION_MIFID_TO_34>

The TO should only apply to categories of package transactions that are itself considered liquid. Even if a package transaction consists only of components which fall as such under the TO, such package transaction is not liquid enough and not tradeable on a trading venue. Only trades which exactly match the terms of products tradeable on trading venues should fall under the TO, similar to the approach for analysing/determining product classes subject to the clearing obligation. |

<ESMA_QUESTION_MIFID_TO_34>

Q35. How should the TO apply for package transactions that include some components subject to the TO, whereas other components are not subject to the TO?

<ESMA_QUESTION_MIFID_TO_35>

The TO should be applicable to all legs of the package. If any leg is not subject to the TO, then the whole package should not be subject to the TO. The same applies to any deferrals or waivers. As such packages are typically designed based on client needs, irrespective of whether they contain components which fall under the TO, the TO should not apply to package transactions as they are not liquid enough and, as such, are not tradeable on a trading venue. |

<ESMA_QUESTION_MIFID_TO_35>