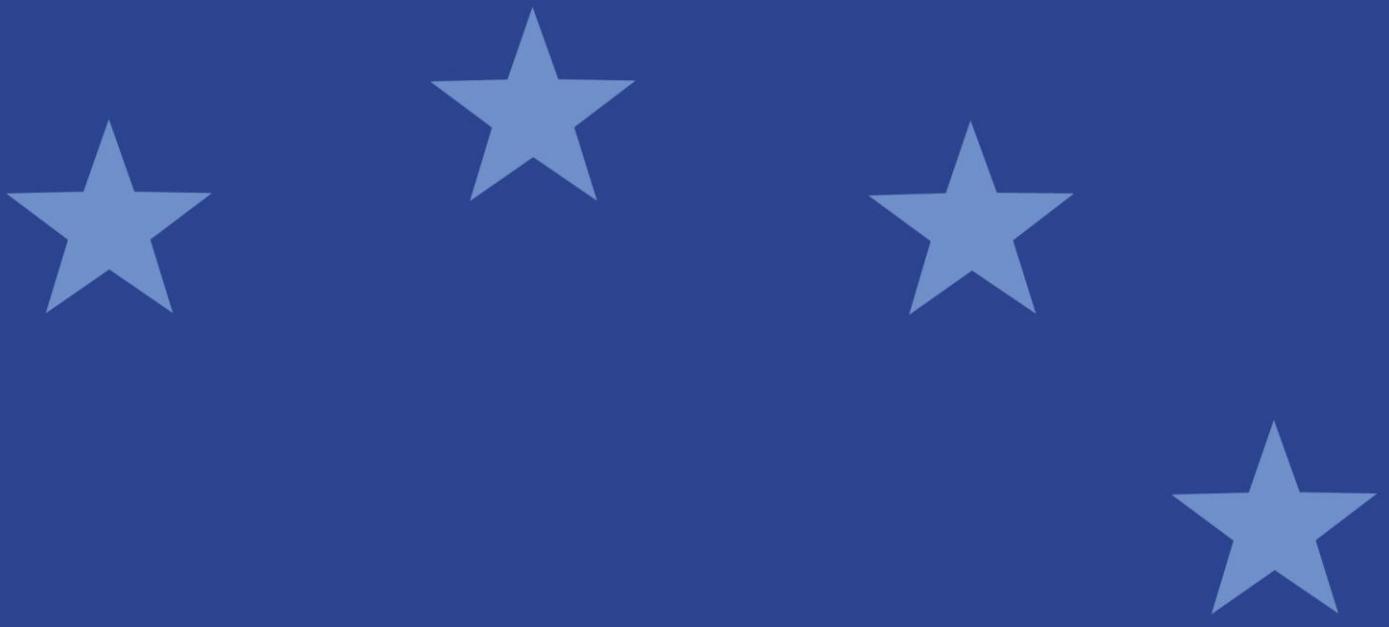




European Securities and  
Markets Authority





## **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](http://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](http://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 Federation of European Securities Exchanges (FESE) represents 36 exchanges in equities, bonds, derivatives and commodities through 19 Full Members from 30 countries, as well as 1 Affiliate Member and 1 Observer Member. FESE represents public Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation.

At the end of 2015, FESE members had 9,201 companies listed on their markets, of which 6% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised markets that allow small and medium sized companies across Europe to access the capital markets; 1,299 companies were listed in these specialised markets/segments in equity, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a single market in capital markets.

FESE is registered in the European Union Transparency Register with number 71488206456-23.

### **General comments on the link between EMIR Clearing Obligations and MiFIR Trading Obligation & Transparency Regime:**

During the consultations by ESMA on the clearing obligation, FESE raised the following concerns, which are – although not explicitly addressed in this consultation – very relevant for the intent and purposes of the trading mandate as set by MiFIR level 1. FESE urges ESMA to consider the overall impact that its work on the EMIR Clearing Obligation will ultimately have on the final implementation of the MiFIR Trading Obligation. Critically, because of the way the trading obligation is designed, any instrument which does not fall under the scope of the EMIR clearing obligation will not be eligible for the trading obligation.

We have two fundamental points to make in our response to this consultation:

- Firstly, FESE rejects the conclusions as regards the exclusion of OTC equity derivatives from the clearing obligation. In this respect, we would like to see a more regional/national approach taken to the assessment of the relative relevance of derivative contracts;
- Secondly, FESE would like to highlight that ESMA's proposed framework is silent on the risk of seeing exchange traded derivatives which have been historically cleared and traded on transparent venues shifting from those regulated venues to OTC environments.

FESE considers that both ESMA's decision regarding equity derivatives and the risk of a shift from a regulated market to an OTC trading environment are completely at odds with the objectives set out by the G20 and implemented by EMIR and the MiFID Review.

In respect of the second risk, while all derivative instruments traded on a Regulated Market will be subject to an obligation to clear pursuant to MiFIR Article 29, look-alike contracts traded OTC (as defined in EMIR) would only be subject to a requirement to clear if ESMA subsequently were to mandate the products for clearing. This leaves open the potential for a loophole in the short-term.

For instance, certain FESE members offering trading in securitised derivatives, foreign exchange derivatives, and contracts for difference (CFDs) (classified as derivatives under Annex I Section C of MiFID II) on their regulated markets are currently observing a significant shift of trading in these products to OTC platforms as defined under EMIR. This shift to OTC means that clearing which was hitherto applied to these products on regulated markets will not be required automatically in an OTC environment. Similar dynamics could easily be replicated across other products such as equity derivatives.



While ESMA could proceed with an assessment as to whether such look-a-like contracts should be subject to the clearing mandate under EMIR, FESE would strongly suggest that a simpler and more effective route would be to automatically require clearing for look-a-like products where clearing is already required for that class of products on the Regulated Market.

Therefore, FESE believes that ESMA should consider an automatic clearing obligation for lookalike OTC equity derivatives. Failing that, the integrity of some exchange-traded equity derivatives markets may be threatened, especially at regional level, as these markets would be presented with a non-cleared alternative. For these products to fall outside the clearing obligation would also cause them not to fall within the trading obligation under MiFIR and would therefore exacerbate fragmentation of these markets, which cannot be in the regulatory interest.

Leaving exchange-traded derivatives outside of EMIR's and MiFIR's clearing, trading, and transparency obligations would also encourage trading on venues which are not subject to any clearing requirements. For investors, this would translate into a perverse incentive to shift trading from transparent and cleared venues to the OTC space. It would certainly seem counter-intuitive that the implementation of EMIR and the MiFID Review should result in a less transparent framework for instruments which are already available to trade on transparent and multilateral markets. As a matter of fact, we are already witnessing significant shifts in trading of these products from regulated venues to OTC platforms in several Member States.

While these products may not be as systematically important as others on a global scale, such a scenario would be a perverse outcome and completely at odds with the political ambitions of the G20, EMIR and the MIFID Review in respect of OTC derivatives.

In addition to harming overall transparency levels, this raises important investor protection issues, both because OTC trading in these instruments is not subject to central counterparty clearing and due to the predominantly retail nature of these markets. Investor warnings have already been issued by a number of securities regulators in Europe for forex derivatives and CFDs.

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

While we support ESMA's view regarding non-financial counterparties, an additional element in Level 1 is the general forward-looking criterion in MiFIR Article 32(3):

*“In preparing those draft regulatory technical standards, ESMA shall take into consideration the anticipated impact that trading obligation might have on the liquidity of a class of derivatives or a relevant subset thereof and the commercial activities of end users which are not financial entities.”*

We believe the forward-looking assessment should be viewed as a stand-alone criterion and in a broader context. Specifically, we had understood that it was introduced during the Level 1 discussions to ensure that a lack of liquidity in OTC markets would not automatically rule out such derivatives from consideration under the trading obligation. Instead, we interpreted this provision as requiring ESMA to consider the future levels of liquidity that would develop as a result of trading on regulated trading venues given the likely contribution of specialist proprietary trading firms, a source of liquidity not available in OTC markets where inter-bank business predominates. The addition of those proprietary trading firms to the market in OTC derivatives products would help to facilitate tighter bid offer spreads and deeper liquidity.

We believe this expectation could be assessed by consulting trading venues and specialist traders to understand the appetite, and consequently the anticipated increased liquidity of the financial instrument being considered for inclusion within the trading obligation.

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<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>

No, we do not agree. The reason behind the trading mandate is to enable a safe and transparent environment for these products to be traded. The transparency framework for trading venues already caters for LIS trades in the sense that waivers exist for those trades. Should a product be trading mandated, it should be able to benefit from the LIS waiver and should therefore not be exempted from the trading mandate beforehand. The LIS waiver would otherwise become redundant.

|  
<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>

In general, we feel the trading mandate and the clearing mandate could be aligned as much as possible in the sense that the Level 1 goal of increasing safe and transparent trading should be upheld. It should however not be fully aligned in the sense that the trading mandate carries an additional criterion, being the forward looking criterion. As that is not part of the transparency mandate, we feel a full alignment cannot be expected.

|  
<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>

|TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_16>

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

<ESMA\_QUESTION\_MIFID\_TO\_17>

|TYPE YOUR TEXT HERE |

<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>

|TYPE YOUR TEXT HERE |

<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>

|TYPE YOUR TEXT HERE |

<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[We believe a period of 6 months should be sufficient as the market will already have had time to adapt to the set clearing obligation. A 6 month period to move towards on-venue trading seems a reasonable option.  
]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<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>  
[TYPE YOUR TEXT HERE ]  
<ESMA\_QUESTION\_MIFID\_TO\_35>