# Reply form for the Consultation Paper on the trading obligation for derivatives under MiFIR

European Securities and Markets Authority

Date: 19 June 2017

## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation 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 **31 July 2017.**

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 under the headings 'Legal notice' and 'Data protection'.

## General information about respondent

| | |
|---|---|
| Name of the company / organisation | Click here to enter text. |
| Activity | Choose an item. |
| Are you representing an association? | ☐ |
| Country/Region | Choose an item. |

## Introduction

***Please make your introductory comments below, if any:***

<ESMA_COMMENT_MIFID_TO_0>

The Securities Industry and Financial Markets Association's Asset Management Group ("**SIFMA AMG**") appreciates the opportunity to respond to ESMA's consultation paper on the trading obligation for derivatives under MiFIR. SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $34 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

We would like to make the following general comments on the consultation paper, before responding to a number of the specific questions on which ESMA has sought feedback:

**Provision for package transactions**

We are concerned by ESMA's conclusion that it lacks a mandate to make special provision for derivatives in a class that it has determined should be subject to the trading obligation under MiFIR, where the derivative is part of a package. Asset managers and their funds and accounts use packages for a variety of reasons, including to manage (and minimise) execution costs and risks and to diversify their portfolio of investments or to achieve a better hedge for their exposures (compared to executing components of packages on a standalone basis). ESMA's position on packages appears to have the result that, if a single component of a package is a derivative in a class that has been declared to be subject to the trading obligation, all components of the package must be concluded on a trading venue, in order for the components to be transacted as a package. Our members are concerned that, even considering the flexibility of execution methods allowed under Articles 28 and 32 of MiFIR, it is not clear that, for all forms of packages, the combinations of instruments transacted as packages will be offered for trading by trading venues, at least, not by the time the MiFIR trading obligation is intended to apply. Whilst it may be possible to trade certain standard, liquid packages on trading venues, on-venue trading of the package as a whole is unlikely to be possible in the case of more bespoke forms of package. We would also like to point out that it is not certain that the swaps that currently benefit from the relief for certain types of packages granted by the U.S. Commodity Futures Trading Commission (CFTC) under the "made available for trade" (MAT) swap execution regime will be brought back into scope of the trade execution requirements in the U.S. when the relief expires. The markets and regulators in the U.S. are still seeking to resolve the problems that arise when a package involves instruments such as bonds or futures which are not traded on a "swap execution facility" (SEF), or derivatives which are outside the jurisdiction of the CFTC. In any event, the fact that the series of no-action letters was needed is an indication of the difficulties that can arise from universally imposing the trading obligation on derivatives that are part of a package. If the MiFIR trading obligation is imposed on package components, without allowing the venues and markets the time needed to develop the infrastructure and protocols to support transacting on-venue all the components as a package, market participants will be restricted. Asset managers may be forced to transact the components of the package separately, leading to increased risks and costs of execution and ultimately to package users paying more to hedge their risks.

**Progress towards equivalency determinations of non-EU venues**

At this point in time (less than six months before the date from when it is intended that the trading obligation will apply), no equivalence determinations have been made in respect of non-EU venues under Article 28 of MiFIR. Moreover, it is unclear whether progress has been made towards establishing the mutual recognition arrangements required by Article 28(1)(d) of MiFIR

with regulators in important jurisdictions such as the United States and countries in the Asia Pacific region. Consequently, even at this late stage, our members are unable to judge the impact that the EU trading obligation for derivatives will have on their trading activities. If a derivative is in a class declared to be subject to the trading obligation in the EU and, at the same time, is also in scope of the CFTC's MAT swaps determinations, in the absence of any mutual recognition by EU and U.S. regulators of EU venues or SEFs, it will be impossible for cross-border dealings in derivatives of that class to continue, unless the venue is of a type which benefits from dual-registration. Market fragmentation was narrowly averted, when CCPs in the key non-EU jurisdictions were finally granted recognition under EMIR, just at the point when the EU clearing obligation for OTC derivatives was coming into effect. If equivalence determinations are not in place well in advance of the application date of the MiFIR trading obligation, our members may be forced to commit time and resources to ensure they have access to qualifying EU trading venues, when ultimately that access may not be needed, or may be needed only for a short period of time.
<ESMA_COMMENT_MIFID_TO_0>

**Q1. Do you agree with ESMA's assessment and proposed way forward for the criteria assessing the number and types of active market participants? If not, please explain your position and how you would integrate these elements into the liquidity test.**

<ESMA_QUESTION_MIFID_TO_1>
Whilst we agree with the revised approach to the liquidity assessment set by ESMA in the consultation paper, compared to the liquidity assessment proposed at the discussion paper stage, for future assessments, we would encourage ESMA to consider CCPs as an additional data source. We continue to believe that it will be important for ESMA to determine, not simply the number of market participants in a given class of derivative, but also whether there are sufficient liquidity providers and other dealers in the class to meet the trading needs of end-users once the trading obligation is imposed. Further, we have doubts about whether ESMA's reliance on Article 28(3) of MiFIR is well-founded. Article 28(3), in summary, requires trading venues and equivalent non-EU venues to make available for trading "on a non-exclusive and non-discriminatory basis" derivatives that have been declared subject to the trading obligation, once the trading obligation applies. To avoid their dealings in derivatives being interrupted, end-users need to be able to establish the necessary arrangements with venues or intermediaries in advance of the trading obligation start-date, to ensure they are permitted access to the venues offering the derivative for trade from the date when the trading obligation applies. If ESMA has found sufficient liquidity in a class of derivatives for the purposes of determining a trading obligation, despite end-users not being granted access to the venues where those derivatives are traded, it is not clear that our members will be able to transact in the derivatives on-venue in order to meet the trading obligation when it applies.
<ESMA_QUESTION_MIFID_TO_1>

**Q2. Do you agree with the revised proposal not to exempt post-trade LIS transactions? If not, please explain and present your proposal.**

<ESMA_QUESTION_MIFID_TO_2>
In general, we find ESMA's conclusion that no exclusion from the trading obligation for large-in-scale trades is needed perplexing. We understand ESMA's rationale to be that a waiver or deferral might be granted from pre- and post-trade transparency by national regulators and MiFIR is not prescriptive about the method by which a derivative in scope of the trading obligation must be concluded on a trading venue. Even taking into account the flexibility of execution methods allowed under MiFIR, our members believe that the RTS need to make it clear that the trading obligation being imposed on a class of derivatives does not prevent the terms of large-in-scale transactions in derivatives of that class being negotiated away from the trading venue (but subject to the venue's rules and procedures), as long as, once its terms have been agreed, the transaction is processed pursuant to the venue's rules and procedures. If this were not the case, we are concerned that our members would face problems with complying with any trading obligation imposed on large-in-scale trades, as dealers are likely to be deterred from providing liquidity in large-in-scale trades for which on-venue trading is mandatory. Indeed, if ESMA does not agree to provide the necessary clarity on execution methods in the RTS, our members would be in favour of ESMA providing for the exemption from the trading obligation for large-in-scale transactions that it originally proposed, irrespective of any waivers or deferrals from pre- and post-trade transparency that might be available for these transactions.
<ESMA_QUESTION_MIFID_TO_2>

**Q3. Do you agree with this proposal? If not, please explain why and provide an alternative proposal for ESMA to populate and maintain the register.**

<ESMA_QUESTION_MIFID_TO_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_3>

**Q4. Do you agree with this proposal? Would you add other parameters e.g. day count convention of the floating leg, notional type (constant vs. variable), fixed rate type (MAC vs. MAC)? If yes, please explain why and provide the parameters.**

<ESMA_QUESTION_MIFID_TO_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_4>

**Q5. For each Case, specify if you agree with the proposal of qualifying the sub-classes as liquid for the purpose of the trading obligation and if not, please explain why and provide an alternative proposal**

<ESMA_QUESTION_MIFID_TO_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_5>

**Q6. Would you also consider any of these possible sub-classes as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?**

<ESMA_QUESTION_MIFID_TO_6>
As a general principle, we are supportive of alignment between the classes of derivatives that are determined to be subject to the EU trading obligation and the classes of swaps in scope of the MAT regime. ESMA itself notes that it is counter-intuitive for fewer classes of Euro-denominated fixed-floating rate swaps to be subject to the MiFIR trading obligation than are subject to the U.S. trade execution requirement. However, we appreciate ESMA's efforts only to determine classes of derivatives to be subject to the trading obligation under MiFIR where it has assessed there to be sufficient liquidity in the class, and do not support derivatives with other contract specifications being considered for inclusion in the trading obligation in MiFIR solely on the ground that derivatives with those contract specifications are included in the trade execution requirement in the U.S. Overall, we would encourage ESMA, for the purposes of future assessments of liquidity, to collaborate with the CFTC on data sources and specifications of the MAT swaps, with a view to ensuring that the EU trading obligation for derivatives is harmonised with the U.S. MAT regime to the fullest extent possible, i.e., in light of the level of liquidity of the contracts in the EU.
<ESMA_QUESTION_MIFID_TO_6>

**Q7. For each Case, specify if you agree with the proposal of qualifying the sub-classes as liquid for the purpose of the trading obligation and if not, please explain why and provide an alternative proposal.**

<ESMA_QUESTION_MIFID_TO_7>
TYPE YOUR TEXT HERE

<ESMA_QUESTION_MIFID_TO_7>

**Q8. Would you also consider any of these possible sub-classes as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?**

<ESMA_QUESTION_MIFID_TO_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_8>

**Q9. For each case, specify if you agree with the proposal of qualifying the sub-classes as liquid for the purpose of the trading obligation and if not, please explain why and provide an alternative proposal.**

<ESMA_QUESTION_MIFID_TO_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_9>

**Q10. Would you also consider the possible sub-classes here below as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?**

<ESMA_QUESTION_MIFID_TO_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_10>

**Q11. Do you agree with this proposal? If not, please explain why and provide an alternative proposal.**

<ESMA_QUESTION_MIFID_TO_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_11>

**Q12. Do you agree with this proposal? If not, please explain why and provide an alternative proposal**

<ESMA_QUESTION_MIFID_TO_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_12>

**Q13. Do you agree to the proposed timeline? If not, please explain why and present your proposal.**

<ESMA_QUESTION_MIFID_TO_13>

SIFMA AMG is concerned by ESMA's insistence on adhering to the MiFID II application date of 3 January 2018, albeit for counterparties in categories 1 and 2 only. Our members are concerned that this timeline does not allow them sufficient time to open accounts and agree the necessary legal documentation with the relevant trading venues, intermediaries and clearing brokers or to familiarise themselves with the venues' or clearing houses' rules and trading protocols in advance of the trading obligation taking effect. As mentioned, this timeline presents particular challenges for packages trading, for which, in some cases, on-venue trading standards have yet to be developed and there remains uncertainty about non-EU venues being deemed equivalent.
<ESMA_QUESTION_MIFID_TO_13>

**CBA QUESTIONS**

**Q14. This first question aims at identifying the category of firm/entity you belong to. Please provide the total notional amount traded in derivatives (trading venues + OTC) in 2016 in thousands euros and the related total number of trades in the relevant boxes**

<ESMA_QUESTION_MIFID_TO_14>

| **Category** | **Number of employees** | **Total Notional traded 2016 (in thousands euros)** | **Total number of trades 2016** |
|---|---|---|---|
| **EMIR Category 1** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **EMIR Category 2** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **EMIR Category 3** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[251-1000]** | TYPE YOUR TEXT | TYPE YOUR TEXT |

| | | | |
|---|---|---|---|
| | | HERE | HERE |
| | | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **EMIR Category 4** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Trading Venue** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| | **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_14>

**Q15. Based on the draft RTS, which percentage of your derivative trading (notional amount and number of trades) do you expect to be captured by the TO? Please provide the data for derivatives globally, and then for interest rate derivatives and for credit default swaps, using 2016 trading data?**

<ESMA_QUESTION_MIFID_TO_15>

| **% of trading captured by the TO** | **Year 2016** |
|---|---|
| % of total notional amount traded in derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total number of transaction in derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total notional amount traded in interest rate derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total number of transactions in interest rate derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total notional amount traded in credit default swaps captured by the TO | TYPE YOUR TEXT HERE |

| | |
|---|---|
| % of total number of transactions in credit default swaps captured by the TO | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_15>

CBA Questions 16 and 17 are to be answered by investment firms and significant non-financial counterparties

**Q16. Out of the trading activity expected to be captured by the TO, as identified under Q2, which % is already traded on an EU regulated market, an EU Multilateral Trading Facility (MTF), a US Swap Execution Facility (SEF) or another third-country trading venue?**

<ESMA_QUESTION_MIFID_TO_16>

| **Trading activity expected to be captured by the TO** | **Traded on a regulated market** | **Traded on an EU MTF** | **Traded on a US SEF** | **Traded on another 3rd country venue** |
|---|---|---|---|---|
| **% of total trading volume captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **% of total number of transactions captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_16>

**Q17. Compliance with the TO may require some further trading arrangements. Which of the following statement would you consider relevant regarding the steps you might be taking to that end? Please add any comment as appropriate.**

<ESMA_QUESTION_MIFID_TO_17>

| Arrangements contemplated to comply with the TO | Yes | No | Comments |
|---|---|---|---|
| 1. Current membership/Direct Electronic Access (DEA) arrangements are sufficient to comply with the TO | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 2. I intend to become a member/ participant/client of one (or multiple) EU trading venues for the first time | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 3. I intend to become a member/participant/client of additional EU trading venues | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

| | | | |
|---|---|---|---|
| 4. I intend to seek access to EU trading venues through Direct Electronic Access (DEA) | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 5. I intend to combine membership (2.or 3) with DEA (4.) | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 6. I am considering other arrangements; Please explain those arrangements in the Comments section | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_17>

**CBA Question 18 is to be answered by trading venues**

**Q18. Question 5: Which of the derivatives subject to the TO, based on the draft RTS, are currently available for trading on your trading venue? Do you consider extending trading on your venue to other derivatives subject to the TO?**

<ESMA_QUESTION_MIFID_TO_18>

| **Derivatives potentially subject to the TO currently available for trading on your venue** | **Derivatives potentially subject to the TO that may become available for trading on your venue** |
|---|---|
| TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_18>

**CBA Questions 19 to 22 are to be answered by all respondents**

**Q19. Based on the draft RTS, which impacts do you expect from the TO in the short and medium term? Please elaborate as appropriate under Positive or Negative impact.**

<ESMA_QUESTION_MIFID_TO_19>

| TO Impact | Positive Impact | Negative impact |
|---|---|---|
| Impact on your business model/ organisation/ client relationship | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Impact on your revenues | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Impact on market structure (e.g. principal vs. agency trading etc). | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

| | | |
|---|---|---|
| | | |
| Impact on market liquidity and execution costs. | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Other impacts. Please elaborate | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_19>

**Q20. Is there any specific provision in the draft RTS that you would expect to be a source of significant cost? If so, please elaborate.**

<ESMA_QUESTION_MIFID_TO_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_MIFID_TO_20>

**Q21. Please provide an indication, even a rough one, of compliance costs (in thousands of euros).**

<ESMA_QUESTION_MIFID_TO_21>

| Draft RTS on the TO | a. IT costs | b. Training costs | c. Staff costs | d. Other costs (please identify) | Total costs ( if a., b, c or d. are not available separately |
|---|---|---|---|---|---|
| One-off costs | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Recurring costs (on an annual basis} | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_21>

**Q22. Taking into account the size of your firm, would you qualify overall compliance costs with the draft RTS as low, medium or high?**

<ESMA_QUESTION_MIFID_TO_22>

| |
|---|
| Please enter here “Low”, “Medium” or “High”<br>TYPE YOUR TEXT HERE |

<ESMA_QUESTION_MIFID_TO_22>