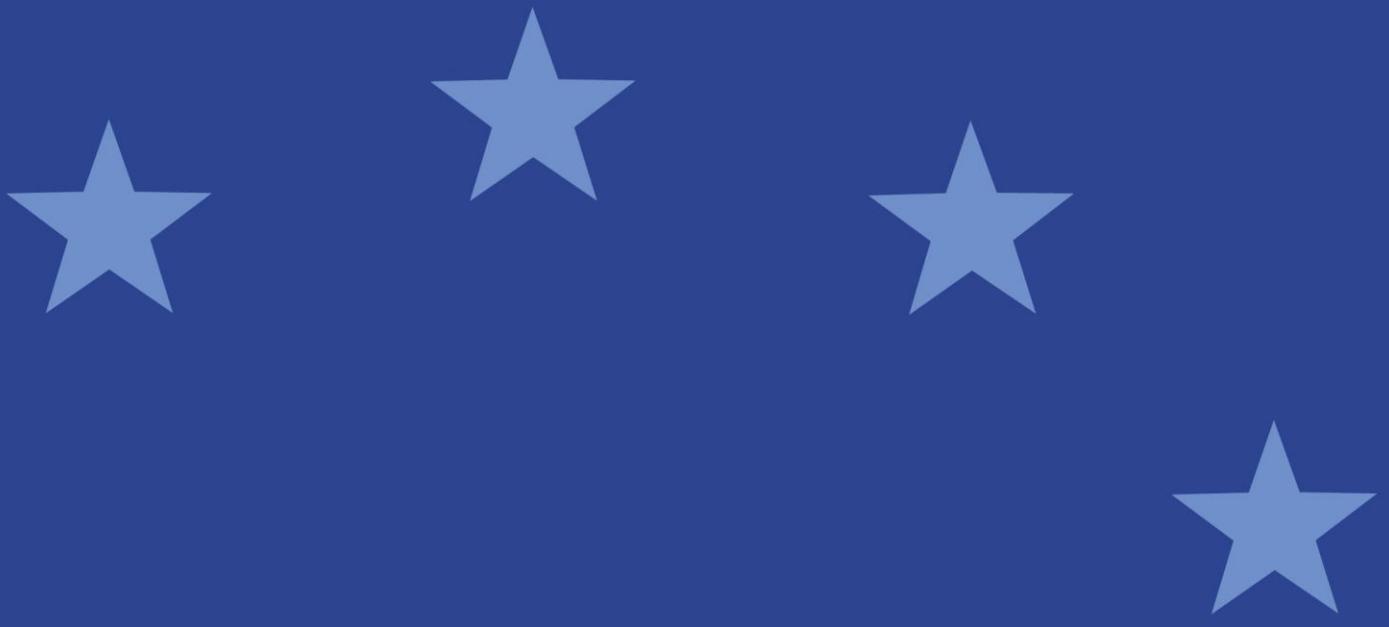




European Securities and
Markets Authority





EBF reply to 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 European Banking Federation (EBF) welcomes the opportunity to comment on ESMA's discussion paper regarding the trading obligation for derivatives under MIFR.

General comments [*To be developed further*]:

- The EBF is of the opinion that the data used by ESMA for liquidity assessment in DP is not of sufficiently high quality. In particular there is a risk that a trading obligation could harm the liquidity in smaller currency areas in the EU, such as Sweden, Norway and Poland.
- Regarding the data, the liquidity test in the discussion paper is based on trade data from H2 2015, i.e. from pre-EMIR. In order to avoid that the trading obligation causes unintended harm to well-functioning markets, the EBF proposes that ESMA should use data from CCP once the clearing obligation has been in force for one year. ESMA can then access and decide which derivative are TO mature. Such an approach would also enable ESMA to take into account the effects that the MiFIR transparency regime will have on the liquidity of the instruments. Furthermore, only cleared trades should be used in any TR data assessments.
- The EBF would also like to underline the importance of introducing into the framework a suspension mechanism (or similar) that would allow an instrument subject to trading obligation to be traded OTC e.g. if there suddenly is no longer a CCP or trading venue available for that instrument or the liquidity falls below the liquidity thresholds. In such situations it is not reasonable that firms and counterparties need to wait for a new or amended RTS (i.e. which removes the trading obligation) to be adopted before being able to trade (EMIR has the same issue).
- Further liquidity criteria's, ESMA is required to consider "number of market makers under a binding written agreement or an obligation to provide liquidity". It is therefore our understanding that an instrument for which there are no market makers under binding writing agreement or any trading venue cannot be subject to the TO. Further, when executing the liquidity assessment for Fixed-Floating Interest Rate Swaps as well as Overnight Index Swaps further criteria's – payment frequency, reset frequency, day count convention and trade start type – need to be taken into consideration.
- International harmonisation: From a practical perspective and in order to prevent 'jurisdiction optimisation' legislators should aim for (to the extent possible) aligning methodologies used for defining TO mature products as well as harmonising the palette of products encompassed by the TO between jurisdictions. The European regulation on Derivatives TO under MiFIR is going to co-exist with similar regulation in other jurisdictions. As an example, MiFIR should (like US MAT) take contract terms (like payment frequency, reset frequency, day count convention and trade start type) into consideration when executing the liquidity assessment for Fixed-Floating Interest Rate Swaps as well as Overnight Index Swaps. In our view only standard (with regards to payment frequency, reset frequency and day count convention) and spot-starting contracts should pass the liquidity test and thus be subject to the Derivative TO.
- We also ask for a clarification of the meaning of counterparties, market participants and market makers in the document as these sometimes seems to be used interchangeably throughout the ESMA consultation paper.



< 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>
<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>

No, we do not agree with the statement that all derivatives considered for the CO today are admitted to trading or traded on at least one trading venue.

Interest rate swaps with non-standard terms such as amortizing capital with different methods of amortization, odd maturity dates, different value dates for the pay leg and receive leg used for asset swaps, and different repricing tenors for each leg etc. are not outright traded in trading venues. Thus, while IRSs with non-standard terms have to be cleared based on the CO, the requirement to trade through specified trading venues would restrict the ability to hedge particular exposures such as loans and bonds and perform a hedge effectiveness relationship between our exposures and interest rate swaps.

Also to our knowledge PLN and NOK derivatives are not available for trading on venues. As regards SEK IRS, they can be traded via Bloomberg's MTF in limited size by bank clients. The banks contributing prices do not allow other SEK market makers to see their price feed. Spreads on Bloomberg's MTF are wide in SEK (1.5 bps), hence these prices serve more as a mid-level indication for SEK IRS for price takers. In other words the SEK IRS market is traded close to 100% OTC i.e. bilaterally, and risk is absorbed in the bilateral sphere. Although a venue option exist, the flow on it is so marginal one can hardly say the product is traded on venue.

Furthermore, the EBF is of the opinion that some liquidity criteria's are needed for venues. It is not sufficient that a product is available at one venue: active trading needs to take place at two or more venues before the instrument can be subject to the Derivative 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>

ESMA has in the consultation paper based the liquidity assessment on the number of distinct counterparties having traded the specific product in a historic period (H2 2015). EBF believes that ESMA's liquidity assessment is misleading foremost because the measure used express market breadth (number of counterparties with sporadic interest in the product) rather than market depth/liquidity (number of counterparties with continuous interest in the product).

Instead we recommend ESMA to base their assessment on the number of active market makers/participants quoting bid price and ask price with a limited spread for a certain amount size on a continuous basis. We thereto suggest the number of market makers/participants to be 10 as a minimum. 10 is also the number of primary dealers Central Banks normally target to have in government bond markets and they normally also have to sign a binding market maker agreement. However, in OTC derivatives markets, firms that provide liquidity do not have binding written agreements or other formal commitments with a venue.

If ESMA continue with their current methodology and base the liquidity assessment on the number of distinct counterparties having traded the product in a historic period, a minimum of 100 distinct counterparties would – in EBFs view – be an appropriate threshold.

Seen from our perspective it's irrelevant whether the quotation is taking place under a written agreement or not.

Further it's important to bear in mind liquidity is not a static concept. Liquidity can vary considerably over time, and has historically dropped rapidly due to sudden market circumstances and in times of high volatility.

One reliable alternative source of data would be from CCPs. |
<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 EBF is of the opinion that any number of market makers (as defined in Q3) that is not a double digit would be too low and would negatively impact the liquidity, especially in adverse market conditions.

The number of market participants is a poor measure for liquidity. Especially in smaller markets such as the Scandinavian markets, participants may enter on an opportunistic basis, while only a very small number of banks operate as permanent liquidity providers / market makers. A trading obligation in Scandinavian currency instruments would therefore create undue risk to liquidity providers, and further reduce liquidity. The number of liquidity providers would therefore be a more precise liquidity measure. |

<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>

[No. In the opinion of the EBF, the more trading venues that offer trading of a class of derivatives does not necessarily mean increased liquidity. Only because the venue offers trade in an instrument does not mean that the instrument is de facto traded. In addition it should be noted that a very large number of trading venues could lead to fragmented markets which is not necessarily good for liquidity.]

<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>

There needs to be more than one venue otherwise there is a risk that banks would not be able to trade the instrument, because they are not members of that particular venue.

A derivative needs to be actively traded among an appropriate number of market participants on at least two trading venues. This is the only way to secure (1) sufficient liquidity in the instrument at the specific trading venue, (2) competition among venues and thus fair pricing of venue trading and (3) confidence of continuous trading possibilities even if one venue should suddenly stop its activities (i.e. back-up trading venue solution).

Multiple venues offering trading in a particular instrument does not indicate sufficient liquidity, and does not provide a guarantee that market participants would not be shut out of the market. Some of the currencies included in the clearing obligation are not traded on venues today, and have market participants too small in scale to invest in infrastructure supporting venue trading and clearing. A trading obligation would therefore have negative effects on liquidity.

<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 reply to Q 8.]

<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>

[On some derivatives markets, firms that provide liquidity do not have binding written agreements or other formal commitments with a venue. Therefore, the question of the number of market makers with binding written agreement is not relevant.

Please also note that in the view of EBF, the term “market maker” and “other liquidity provider” is unclear in MiFID II/MiFIR. This leads to significant implementation challenges. For instance, in



our opinion, the term market maker and liquidity provider in RTS 27 must refer to on venue market makers/liquidity providers. For off venue OTC-trading many of the requirements in RTS 27 simply do not make sense. |

<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>

|See reply to Q8 |

<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, the average size of spreads should receive a much lower weighting in the liquidity assessment.

Moreover in point 91, the EBF would like to strongly object to the assumption that spreads will narrow as a result of the MiFIR transparency regime. In particular for markets where liquidity is provided by market makers/liquidity providers that trade against own account, we believe that the effect will in fact be the opposite, i.e. that the spreads will become wider. |

<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>

|For certain swaps this information is not available, e.g. IRS SEK. |

<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>

|The EBF does not think it is possible to find such a proxy. |

<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>



Yes, the EBF agrees with the approach to assess the possible effects on non-financial end users by using information on the number and type of market participants, average frequency and average size of transactions, i.e. not to include average size of spread.

The EBF supports a gradual introduction of the trading obligation, see reply to Q 30. In particular it would be useful to wait for reliable data from CCP and to properly analyze the effects on liquidity on the transparency regime before deciding on a trading obligation. Especially for instruments close to the liquidity 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>

The EBF strongly supports the introduction of an exemption from the trading obligation for larger trades, i.e. similar to the block trade exemption in the US. Such exemption could help to mitigate the risks of unintended consequences that the trading obligation otherwise could have on some professional markets (i.e. interbank).

However, as regards the level of the threshold, we think that post trade LIS is too high.

No additional conditions should apply.

<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>

The EBF does not consider alignment with transparency rules in MiFIR should be a priority as these rules have a different purpose than the trading obligation. In our opinion, it is better to focus on a well-calibrated regime of the trading obligation and to avoid unintended consequences.

<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>

<ESMA_QUESTION_MIFID_TO_16>

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



<ESMA_QUESTION_MIFID_TO_17>

The EBF agrees to the use of unbroken tenors.

As regards forward started derivatives, tenors should not be computed as the difference between the maturity and execution date. Both execution and effective dates are relevant when trading these instruments as a 10-year out-right and a 5-year forward starting 5-year swap have distinctly different risk profiles, and hence should not fall within the same category. |

<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>

Yes, most relevant explanations seem to be included, although additional reasons for executing IRSs outside the benchmark dates could be related to exposures of the banking book such as loans and funding agreements. |

<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>

The EBF does not think that certain currencies (e.g. IRS SEK 10 yr) are sufficiently liquid to be subject to the trading obligation. We note that the trading volumes have decreased since the measurement period and are worried that ESMA's assessment is not based on data of sufficient quality.

We expect this to be proven when/if ESMA (1) implement proper solutions to the data quality (including update of trading data) issues addressed under our general comments and (2) adopt and base the liquidity assessment on number of active market makers/participants (proposed minimum 10) quoting bid price and ask price with a limited spread for a certain amount size on a continuous basis as suggested in our response to Q3.

As regards the liquidity criteria, the EBF notes that ESMA have used the same as in RTS 2 (see table 7 on page 48 DP). However for the purposes of deciding whether an instrument is sufficiently liquid to be traded solely on trading venues, we think these thresholds are too low - in particular EUR 50 M average notional per day and 80 percent of the days traded. As mentioned in our reply to Q 15, it is much more important to have a regime that is well-calibrated than to aim for alignment with the transparency regime which serves another regulatory purpose. |

<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>

We do not understand the term "distinct counterparties" and notes that there is no definition in the DP which makes the data difficult to evaluate. |



As stated in our response to Q3, ESMA is recommended to base their assessment on the number of active market makers/participants quoting bid price and ask price with a limited spread for a certain amount size on a continuous basis. Further we suggest the number of market makers/participants to be 10 as a minimum.

<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>

Only transactions with standard market convention and unbroken dates should be included in the trading obligation. |

<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>

In the opinion of EBF, OIS are not liquid. |

<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>

Same comments regarding liquidity criteria as for IRS, see reply to Q 20. |

<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>

Only transactions with standard market convention should be included in the trading obligation |

<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>



|Yes, EBF agrees that FRA should not be considered for the TO |
<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>
|Not applicable. |
<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>
|No, the EBF does not consider the two CDS index to be sufficiently liquid for being covered by the TO. |<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>
|EBF does not agree with the proposed application dates. We believe there needs to be given sufficient time for banks to enter membership agreements with venues. Consequently we suggest a phase in of TO that gives sufficient time for banks to act in the course of the events when a product (1) passes the liquidity assessment test and (2) is admitted to trading on a trading venue and until the TO enters into effect.

In our view ESMA should await announcing application dates until the clearing obligation has been in force for a full year and data from CCPs are available. Firstly ESMA could avoid some of the problems with unreliable data mentioned in our general comments above. Secondly, this approach would enable ESMA to wait and see which effect the transparency rules will have on the liquidity. Thirdly, it should be noted that the adjustments for many clients to a trading obligation can be administratively burdensome and costly, in particular taking into account that the technical solutions etc. will have to be built only for trading in one type of interest rate derivative. A cautious approach is therefore recommended.

Furthermore the proposed application dates should be in line with any potential extension of the clearing requirement for Category 3 financial institutions.

<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>

Please also see reply to Q 30 .

Yes, particularly for Category 3 financial institutions which may not be using MTFs at the moment, an additional phase-in should be provided in order for such institutions to understand and implement the operational requirements for such trading to take place. For Category 3 financial institutions at least a year of additional phase-in should be provided. |

<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>

One “package” could be simultaneous trading in IRS and cash bond (“Asset Swaps”). Others could be combinations of two or more interest rate swaps (“Curve trades” and “Butterflies”).

It seems unlikely that any of these packages independently would qualify as liquid instruments. |

<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>

The packages of IRS and cash bonds are not standardised. |

<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>

Yes. Only packages where all components are subject to TO should be covered by the TO. It would not be workable for firms to be subject to a trading obligation for certain currencies (e.g. IRS SEK 10 yr) when trading in a package together with a bond

<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>

For package transactions that include some components subject to the TO and others not, the TO should not apply.

<ESMA_QUESTION_MIFID_TO_35>