



European Securities and
Markets Authority

Consultation Paper

The trading obligation for derivatives under MiFIR



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **31 July 2017**.

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 close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response 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 heading [Legal Notice](#).

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from trading venues and from counterparties trading OTC-derivatives that may become subject to the trading obligation.

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Acronyms used

AIF	Alternative Investment Fund
AIFMD	Alternative Investment Fund Managers Directive (Directive 2011/61/EU)
APA	Approved Publication Arrangement
CA	Competent Authority
CBA	Cost Benefit Analysis
CEA	Commodity Exchange Act
CCP	Central Counterparty
CDS	Credit Default Swap
CFTC	Commodity Futures Trading Commission
CFD	Contract-for-difference
CO	Clearing obligation
CP	Consultation Paper
CTP	Consolidated Tape Provider
DCM	Designated Contract Market
DP	Discussion paper
EEA	European Economic Area
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories
ESMA	European Securities and Markets Authority
EU	European Union
FRA	Forward rate agreement
FX	Foreign Exchange
IRS	Interest Rate Swap
LEI	Legal Entity Identifier
LIS	Large in scale
MAT	Made available to trade
MIFID II	Markets in Financial Instruments Directive II – Directive 2014/65/EU of the European Parliament and the Council
MIFIR	Markets in Financial Instruments Regulation – Regulation (EU) 600/2014 of the European Parliament and of the Council
MRM	Minimum Remaining Maturity

MTF	Multilateral trading facility
OIS	Overnight index swap
OTC	Over-the-counter
OTF	Organised trading facility
RFQ	Request for quote
RM	Regulated Market
RTS	Regulatory Technical Standard
RTS 2	Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives
RTS 4	Commission Delegated Regulation (EU) 2016/2020 of 26 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation
SEC	US Securities and Exchange Commission
SEF	Swap Execution Facility
SSTI	Size specific to the instrument
TR	Trade Repository
TO	Trading obligation

1 Executive Summary

Reasons for publication

This consultation paper (CP) explains ESMA's revised approach for implementing the trading obligation for derivatives as foreseen in Articles 28 and 32 of Regulation (EU) No 600/2014 of the European Parliament and the Council on markets in financial instruments following the publication of a discussion paper (DP) in September 2016. Stakeholders are invited to provide feedback on the revised approach, the liquidity analysis and the draft RTS and CBA in the Annexes.

The input from stakeholders should help ESMA to finalise the draft regulatory standards implementing the trading obligation (TO) for derivatives. The submission of supportive data would be particularly appreciated and kept confidential where requested.

Contents

Sections 3 and 4 provide an overview of the process for implementing the TO for derivatives. Feedback received on the DP and the revised approach for the purpose of this CP is also outlined. Section 5 presents ESMA's approach concerning the register to be maintained by ESMA for the TO. Sections 6 and 7 contain the liquidity analysis for interest rate derivatives and Index CDS based on a dataset covering the second half of 2016. Finally section 8 discusses the phase-in of the TO for derivatives. Annex II contains the draft RTS and Annex III the high-level draft CBA, including further questions to stakeholders related to the CBA.

Next Steps

On the basis of the responses received to this CP, ESMA will finalise the draft RTS and will submit the final report to the European Commission for endorsement.

2 Introduction

Article 32 of MiFIR

1. *ESMA shall develop draft regulatory technical standards to specify the following:*

- (a) Which of the class of derivatives declared subject to the clearing obligation in accordance with Article 5(2) and (4) of Regulation (EU) No 648/2012 or a relevant subset thereof shall be traded on the venues referred to in Article 28(1) of this Regulation;*
- (b) The date or dates from which the trading obligation takes effect, including any phase-in and the categories of counterparties to which the obligation applies where such phase-in and such categories of counterparties have been provided for in regulatory technical standards in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012.*

ESMA shall submit those draft regulatory technical standards to the Commission within six months after the adoption of the regulatory technical standards in accordance with Article 5(2) Regulation (EU) No 648/2012 by the Commission.

Before submitting the draft regulatory technical standards to the Commission for adoption, ESMA shall conduct a public consultation and, where appropriate, may consult third-country competent authorities.

2. *In order for the trading obligation to take effect:*

- (a) The class of derivatives pursuant to paragraph 1(a) or a relevant subset thereof must be admitted to trading or traded on at least one trading venue as referred to in Article 28(1); and*
- (b) There must be sufficient third-party buying and selling interest in the class of derivatives or a relevant subset thereof so that such a class of derivatives is considered sufficiently liquid to trade only on the venues referred to in Article 28(1).*

3. *In developing the draft regulatory technical standards referred to paragraph 1, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid pursuant to the following criteria:*

- (a) The average frequency and size of trades over a range of market conditions, having regard to the nature and lifecycle of products within the class of derivatives;*
- (b) The number and type of active market participants including the ratio of market participants to products/contracts traded in a given product market;*
- (c) The average size of the spreads.*

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.

ESMA shall determine whether the class of derivatives or relevant subset is only sufficiently liquid in transactions below a certain size.

4. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives or individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 28(1), but for which no CCP has yet received authorisation under Article 14 or 15 of Regulation (EU) No 648/2012 or which is not admitted to trading or traded on a trading venue referred to in Article 28(1).

Following the notification by ESMA referred to in the first subparagraph, the Commission may publish a call for development of proposals for the trading of those derivatives on the venues referred to in Article 28(1).

5. ESMA shall in accordance with paragraph 1, submit to the Commission draft regulatory technical standards to amend, suspend or revoke existing regulatory technical standards whenever there is a material change in the criteria set out in paragraph 2. Before doing so, ESMA may, where appropriate, consult the competent authorities of third countries.

5. Article 28 of MiFIR introduces a TO for derivatives, established in accordance with the procedure set out in Article 32 of MiFIR and further specified in Commission Delegated Regulation (EU) 2016/2020 of 26 May 2016¹ (RTS 4). Derivatives that are subject to the TO may only be traded on a regulated market (RM), multilateral trading facility (MTF), organised trading facility (OTF) or a third country trading venue deemed to be equivalent by the Commission. Article 32(1) of MiFIR mandates ESMA to develop regulatory technical standards (RTS) specifying the derivatives that should be subject to the TO.
6. This CP presents ESMA's approach for determining which derivatives should be subject to the TO based on feedback and comments received from stakeholders responding to the DP on the TO published on 20 September 2016.² Furthermore, this CP includes a new data analysis of those derivatives that are subject to the clearing obligation (CO) under EMIR, in particular fixed-to-float single currency interest rate swaps (IRS) and Index CDS. ESMA

¹ Commission Delegated Regulation (EU) 2016/2020 of 26 May 2016¹ supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation, OJ L 313, 19.11.2016, p. 2.

² Discussion paper - the trading obligation for derivatives, 20 September 2016, ESMA/2016/1389, https://www.esma.europa.eu/sites/default/files/library/2016-1389_dp_trading_obligation_for_derivatives_mifir.pdf

has considered these types of derivatives for the purpose of the TO based on the analysis undertaken for the DP and the feedback provided by stakeholders to the DP.

7. The proposed draft RTS are included in Annex IV and a high-level cost-benefit analysis (CBA) is outlined in Annex III. The final draft RTS will be accompanied by a detailed CBA.

3 The TO procedure under Article 32 of MiFIR and RTS 4

8. Article 32 of MiFIR outlines the procedure for establishing which derivatives should be declared subject to mandatory trading on trading venues. According to Article 32(1) of MiFIR once a class of derivatives has been made subject to the CO under EMIR, ESMA shall draft RTS specifying which derivatives (or a subset of them) should be subject to the TO.

9. Currently the following classes of derivatives are subject to the CO:

- Basis swaps in EUR, GBP, JPY and USD;
- Fixed-to-float IRS in EUR, GBP, JPY, USD, NOK, PLN and SEK;
- Forward rate agreements (FRAs) in EUR, GBP, USD, NOK, PLN and SEK;
- Overnight index swaps (OIS) in EUR, USD and GBP
- Index CDS: iTraxx Europe Main and iTraxx Europe Crossover as of series 17.

10. Article 32(2) of MiFIR specifies that the following two factors have to be met when determining whether a class of derivatives subject to the CO should also be made subject to the TO:

- The venue test: the class of derivatives must be admitted to trading or traded on at least one admissible trading venue; and
- The liquidity test: whether the derivatives are ‘sufficiently liquid’ and there is sufficient third party buying and selling interest.

11. Article 32(3) of MiFIR lists a set of criteria for determining whether a class of derivatives or a relevant subset thereof is sufficiently liquid, and in particular: (i) the average frequency and size of trades, (ii) the number and type of active market participants, (iii) the average size of spreads.

12. As mandated under Article 32(6) of MiFIR, RTS 4 further specifies the criteria for determining whether there is sufficient third-party buying and selling interests in a class of derivatives (or a subset) so that such a class of derivatives (or subset) is considered “sufficiently liquid” to trade on trading venues only.

13. Under Article 32(1) of MiFIR, every time a class of derivatives (or subset) is declared subject to the CO under EMIR, ESMA has 6 months to prepare, consult on, and present to the Commission a draft RTS specifying which derivatives should also be made subject to the TO and as of which date.
14. The legislative deadline to submit the draft RTS for the TO has not been amended in the context of the extension of the application deadline of MiFID II. However, the application of the TO has been affected by the MiFID II delay since the TO can in any case not apply before 3 January 2018, the date of MiFID II application. Therefore, ESMA considered it a better regulatory approach to finalise the draft RTS for the TO closer to the application date of MiFID II, to ensure that the TO standards give an up to date picture of the liquidity in derivatives classes based on data that has been collected reasonably close to 3 January 2018.
15. Lastly, Article 32(4) of MiFIR empowers ESMA to identify and notify to the Commission on its own initiative the classes of derivatives or individual derivative contracts that should be subject to the TO but for which no CCP has yet received authorisation under EMIR or which are not admitted to trading or traded on a trading venue. Following the notification, the Commission may publish a call for development of proposals for imposing the TO on those derivatives. At this stage, ESMA does not intend to identify on its own initiative classes of derivatives that meet the conditions in Article 32(4) of MiFIR and should be subject to the TO. This is without prejudice to ESMA potentially using this possibility at a later point in time, if considered necessary.

4 Feedback from the Discussion Paper and revised approach

4.1.1 Trading venue test

16. In accordance with Article 32(2)(a) of MiFIR, a class of derivative subject to the CO (or a relevant subset thereof) should be admitted to trading or traded on at least one trading venue for the TO to take effect.
17. Against this backdrop, ESMA identified in the DP three main issues arising in order to make this requirement effective:
 - the level of granularity at which this requirement should be applied;
 - how to determine which derivatives are admitted to trading or traded on a trading venue; and
 - how to take into consideration that MiFID II / MiFIR is creating a new type of trading venue for derivatives (namely, the OTF) which will only become effective with the application of MiFID II / MiFIR on 3 January 2018.

18. With respect to the level at which the venue test should be performed, ESMA proposed in the DP to use as a starting point for determining which derivatives should be subject to the TO the classes of derivatives identified for the purpose of the CO. Furthermore, ESMA proposed to consider for interest rate derivatives (IRD) only contracts with an unbroken tenor (benchmark dates). The majority of respondents agreed with this starting point, but many stressed that the TO should ultimately be determined at a more granular level. Indeed ESMA notes that, in most responses received, the concerns expressed with respect to the granularity appear to go beyond the trading venue test and to apply also to the liquidity test and, more generally, to the general calibration of the future TO regime.
19. There was strong support amongst the respondents for considering that standardised derivatives subject to the CO are admitted to trading or traded on a trading venue. About half of respondents considered that all derivatives subject to the CO are available for trading on a trading venue, whereas the other half of respondents stressed that certain contracts with non-standard terms, although being subject to the CO, are not available for trading on any trading venue (e.g. amortized swaps/variable notional, bespoke maturity dates, as well as contracts in smaller currencies). Additionally, some respondents noted that the test for assessing whether a derivative is admitted to trading or traded on a trading venue was not sufficiently granular.
20. Some respondents noted that for IRD, contracts in smaller currencies such as NOK, PLN and HUF are not available for trading on trading venues. Similarly, they stressed that IRD Contracts in SEK are available for trading on one trading venue, but that only a very small fraction of trades takes place on that trading venue, whereas 99% of trades are executed OTC. Based on the feedback, it is unclear whether all FRAs and OIS subject to the CO are available for trading on trading venues. With respect to CDS, responses supported ESMA's assessment that CDS indices subject to the CO are available for trading on several trading venues.
21. ESMA acknowledges those remarks but would like to highlight that the trading venue test should be assessed in light of the results of the liquidity test, which has a corrective effect with respect to the issues reported in the previous paragraphs. For instance, with respect to smaller currencies, the liquidity analysis presented in the DP concluded that IRD denominated in NOK and PLN were not liquid (IRD contracts in HUF are not subject to the CO and, therefore, to the TO).
22. Some respondents commented on how the concept of "traded on a trading venue" should be interpreted in the context of the TO for derivatives. A number of respondents suggested that ESMA should assess whether actual trading takes place when a derivative is admitted to trading. Some other respondents similarly suggested that there should be a proof of effective trading in order for a derivative to be considered traded on a trading venue for the purpose of the TO.
23. ESMA does not agree with those interpretations. ESMA notes that the trading venue test is to be applied, in accordance with Article 32(2)(a) of MiFIR, at a class of derivatives level (or a relevant subset thereof). In this context, it is difficult to establish whether there is

actual trading for all the derivatives within a specific class. This renders the respondents' suggestions above impossible to implement in practice. In addition, Article 28(3) of MiFIR provides that "derivatives declared subject to the TO [...] shall be eligible to be admitted to trading on a regulated market or to trade on any trading venue [...] on a non-exclusive and non-discriminatory basis". ESMA is of the view that the venue test should be applied more broadly. It should focus on whether a specific class of derivatives is available for trading on a European trading venue and not on an assessment of actual trading of a specific derivative. This would be the case where a trading venue offers to trade this class of derivatives to its members and participants or clients.

4.1.2 Liquidity assessment

24. Article 32(2) of MiFIR requires that in order for the TO to take effect "there must be sufficient third-party buying and selling interest in the class of derivatives or a relevant subset thereof so that such a class of derivatives is considered sufficiently liquid to trade only on the venues referred to in Article 28(1)." The concept of 'sufficient liquidity' is further developed in Article 32(3) of MiFIR and in RTS 4 which require ESMA to take the following criteria into consideration when establishing whether a class of derivatives should be subject to the TO:

- a. the average frequency of trades over a range of market conditions;
- b. the average size of trades over a range of market conditions;
- c. the number and type of active market participants; and
- d. the average size of spreads.

25. In the DP ESMA discussed the abstract criteria to be taken into account when determining whether a class of derivatives (or a relevant subset thereof) is sufficiently liquid for the purpose of the TO. In addition, ESMA presented in the CP the results of a preliminary liquidity assessment based on a subset of the liquidity criteria, in particular the average frequency and size of transactions as well as some information on the number of active market participants.

26. This section presents the general feedback ESMA received on the abstract discussion of the liquidity criteria and the revised overall policy approach for the liquidity assessment. It also outlines feedback received from stakeholders on the preliminary liquidity assessment and consequent changes to the liquidity assessment for the purpose of this CP.

4.1.2.1 Average frequency and size of trades over a range of market conditions

4.1.2.1.1 Dataset

27. ESMA proposed in the DP to base the assessment of the TO pending the application of MiFIR for those classes of derivatives that are already subject to or will soon be subject to

the CO mainly on OTC data taken from trade repositories (TR) data for those classes of derivatives that are already subject to or will soon be subject to the CO.

28. In the DP ESMA presented the results of a preliminary liquidity analysis based on TR data covering a period from 01/07/2015 to 31/12/2015. ESMA received a number of comments concerning the choice of TR data and the cleaning of the dataset as performed by ESMA.
29. Overall, many respondents raised concerns about the use of TR data, in particular questioning the quality of the data (e.g. double counting of transactions) and the lack of sufficient granularity of TR data for the purpose of carrying out a precise liquidity assessment (e.g. information on effective date is missing for many transactions which may result in the misallocation of transactions) and for specifying the derivatives that should be subject to the TO (e.g. there is no information on the payment frequency or day count convention in TR data). Furthermore, some respondents considered that an assessment based on post-allocation data results in overestimating the number of trades while lowering the actual size of a transaction.
30. In particular, respondents recommended using alternative and/or additional data sources for performing the liquidity assessment. Proposals received included using data from MTFs and CCPs or US Swap Data Repositories.
31. ESMA agrees that TR data is not without flaws, and that the granularity of the data may not be sufficient for specifying all the attributes of derivatives that should be subject to the TO. Nevertheless, ESMA considers that TR data provides indispensable insights into the trading of OTC derivatives. At this stage, there exists no other exhaustive source of trading data for OTC-data going to the level of detail that is included in TR-data. Looking forward, ESMA may supplement TR data with post-trade data under MiFID II, but pending the application of MiFID II this is not yet possible.
32. ESMA considers that the liquidity assessment could be improved if supplemented by additional data sources. For the purpose of the liquidity assessment of this CP, ESMA therefore included not only TR data but also collected trade data from MTFs, both datasets covering a period from 1 July to 31 December 2016.

Addressing reporting of cleared trades

33. For the DP, ESMA aimed at removing duplicative trades from the TR data set by excluding all cleared trades where one of the counterparties is a CCP or a clearing member. Approximately half of the respondents to the DP supported this approach, whereas the other half was split between the two alternative options for removing duplicative trades that ESMA discussed in the DP. Some respondents were concerned that ESMA was removing too many records from the data and were therefore in favour of an approach removing less records. Others considered that more records should be removed from the data set prior to performing the liquidity assessment.

34. Having reviewed the feedback received, ESMA agrees with the proposals brought forward by a number of respondents to exclude all trades marked as cleared from the dataset (option 3) for excluding duplicated records. This is also the approach that ESMA has taken in the context of developing the amendments to the RTS on data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data, under EMIR³.
35. Some respondents that supported ESMA's proposal, recommended assessing only standalone transactions and removing package transactions from the data set. However, it is not possible to identify components of package transactions based on TR data.

Benchmark tenors for IRDs

36. In the DP ESMA proposed to only impose the TO on IRD contracts with benchmark dates +/- 5 days. In consequence, only contracts with unbroken tenors +/-5 days were included in the data analysis, whereas contracts with a broken tenor were not included in the data analysis. The benchmark date was calculated by dividing the number of days between maturity and execution dates by 365.25 days to take into account leap years.
37. The majority of stakeholders agreed with ESMA's proposal to limit the TO to IRD contracts with benchmark dates. Some stakeholders agreed with the general approach to focus on benchmark dates but were not supportive of using a range of days around the benchmark dates, whereas others recommended using the same maturity buckets as for the CO.
38. Many stakeholders that were supportive of the +/- 5 days of tenor date approach, recommended using the 'effective date' for calculating the benchmark date instead of the 'execution date', in particular for forward starting contracts.
39. Overall, respondents agreed that the majority of trades in IRD contracts are based on benchmark date contracts. Respondents also agreed with ESMA's analysis of the rationale for the significant number of trades falling outside of benchmark dates. These respondents provided a number of additional reasons, such as forward starting swaps that are part of an invoice spread package, asset swaps, novation and unwinds, trades to match a risk profile or specific clients' needs. Some respondents suggested that trades on IMM dates and 'MAC' swaps should also be subject to the TO, even though their trading frequency is still rather low in Europe.
40. Based on the feedback received, ESMA decided to maintain the approach of considering only IRD contracts with benchmark dates for the TO. Furthermore, for this CP ESMA included the effective date field to compute tenors in line with the overall feedback received,

³Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available by trade repositories and operational standards for aggregating, comparing and accessing the data, 23.02.2013, OJ L 52, p. 33 .

instead of the execution date that ESMA used in the DP. This approach will also allow ESMA to consider IMM swaps for the TO.

4.1.2.1.2 Liquidity assessment

Liquidity assessment of fixed-to-float interest rate swaps (IRS)

41. In the DP ESMA carried out the liquidity assessment to determine which derivatives should be subject to the TO based on four criteria. Firstly, only those classes of IRD with more than 1,300 trades during the assessment period, i.e. an average of 10 trades per day, were considered for the further analysis. The categories of derivatives that passed this first criterion were then assessed against three further criteria:

- Average notional amount per day (EUR);
- days traded; and
- number of distinct counterparties⁴.

42. For the purpose of the DP, ESMA did not use fixed thresholds but used the thresholds developed for the liquidity assessment for derivatives in Commission Delegated Regulation (EU) No 2017/583⁵ (RTS 2) for the two criteria average notional amount/day and days traded as a point of orientation. No thresholds were used for the criterion 'number of distinct counterparties'.

43. Overall, most respondents agreed with the results of the liquidity assessment for those single currency fixed-to-float IRS that passed the first criterion (10 trades per day). However, many respondents raised concerns as to the potential inclusion of contracts denominated in SEK to the TO, stating that those contracts are not liquid and are currently only available for trading on one trading venue where only a very small fraction of trading takes place, whereas 99% of trades are executed OTC. Furthermore, a number of stakeholders noted that since only one tenor point in SEK meets all the four criteria, this could be an indication that the class as such is not sufficiently liquid and should not be made subject to the TO.

44. More generally, one respondent recommended that contracts determined in a particular currency should only be subject to the TO where at least 3 tenor points are considered to be liquid. This would avoid high operational and infrastructure costs for firms that have to connect to trading venues for trading contracts in only one or two particular tenors and to avoid negative liquidity impacts.

⁴ The feedback to the criterion 'number of counterparties' is discussed in section 4.1.2.2.

⁵ Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives, OJ L 87, 31.3.2017, p. 229.

45. Furthermore, some respondents raised doubts as to whether contracts in JPY are sufficiently liquid to be subject to the TO. Other responses considered that not all tenors analysed in the DP should be subject to the TO, such as 5y, 7y, 8y and 9y EUR denominated contracts that are often part of package transactions. On the other hand, many respondents identified additional liquid classes that should be covered by the TO. These include, in particular, contracts in USD (6y, 12y, 15y, 20y) and GBP (2y, 3y, 4y, 6y, 7y, 15y, 20y).
46. Many respondents called for an alignment with the TO in the US, both in terms of the tenors of the classes of derivatives to be included in the TO as well as their contract specifications. Most respondents were in favour of including additional specifications when determining the TO, i.e. including contract specificities that are not available in TR data. While some respondents advocated for replicating the specifications developed by the US Commodity Futures Trading Commission (CFTC), others suggested a range of more narrow parameters or the use of market conventions. Furthermore, some respondents warned against too much granularity as it could also serve as a means to circumvent the TO.
47. Concerning the appropriate liquidity thresholds, many stakeholders restated their concerns about the shortcomings of TR data, with some respondents asking for higher thresholds and others being in favour of lower thresholds for the average number of trades. Concerning the criterion of traded days, some respondents recommended increasing it to 95%, whereas other recommended removing it since they considered the added value of this criterion as limited.

Liquidity assessment of overnight index swaps (OIS)

48. Only OIS in EUR with a tenor of 3 months passed the liquidity criteria in the liquidity assessment in the DP. Some respondents to the DP agreed that those contracts should be subject to the TO, with some of those respondents recommending to include further tenors of OIS in EUR in the TO (e.g. monthly tenors up to 1 year). On the other hand, the majority of respondents were against applying the TO to OIS, either because they considered OIS as not sufficiently liquid as such to become subject to the TO or because they considered that applying the TO to only one tenor point would result in high operational costs, which would outweigh the benefits of the TO.
49. Concerning the thresholds for the liquidity criteria, some respondents recommended increasing the criterion of 'days traded' to 95% and the average daily notional amount to EUR 100 million, whereas most respondents did not express a view on the two criteria.
50. Most respondents were in favour of adding further specifications to OIS should they be considered subject to the TO, to only include OIS with standard market conventions and exempt instruments with non-standard characteristics. Recommendations provided by stakeholders included to limit the TO to contracts that are cash starting, with a quarterly, semi-annual or annual payment and/or reset frequency, a fixed notional and standard day count convention ((30 or actual)/(360 to 365)).

Liquidity assessment of forward rate agreements (FRA)

51. In the DP, ESMA proposed not to consider FRAs for the TO based on the understanding that 90-95% of the global volume of FRAs is related to post-trade risk reduction services, whereas only 5% of the global volume relate to actual transactions.
52. The large majority of respondents agreed with this assessment not to include FRAs in the TO.

Liquidity assessment of index credit default swaps (CDS)

53. Two index CDS, iTraxx Europe Main and iTraxx Europe Crossover, are subject to the CO under EMIR and were therefore assessed for the purpose of the TO in the DP. Since TR data on CDS transactions does not currently allow ESMA to identify the underlying index, ESMA conducted only a qualitative liquidity assessment for the DP based on discussions with selected stakeholders. On that basis, ESMA considered applying the TO to the current on-the-run series of the two CDS indices as well as to the first thirty working days of the first off-the-run series.
54. The majority of respondents to the DP agreed that the two index CDS classes are sufficiently liquid for the purpose of the TO. In particular respondents concurred that the current on-the-run series of the two indices should be subject to the TO. On the other hand, some respondents did not support the proposal to cover also the first 30 days of the most recent off-the-run series. The main argument brought forward in that regard was that index series become illiquid as soon as the index is off-the-run. Some other respondents considered the 30-day cut off for the most recent off-the-run series as arbitrary, and recommended either to exclude the whole first off-the-run series or to include the whole series similar to the approach by the CFTC.
55. Concerning the need for further specification, respondents recommended in addition to the specification of the reference index and the tenor to include the following elements: settlement currency, ID code, default pay-out profile and default events.

Liquidity assessment – way forward

56. Based on the feedback received, ESMA amended the following elements for the liquidity analysis for the purpose of this CP:
 - The liquidity analysis for IRD is based on both MTF and TR data to allow the inclusion of a higher level of granularity and in particular more detailed contract specifications similar to those considered in the US such as reference rate, payment frequency and IMM dates, to the extent they were populated.
 - The liquidity analysis for IRD covered only the classes of derivatives that were considered sufficiently liquid in the DP, i.e. fixed-to-float IRS. No further work has

been undertaken on FRAs, OIS and basis swaps based on the previous analysis and feedback to the DP.

- To limit operational costs and the risks of regulatory arbitrage, ESMA considered that only IRD classes with at least three liquid benchmark tenor points should be considered subject to the TO. In consequence, IRD contracts where only one or two benchmark tenors are sufficiently liquid will not be subject to the TO.
- No further liquidity analysis for index CDS was carried out given the broad support of the assessment in the DP and the lack of sufficiently granular information in TR data for such an analysis. However, in view of the split views expressed by stakeholders on whether to include the first off-the-run series in the TO, ESMA carried out an assessment of trading activity in the first off-the-run series based on MTF data.
- In light of the concerns brought forward by stakeholders on the robustness of TR data, ESMA did not set fixed thresholds for the liquidity criteria to determine whether a derivative should be subject to the TO, but – similar to the approach in the US – relied rather on an holistic liquidity assessment. This approach thereby takes into account the various liquidity criteria.

57. A revised liquidity assessment using the new dataset gathered by ESMA comprising of the average frequency and size of trades over a range of market conditions is presented in sections 6 and 7. These sections include an explanation of the methodology ESMA used and a revised determination of the classes of derivatives that would be subject to the TO based on that analysis.

4.1.2.2 Number and type of active market participants

Number and types of market participants

58. Article 4(1)(a) of RTS 4 requires ESMA to consider that the “total number of market participants trading in that class of derivatives or a relevant subset thereof is not lower than two”. In the DP, ESMA proposed to assess the information on the number and types of market participants on the basis of TR data as well as from trading venues. While RTS 4 requires a minimum number of two market participants ESMA understands that the minimum number of market participants for derivatives that should be considered for the TO may be higher and may differ for the different classes of derivatives.

59. A number of respondents agreed that the number of distinct market participants should be kept as a criterion to determine whether the instruments are sufficiently liquid. Respondents did not agree on the source of that data. While the majority of respondents to the consultation suggested using TR data to compute the number and type of market participants, other respondents indicated that TR data could be misleading given post-trade allocation data. Proposals for other data sources included CCP data once the CO under EMIR is fully in place for all categories, data collected from trading venues on the number

of market participants on-boarded to trade the relevant derivatives, APAs and swap data repositories in the US.

60. In terms of the minimum total number of market participants to consider, there was a wide range of responses with some respondents indicating that nature and diversity is a more relevant perspective for determining liquidity than simply a minimum number of participants. Some respondents recommended using 10 distinct market participants on each trading day, while others proposed a range of 15 to 100 distinct counterparties. Other respondents recommended considering only the number of SIs or liquidity providers.
61. For fixed-to-float IRS in EUR, USD, JPY and GBP respondents suggested about 50 participants and for other currencies fewer participants. Feedback received on index CDS considered about 50 participants as an appropriate number.
62. The liquidity assessment for the DP showed that for all classes of IRD that are likely to be subject to the TO the number of counterparties is higher than 10 and, with the exception of JPY, between 50 to 100 distinct counterparties. The number of counterparties for IRS in JPY was with 29-42 somewhat lower, but still indicated a high number of different counterparties. ESMA had no information on the number of counterparties for the liquidity assessment for index CDS for the DP, but based on feedback from market participants, the two contracts appear to be sufficiently liquid.
63. ESMA agrees that the number of market participants should be around 50 counterparties, but that there may be some room for deviation depending on the overall market size and liquidity of the different derivatives classes. ESMA therefore decided not to set fixed thresholds for the minimum number of market participants of a class of derivatives to be subject to the TO but to use a more flexible approach that allows for some deviation where this is supported by the other liquidity criteria.
64. For the purpose of this CP, ESMA did not conduct an analysis on the type of market participants given data constraints.

Number of trading venues

65. Article 4(1)(b) of RTS 4 requires ESMA to consider the number of trading venues that have admitted to trading or are trading the class of derivatives. In the DP, ESMA considered that while one trading venue is sufficient for a derivative to be considered subject to the TO, it may be preferable to have more than one trading venue making that derivative available for trading, since this could reflect that the instrument is more frequently traded.
66. Most respondents to the DP were of the opinion that one trading venue is not enough for a derivative or class of derivatives to be considered subject to the TO and most respondents favoured a threshold of two trading venues as a minimum.
67. Most respondents to the DP did not agree with the proposal that the more trading venues offer trading in a class of derivatives, the more liquid that class can be considered. They

indicated that a venue offering trading in an instrument does not signal that the instrument is actually being traded and that using 'admitted to trading' as a criterion indicative of liquidity could lead to competition among trading venues admitting a class of derivatives to trading and therefore liquidity could be fragmented across different venues. In particular, many respondents considered it necessary to include some test of whether an instrument is actively traded, such as the volume and frequency of trading, on a trading venue as opposed to admitted to trading.

68. ESMA agrees that more than one trading venue making a derivative available for trading does not necessarily lead to the conclusion that there is a liquid market. Moreover, it may well be that liquidity is concentrated on only one trading venue, and that in consequence it may not be necessary to require that at least two trading venues make a derivative available to trading to meet this criterion.
69. ESMA understands the concerns of respondents that there should be some minimum active trading on trading venues prior to the introduction of the TO, but does not agree that this requires the introduction of an additional liquidity test at trading venue level. Such a test may create an impasse and undermine the G20 commitment to move trading of standardised derivatives to trading venues based on the argument that there is insufficient trading on trading venues in the first place. Moreover, the revised approach for the liquidity assessment includes also trading data from MTFs. Hence, the liquidity test incorporates the trading activity on trading venues and will ensure that only sufficiently liquid standardised derivatives will be subject to the TO.
70. ESMA does not agree with the view of some stakeholders that competition among trading venues would be undesirable. While competition may lead to fragmentation, this can be mitigated by trade transparency requirements as set out in MiFID II/MiFIR. Furthermore, competition contributes to more choice and lower costs for market participants, lower barriers of entry and thereby improved liquidity. Moreover, an environment where market participants can trade derivatives on more than one trading venue could increase market robustness due to the substitutability of trading venues in case one trading venue no longer makes the instrument available to trading.
71. Article 28(3) of MiFIR requires that derivatives subject to the TO should be eligible to be admitted to trading on a regulated market or traded on an MTF, OTF or a third country trading venue following an equivalence decision of the Commission on a non-exclusive and non-discriminatory basis. This provision explicitly aims at ensuring competition between trading venues, and should ensure that more than one trading venue makes a class of derivatives available for trading, once the TO applies.

Number of market makers

72. Article 4(1)(c) of RTS 4 requires ESMA to consider the number of market makers and other market participants under a binding written agreement or an obligation to provide liquidity. ESMA proposed in the DP to obtain this information from trading venues and asked for

feedback on how many market makers should be in place before considering a derivative subject to the TO.

73. The majority of respondents supported the proposal in the DP to obtain the information from trading venues. Respondents suggested that an appropriate minimum number of liquidity providers/market makers should be considered as falling between 1 and 10, depending on the liquidity, standardisation and trade frequency of the respective class of derivatives.
74. Some respondents raised concerns that the terms/concept of “market maker” and “other liquidity provider” are unclear in MiFID II/MiFIR, which could lead to significant implementation challenges. Furthermore, some respondents indicated that in many trading systems for derivatives firms that provide liquidity do not have binding written agreements or other formal commitments with a venue. Therefore, in their view, ESMA should consider rather the number of liquidity providers than the number of market makers with binding written agreements as there is widespread use of request-for-quote and voice trading systems for OTC derivatives. Furthermore, some stakeholders argued that as not all trading venues require the existence of binding liquidity provision / market making agreements, ESMA should rather focus on identifying whether there are a sufficient number of trading venues on which there is a meaningful volume of trading taking place in the class of derivatives, taking into account the differences across different types of derivatives.
75. ESMA agrees that the boundaries between the terms of “market maker” and “other liquidity provider” are not very clear. Based on the feedback received to the DP ESMA considers it appropriate to take a broad interpretation of the concepts of “market maker” and “liquidity provider” to capture the specificities of derivative markets.
76. ESMA agrees that the number of market makers/liquidity providers may depend on the product and market specificities. Given the very diverse views expressed on the appropriate number of market makers/liquidity providers, ESMA did not contact trading venues to gather more detailed information on the number of market makers/liquidity providers for the purpose of this CP. Furthermore, ESMA considers that this criterion should receive a lower weighting given the ambiguities around the concepts of “market maker” and “liquidity provider” and the fact that many trading venues do not have binding liquidity arrangements in place. Nevertheless, ESMA believes that this criterion may be valuable for complementing the liquidity analysis and intends to include this criterion in future assessments.

Ratio of market participants to average size/frequency of trades

77. Article 4(2) of RTS 4 requires ESMA to compare the ratio of market participants to the findings in the data obtained for the analysis of the average size and frequency of trades.
78. The majority of respondents supported this approach but expressed some caveats, mainly on the use of TR data, and suggested using data from CCPs, CAs and trading venues in

addition. Some respondents urged ESMA to perform a more holistic assessment that allows appropriately weighing all the various assessment criteria.

79. It is unclear how the results of this comparison should feed into the liquidity test. In particular, should a high (low) ratio of market participants to the average size/frequency of trades be considered as a sign of liquidity (lack of liquidity) or vice versa. Given these ambiguities ESMA decided to not take this criterion into account for the purpose of this analysis.

Q 1: 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.

4.1.2.3 Average size of spreads

80. Article 32(3)(c) of MiFIR requires ESMA to consider the average size of spreads for the liquidity assessment. This criterion is further specified in RTS 4. ESMA suggested in the DP to use proxies for the assessment of that criterion where no spreads are available and asked for input from stakeholder on the sources of spreads and available proxies. Furthermore, ESMA proposed that the criterion ‘average size of spreads’ should receive a lower weighting than the other assessment criteria.

81. Respondents to the DP supported ESMA’s proposal to give the criterion of average size of spreads a lower weighting than the other liquidity criteria. In terms of sources to use to obtain data on spreads, respondents agreed with ESMA’s suggestion to use information from trading venues and data vendors. An alternative suggestion brought forward was to use data from liquidity providers/brokers (actionable quotes).

82. In terms of proxies, the majority of respondents rejected the idea of finding/using a proxy where information on actual spreads is not available. In addition, very little advice was provided on what a proxy might look like.

83. ESMA agrees that where no information on spreads is available, and given the deficiencies of proxies, this criterion should receive a low weighting/not feed into the analysis. For the purpose of the liquidity assessment in this CP, given that ESMA did not have access to data on spreads, the liquidity analysis was performed without taking this criterion into consideration.

4.1.2.4 Other elements of the liquidity assessment

The anticipated impact of the TO on the liquidity of a class of derivatives and the commercial interest of non-financial end users

84. Article 32(3) of MiFIR specifies that ESMA should consider “the anticipated impact that the trading obligation might have on the liquidity of a class of derivatives or a relevant subset thereof and the commercial interest of end users which are not financial entities” and also

assess whether the class of derivatives is only sufficiently liquid in transactions below a certain size. In the DP, ESMA suggests assessing possible impacts on non-financial end users based on the information on the type and number of market participants, average frequency and average size of transactions.

85. The majority of respondents were supportive of the approach proposed by ESMA in the DP. Some respondents suggested taking into account the market experience with the TO in other jurisdictions, such as the US. A number of respondents claimed that the anticipated impact of the TO on the liquidity of a class of derivatives should be considered on its own and separately from the question of the interests of non-financials.
86. Several respondents considered that the TO should be introduced carefully, and that ESMA should wait for reliable data from CCPs and trading venues in order to properly analyse the effects of the MiFIR transparency regime on market liquidity before calibrating and implementing a TO. Others suggested that ESMA should specify the frequency with which it will conduct its analysis and set the framework in advance under which it would consider revoking or amending the TO for a particular class of derivatives.
87. Considering the impact of the TO is difficult, especially because the impact may be different across different market conditions. Furthermore, it is expected that the TO will change trading behaviour since all derivatives subject to the TO will have to be executed on a trading venue.
88. ESMA is of the view that bringing a class of derivatives within the scope of the trading mandate is likely to impose certain costs on market participants in terms of a) flexibility to negotiate transactions in derivatives according to protocols and execution methods different from those provided by trading venues, b) transparency obligations associated with on-venue trading and c) the costs of accessing, directly or indirectly, a trading venue.
89. These costs must be assessed against a number of benefits that are likely to result from the TO. More on-venue trading is likely to foster greater competition between trading venues and within them between liquidity providers. In addition, trading on regulated venues enhances transparency, operational efficiency and monitoring against market abuse.
90. ESMA, following the approach outlined in MiFIR, is of the view that those benefits can materialise only in relation to sufficiently standardised and liquid derivatives. For that reason, it is proposing to mandate on-venue trading only in relation to derivatives which, in addition of being standardised, demonstrate evidence of being frequently traded and already subject to some level of transparency. ESMA has considered the TO in other jurisdictions when specifying the derivatives that should be subject to the TO. Preliminary

evidence seems to support the view that properly calibrated trading mandates improve liquidity and lower execution costs for end-users.⁶

91. To further mitigate the operational costs for market participants in case only very few tenors are subject to the TO, ESMA proposes to complement the liquidity analysis with the additional requirement that at least three tenor points in a particular currency in a class of IRD should be sufficiently liquid for any currency be in scope. ESMA will closely monitor the development in the liquidity of derivatives and may, should this be considered necessary, suspend or revoke the TO (as envisaged under Article 32(5) of MiFIR).

Market liquidity in relation to transaction size

92. The last subparagraph of Article 32(3) of MiFIR requires ESMA to determine whether the class of derivatives is only sufficiently liquid in transactions below a certain size. In the DP, ESMA proposed to exempt transactions above a certain size from the TO.
93. While a majority of respondents were in favour of exempting large trades from the TO, some of them considered the proposed threshold (post-trade LIS) as too high and argued in favour of lower thresholds (pre-trade LIS or pre-trade SSTI). On the other hand, other respondents considered that trading venues can offer trading protocols that allow for the private negotiation of large trades, thereby removing any concerns about information leakage. Therefore, respondents did not agree with the need for an exemption.
94. ESMA does not agree with the view expressed by some respondents that trades that are larger than the pre-trade LIS or SSTI should be exempted from the TO. Those trades will in any case be eligible for a pre-trade transparency waiver and no additional protection appears to be necessary.
95. After having reviewed the issue, ESMA concurs with the views raised by some respondents that there is no need to systematically exempt transactions above a certain size from the TO. MiFIR already provides for the possibility to waive certain transactions from the pre-trade transparency requirements or to defer the publication of information on transactions post-trade. These waivers/deferrals will also be applicable to derivatives that are subject to the TO.
96. Furthermore, this approach is similar to the CFTC approach in the US which exempts 'block trades', that is trades above a certain size, from the execution requirement on SEFs or DCMs where those trades occur away from the SEF's or DCM's trading system or platform and are executed pursuant to the SEF's and DCM's rules and procedures. The main difference between the CFTC's and ESMA's approach would be in relation to the size for

⁶ Bank of England Staff Working Paper No 580 Centralized trading, transparency and interest rate swap market liquidity: evidence from the implementation of the Dodd-Frank Act by Evangelos Benos, Richard Payne and Michalis Vasios <http://www.bankofengland.co.uk/research/Pages/workingpapers/2016/swp580.aspx>

the large transactions that may benefit from a waiver/deferral in the EU or that may benefit from a more flexible execution regime in the US.

97. Therefore, ESMA revised its approach and considered that given the flexibility of trade execution provided in MiFIR it does not appear necessary to exempt large trades from the TO.

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

Consistency between the transparency regime and the TO

98. In the DP, ESMA sought stakeholders' views on whether the transparency regime and the TO should be aligned. Respondents to the DP generally agreed with the proposal to align the tests for liquidity and TO purposes to the extent possible, but divergent views emerged with respect to how such alignment should be achieved in practice. It should also be stressed that a number of respondents considered that while a high degree of consistency between the transparency regime and the TO would be desirable, it is not of utmost priority.

99. A first group of respondents shared the view that priority should be given to ensuring that all derivatives subject to the TO are also considered liquid for transparency purposes; while the reverse is not necessarily true in their views. Those respondents also stressed that priority should in any case be given to the appropriate calibration of the TO for EU markets.

100. Other respondents insisted on the importance on having two liquidity tests which are materially similar for both purposes. They noted that in practice, taking into account that the sample of transactions is smaller for the determination of liquidity for the TO (only benchmark dates), the thresholds should therefore be reduced. Several respondents requested that ESMA adds an emergency procedure to suspend the TO in case the liquidity of a derivative subject to the TO drops significantly.

101. ESMA agrees that ideally the TO and the transparency regime should be aligned to avoid inconsistencies. At the same time, ESMA agrees with the views expressed by some respondents that both regimes can still function satisfactorily without a full alignment. Therefore, ESMA has decided not to further investigate at this stage how the two regimes could be better aligned. ESMA intends to closely monitor the application of the TO and the transparency regime. Should any major inconsistencies between the two regime emerge, ESMA may considering reopening this issue.

102. ESMA shares the view expressed by many stakeholders that some emergency procedure should be available to suspend the TO in case of significant drops of liquidity. However, neither MiFIR nor the ESMA Regulation⁷ empower ESMA to make use of such an emergency procedure. ESMA expects that the liquidity assessment based on six

⁷ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p.84).

months of data will contribute to only make derivatives subject to the TO that are sufficiently liquid. Furthermore, ESMA intends to closely monitor market developments to allow for a timely adjustment of the TO should this become necessary. In the absence of further powers, ESMA is not in a position to take alternative measures.

4.1.3 Package transactions

103. The mandate for developing draft RTS specifying the TO for derivatives requires ESMA to determine which classes of derivatives should be subject to the TO but does not explicitly empower ESMA to provide for a tailored regime for package transactions. Hence, the TO will only apply at a component level and not at the package level. However, ESMA considered in the DP that it may be appropriate to exempt components subject to the TO that are part of a package and where as a consequence of the TO it may not be possible anymore to execute transactions as a package. ESMA therefore asked for feedback from stakeholders about the appropriate treatment of package transactions for the TO.
104. Feedback from stakeholders indicated many different types of packages comprising components of IRS and CDS that are likely to be subject to the TO. Some of these packages, such as spreads, butterflies and rolls, may only comprise classes of derivatives that are likely to be subject to the TO, even though it is not clear whether all tenors will be subject to the TO. In addition, there are a number of packages, such as spread overs and invoice spreads, that comprise components that are likely to be subject to the TO as well as components that will not be subject to the TO, such as bonds and futures.
105. Concerning the appropriate treatment of package transactions in the context of the TO views from stakeholders can be summarised in two groups. One group of respondents, mostly representatives of institutions that actively trade packages to create tailor-made instruments considered that where a package includes some (but not all) components that are subject to the TO those components should be exempted from the TO because they are not sufficiently liquid. Concerning packages where all components are subject to the TO, this group considers it necessary to conduct a case-by-case assessment to determine whether the TO should apply to the components of such packages.
106. The second group of respondents, mostly trading venues that make packages available for trading, considered that the rationale for exempting components of a package transaction from the TO is less strong since many packages are sufficiently liquid and most components of these packages should anyway be subject to the TO. In the view of this group there should be no exemption from the TO for packages where all components are subject to the TO, whereas an assessment for packages where at least one but not all components are subject to the TO may be appropriate before determining whether the components should be subject to the TO.
107. The empowerment for ESMA to develop draft RTS specifying the TO for derivatives does not indicate that there may be room for exempting certain components from the TO where they are part of a package. Furthermore, ESMA does not have similar powers as the CFTC, which may temporarily provide relief from regulatory obligations based on no-

action relief letters. ESMA also recognises that while the CFTC temporarily exempted the obligation to trade for some components of package transactions on SEFs and DCMs, those temporary reliefs have in the meantime expired for most types of packages. Table 1 provides an overview of the different categories of package transactions identified by the CFTC and the current treatment for the purpose of the trade execution requirement.⁸

TABLE 1: OVERVIEW OF THE PACKAGE TRANSACTION RELIEF GRANTED BY CFTC

Package Transaction Category	Relief Expiration
MAT/MAT: Each of the components is a swap subject to the trade execution requirement.	Relief expired May 15, 2014 pursuant to CFTC Letter 14-12.
MAT/Non-MAT (Cleared): At least one of the components is subject to the trade execution requirement and each of the other components is subject to the clearing requirement.	Relief expired June 1, 2014 pursuant to CFTC Letter 14-62.
US Dollar Swap Spreads: Each of the swap components is subject to the trade execution requirement and all other components are U.S. Treasury securities.	Relief expired June 15, 2014 pursuant to CFTC Letter 14-62.
MAT/Agency MBS: Each of the swap components is subject to the trade execution requirement and all other components are agency mortgage-backed securities.	Relief expired May 15, 2015 pursuant to CFTC Letter 14-137.
MAT/New Issuance Bond: At least one individual swap component is subject to the trade execution requirement and at least one individual component is a bond issued and sold in the primary market.	<p>Relief from CEA section 2(h)(8) until November 15, 2017. Under this relief, the swap components subject to the trade execution requirement are not required to be executed on a SEF or DCM.</p> <p>Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2017, which permits a SEF or DCM to offer any method of execution for the swap components.</p> <p>Relief from Commission Regulation § 37.3(a)(2) until November 15, 2017, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.</p>

⁸ Please refer to CFTC Letter 14-12, CFTC Letter 14-62, CFTC Letter 14-137, CFTC Letter 15-55 and CFTC letter 16-76.

<p>MAT/Futures: At least one individual swap component is subject to the trade execution requirement and all other components are contracts for the purchase or sale of a commodity for future delivery, i.e., futures contracts. This category may include:</p> <ul style="list-style-type: none"> • MAT swap v. Treasury futures; • MAT swap v. Eurodollar futures. 	<p>Relief from CEA section 2(h)(8) until November 15, 2017. Under this relief, the swap components subject to the trade execution requirement are not required to be executed on a SEF or DCM.</p> <p>Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2017, which permits a SEF or DCM to offer any method of execution for the swap components.</p> <p>Relief from Commission Regulation § 37.3(a)(2) until November 15, 2017, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.</p>
<p>MAT/Non-MAT (Uncleared): At least one of the swap components is subject to the trade execution requirement and at least one of the components is a CFTC swap that is not subject to the clearing requirement. This category may include:</p> <ul style="list-style-type: none"> • MAT swap v. swaption; • MAT swap v. uncleared credit default swap. 	<p>Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2017, which permits a SEF or DCM to offer any method of execution for the swap components.</p> <p>Relief from Commission Regulation § 37.3(a)(2) until November 15, 2017, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.</p>
<p>MAT/Non-Swap Instruments: At least one of the swap components is subject to the trade execution requirement and at least one of the components is not a swap. This category excludes U.S. Dollar Swap Spreads, MAT/Futures, MAT/Agency MBS, and MAT/New Issuance Bond. This category may include:</p> <ul style="list-style-type: none"> • MAT swap v. single-name credit default swap; • MAT swap v. bond (secondary market transaction). 	<p>Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2017, which permits a SEF or DCM to offer any method of execution for the swap components.</p> <p>Relief from Commission Regulation § 37.3(a)(2) until November 15, 2017, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.</p>

MAT/Non-CFTC Swap: At least one of the swap components is subject to the trade execution requirement and at least one of the components is a swap over which the CFTC does not have exclusive jurisdiction (e.g., a mixed swap).

Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2017, which permits a SEF or DCM to offer any method of execution for the swap components.

Relief from Commission Regulation § 37.3(a)(2) until November 15, 2017, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.

108. In the course of the last two years the CFTC has brought many swap components of those package transactions back into the scope of the trade execution requirements. This concerns package transactions where:

- each of the components is a swap subject to the trade execution requirement;
- at least one of the components is subject to the trade execution requirement and each of the other components is subject to the clearing requirement;
- each of the swap components is subject to the trade execution requirement and all other components are US Treasury securities; and
- each of the swap components is subject to the trade execution requirement and all other components are agency mortgage-backed securities.

109. Given the lack of an empowerment for ESMA to develop an approach that allows to exempt components that are part of a certain type of package, ESMA decided not to include such provisions in the draft RTS. While ESMA acknowledges that this will lead to some discrepancy between the approach in the US and the EU, the effect of this discrepancy is limited to those few types of packages that are still benefitting from temporary relief in the US. Finally, ESMA is working on a number of Q&As on packages which will provide further certainty on the concept of packages.

5 Public register

110. Article 34 of MiFIR requires ESMA to publish and maintain on its website a public register for the TO for derivatives. This register should specify in an exhaustive and unequivocal manner:

- the derivatives that are subject to the trading obligation,
- the venues on which the derivatives are admitted to trading or traded, and
- the dates from which the obligation takes effect.

111. The requirement for ESMA to maintain a register for the TO resembles to some extent ESMA's requirement to maintain a register for the classes of derivatives that are subject to the CO pursuant to Articles 4 and 5 of EMIR but includes fewer elements. Furthermore, for the CO public register ESMA was required to develop draft RTS specifying the details to be included in the public register to ensure that all information required for the purpose of the register is available and presented in a uniform manner. Article 8 of Commission Delegated Regulation (EU) No 149/2013⁹ specifies the details to be included into the register. In particular, Article 8(1) provides details on the information to be included for each class of derivatives subject to the CO. Article 8(2) and 8(3) provide details on the information to be included for authorised and recognised CCPs in the register and on the dates from which the CO takes effect.

112. No similar empowerment to specify further the register for the TO is included in MiFID II/MiFIR however ESMA considers that for market participants to be able to make maximum use of the register the structures should be adequately aligned. ESMA therefore intends, to the extent possible, to follow a similar approach for both the TO and the CO registers.

The derivatives that are subject to the TO

113. ESMA proposes to start at the level of granularity specified in Article 8(1) of Commission Delegated Regulation (EU) No 149/2013. However, given that only a subset of those derivatives that are subject to the CO will be subject to the TO, a more granular approach will be needed to correctly identify the derivatives subject to the TO as specified in the draft RTS. Therefore, the register should include the following specifications for the asset classes of interest rate derivatives and credit derivatives:

Interest rate derivatives:

- Type
- Reference index (Floating Rate Index)
- Settlement currency
- Settlement currency type
- Trade start type (spot (T+0, T+2), IMM)
- Optionality
- Tenor

⁹ Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52, 23.2.2013, p.11).

- Notional type
- Fixed rate type
- Fixed leg
 - Payment Frequency
 - Day count convention
- Floating leg
 - Reset frequency
 - Day Count convention

Credit derivatives:

- Type
- Sub-type
- Geographical zone
- Reference index
- Settlement currency
- Applicable series
- Tenor

114. Whenever the TO is extended to other asset classes, ESMA may adjust the register to the specificities of that asset class.

The trading venues where the derivatives are admitted to trading or traded

115. Similar to the CO register where ESMA has to include the CCPs that are authorised or recognised to clear the OTC derivative classes subject to the CO, the TO register also requires ESMA to maintain a list of trading venues where the derivatives are admitted to trading or traded, i.e. available for trading.

116. However, contrary to EMIR which requires that CAs immediately notify ESMA when they authorise a CCP to clear a class of OTC derivatives (Article 5(1) of EMIR, which has been further specified in Article 6 of Commission Delegation (EU) No 149/2013), ESMA will not receive such granular information from CAs or trading venues with respect to the TO for derivatives.

117. While Articles 18(10) and 56 of MiFID II require ESMA to maintain and keep an up-to-date list of MTFs, OTFs and regulated markets, this list will only include basic information on the trading venues, such as MIC, full name, country of establishment, CA, date of notification, and type of instruments that can be traded. MiFID II does not empower ESMA to develop draft RTS further specifying the details to be included in the notification of regulated markets, MTFs and OTFs. Hence, the information that ESMA will receive from CAs for the registers for regulated markets, MTFs and OTFs will not be granular enough to identify those trading venues that make derivatives subject to the TO available for trading.
118. For the purpose of the DP on the TO and this CP, ESMA obtained the information on the trading venues on which the classes of derivatives that are considered for the TO are made available for trading from CAs. ESMA intends to continue this approach for the purpose of the register for the TO. The part of the register specifying the venues on which the derivatives are available for trading will therefore be populated and updated on a best effort basis based on information received from CAs.
119. ESMA understands that the register should list all trading venues, including third country trading venues following an equivalence decision of the Commission, that make the derivatives subject to the TO available for trading. Since MiFIR does not provide for a similar system of recognition of third country trading venues by ESMA following an equivalence decision of the Commission as it is provided for in Article 25 of EMIR for CCPs established in a third country, ESMA will not receive all the necessary information from third country trading venues automatically.
120. ESMA therefore intends to maintain the register for third country trading venues on a best effort basis based on information received from third-country authorities and from third-country trading venues.

Q 3: Do you agree with this proposal? If not, please explain why and provide an alternative proposal for ESMA to populate and maintain the register.

The date from which the TO takes effect

121. ESMA will present the dates from which the TO takes effect in a similar manner to the CO for derivatives. In particular, the register will include the category of counterparty (as defined in the delegated regulations implementing the CO) and the application date. Since the minimum remaining maturity is not of relevance for the TO, it will not be included in the TO register.

6 Determination of the classes of interest rate derivative classes to be subject to the TO

122. For the purpose of the CP ESMA collected data for fixed-to-float single currency swaps and OIS from MTFs over the period 1 July – 31 December 2016. The data received has

been integrated with TR data covering the same period and cleaned by applying the following filters:

- Only “new” action types with venue of execution equal to “XXXX” / “XOFF” were selected,
- Reports marked as intragroup, compressed or cleared were eliminated,
- Only values where both counterparties were identified by an LEI were taken into account,
- Notional value outliers were eliminated¹⁰

123. The data presents a higher level of granularity with respect to the DP. In particular, the following parameters, besides the settlement currency and the benchmark tenor, have been added:

- Floating rate index and its term
- Trade date start type
- Payment frequency fixed leg
- Day count convention fixed leg
- Reset frequency floating leg

124. However, there are still parameters not taken into account, e.g. the day count convention of the floating leg, the notional type and the fixed rate type. This information, even though it was available from the dataset collected from MTFs, was not available in the dataset from TRs.

125. Furthermore, out of 6 trading venues offering swap contracts only 3 reported data to ESMA (2 trading venues informed ESMA that they did not record any trades on those contracts over the period considered while 1 did not respond to ESMA’s request). In addition, one reporting trading venue provided data only for a sub-period of the timespan to be taken as a reference. ESMA notes that these MTFs only capture a relatively small part of the overall trading in IRS. ESMA therefore welcomes to receive additional data analysis for the period considered that could be integrated in the final report.

126. Furthermore, since only a small part of TR data could be included for this analysis due to missing fields (e.g. reference rate is usually provided without its term), ESMA believes that the liquidity analysis in this CP is likely to understate the overall liquidity in IRS.

¹⁰ Outliers were defined as values exceeding four times the standard deviation.

127. Moreover, when adding parameters and tenors ESMA also had regard to the fact that even though trades are not always executed in high numbers, evidence of liquidity is demonstrated by the availability of pre-trade prices made public on a continuous basis by a number of trading venues across the currencies (EUR, USD, GBP) and tenors considered in this consultation. In addition, ESMA notes that over the course of the last quarter of this year ICE Benchmark Administration published benchmarks¹¹ for different tenors and currencies multiple times a day derived from electronic order book systems. In the view of ESMA the various liquidity checks those benchmarks are subject to further demonstrates the eligibility of those swaps for the TO.

128. Finally, ESMA did only receive data from MTFs covering transactions denominated in EUR, GBP, USD, JPY and SEK. Currencies for which ESMA received no data were therefore not included in the analysis.

Q 4: 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.

6.1 Fixed-to-float IRS denominated in EUR

129. In the following two tables, the liquid sub-classes identified on Euribor-EUR are presented. For each sub-class the following parameters are also shown:

- Number of trades;
- Number of counterparties;
- Daily notional amount;
- Percentage of days traded.

¹¹ More information can be found here: <https://www.theice.com/iba/ice-swap-rate>

SWAP_TYPE	Trade start type	NOTIONAL_CCY_1	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D	Num trades	Num of CPY	Daily Notional Amount	% Days Traded
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	10Y	578	54	40,661,074	83.87%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	2Y	371	53	68,868,039	77.42%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	4Y	431	56	28,762,777	91.94%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	5Y	497	65	36,455,041	88.71%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	6Y	196	56	17,151,403	58.06%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	7Y	338	53	18,232,217	80.65%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 3M	1Y	30/360	3M	3Y	134	56	43,852,108	58.46%

SWAP_TYPE	Trade start type	NOTIONAL_CCY_1	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D	Num trades	Num of CPY	Daily Notional Amount	% Days Traded
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	3Y	909	71	87,811,249	98.39%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	4Y	1,102	77	87,492,828	96.77%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	5Y	2,437	110	149,130,075	100.00%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	6Y	898	66	61,687,056	95.16%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	7Y	1,157	84	66,441,800	100.00%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	8Y	199	64	50,679,631	73.08%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	10Y	3,997	115	171,180,995	100.00%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	9Y	1,726	70	50,526,253	100.00%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	12Y	546	53	22,372,064	93.55%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	15Y	971	66	31,258,549	95.16%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	20Y	908	60	31,391,710	93.55%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	30Y	1,457	66	42,124,781	98.39%
fixed-float IRS	1_spot starting (T+2)	EUR	Euribor 6M	1Y	30/360	6M	2Y	915	70	188,684,754	96.77%

130. ESMA complemented this liquidity analysis with feedback from stakeholders that supports adding a number of additional tenors (highlighted in red in the table below) as sufficiently liquid.

131. Furthermore, ESMA considers that contracts with a fixed rate day count convention of ACT/360 should also be included in the TO given that this is a current and standardised trade convention and explicitly exempting it from the scope of the TO may result in the circumvention of the TO. The table below shows the classes of IRS in EUR that based on ESMA's analysis are considered liquid for the purpose of the TO in the EU.

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D
Case A1	spot starting (T+2)	EUR	Euribor 3M	Annual	30/360 ACT/360	Quarterly	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 10Y, 15Y, 20Y, 30Y
Case A2	spot starting (T+2)	EUR	Euribor 6M	Annual	30/360 ACT/360	Semi-annual	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 8Y, 9Y, 10Y, 12Y, 15, 20Y, 30Y

Q 5: 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.

132. ESMA notes that based on this analysis fewer derivatives classes would be subject to the TO as compared to the trade execution requirement in the US. In particular, the CFTC also included contracts with additional fixed leg payment frequencies and floating leg reset frequencies in the trading mandate. ESMA could only trace limited liquidity in contracts with these additional features in the EU.

133. ESMA appreciates that having a wider TO in the US than the EU for IRS denominated in EUR does appear counter-intuitive. However, ESMA notes that the process in the EU for determining the classes of derivatives that should be subject to the TO is different from the US approach. In the US the trade execution requirement is triggered by the declaration of a trading venue that a derivative class is sufficiently liquid to be subject to the TO, whereas in the EU ESMA must perform a more structured liquidity test.

134. ESMA considers that based on its liquidity test, some additional contract specifications that are included in the trade execution requirement in the US should not be included in the trading mandate for the EU. Therefore, the trading obligation in the EU would initially start with a more narrowly defined set of IRS denominated in EUR compared to the US. Once ESMA can expand its liquidity analysis based on more trading data, the trading obligation may subsequently be broadened.

135. ESMA is also aware that some market participants are in favour of a full alignment with the US regime to ensure a globally consistent implementation of the TO. ESMA is therefore interested in stakeholder views on whether the contract specifications in each possible combination in the table below that are subject to the TO in the US should also be considered for the TO in the EU (for the same tenors as defined in the previous table; the table below highlights in red those additional features which are not caught by cases A1 and A2 in the table on the previous page).

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency
Case A3	spot starting (T+2)	EUR	Euribor 3M	Semi-annual/ Annual	30/360 ACT/360	Quarterly/ Semi-annual
Case A4	spot starting (T+2)	EUR	Euribor 6M	Semi-annual/ Annual	30/360 ACT/360	Quarterly/ Semi-annual

Q 6: 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?

6.2 Fixed-to-float IRS denominated in USD

136. In the table below the liquid sub-classes identified on Libor-USD are presented. For each sub-class the following parameters are determined:

- Number of trades;
- Number of counterparties;
- Daily notional amount;



- Percentage of days traded.

SWAP_TYPE	Trade start type	NOTIONAL_CCY_1	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D	Num trades	Num of CPY	Daily Notional Amount	% Days Traded
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	2Y	171	58	152,585,931	68.46%
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	3Y	143	50	40,006,133	63.08%
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	4Y	174	52	40,692,363	67.69%
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	5Y	364	77	103,216,553	83.08%
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	7Y	157	53	33,951,637	54.62%
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	10Y	448	70	139,784,743	85.38%
fixed-float IRS	1_spot starting (T+2)	USD	Libor 3M	6M	30/360	3M	30Y	240	57	16,641,749	72.31%

SWAP_TYPE	Trade start type	NOTIONAL_CCY_1	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D	Num trades	Num of CPY	Daily Notional Amount	% Days Traded
fixed-float IRS	2_IMM trade	USD	Libor 3M	6M	30/360	3M	30Y	134	55	38,386,259	26.92%
fixed-float IRS	2_IMM trade	USD	Libor 3M	6M	30/360	3M	5Y	618	100	461,870,291	42.31%
fixed-float IRS	2_IMM trade	USD	Libor 3M	6M	30/360	3M	6Y	675	54	158,914,825	46.15%

137. From the tables above and following the same approach for the fixed rate day count convention as for IRS denominated in EUR, the following sub-classes should be considered liquid for the purposes of the TO in the EU.

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D
Case C1	spot starting (T+2)	USD	Libor 3M	Semi-annual	30/360 ACT/360	Quarterly	2Y, 3Y, 4Y, 5Y, 7Y, 10Y, 30Y
Case C2	IMM	USD	Libor 3M	Semi-annual	30/360 ACT/360	Quarterly	5Y, 6Y, 30Y

138. Additional feedback from stakeholders, supports also adding contracts with an annual fix leg payment frequency, both for spot starting contracts as well as for IMM starting contracts:

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D
Case C3	spot starting (T+2)	USD	Libor 3M	Annual	30/360 ACT/360	Quarterly	2Y, 3Y, 4Y, 5Y, 7Y, 10Y, 30Y
Case C4	IMM	USD	Libor 3M	Annual	30/360 ACT/360	Quarterly	5Y, 6Y, 30Y

Q 7: 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.

139. From the tables above it is evident, similar to the situation for IRS denominated in EUR that fewer sub-classes are determined to be liquid compared to the trading obligation in the US. The US trade execution requirement includes some additional tenors (i.e. 6, 12, 15, 20y), Libor 6m floating reference rates, as well as additional possibilities for the fixed leg payment frequency and floating leg reset frequency.

140. Similarly as for IRS denominated in EUR, ESMA suggests to start initially with a narrower set of classes of IRS in USD to be subject to the TO as compared to the US that may be then subsequently broadened.

141. ESMA is aware that this approach has to be weighed against the drawbacks of inconsistent trading mandates at a global level and is therefore interested in the views of market participants as to whether the additional sub-classes below should also be added to the TO in the EU (the table below highlights in red those additional features which are not caught by cases C1 to C4 in the tables on the previous page).

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D
Case C5	spot starting (T+2)	USD	Libor 3M	Semi-annual/ Annual	30/360 ACT/360	Quarterly/ Semi-annual	2Y, 3Y, 4Y, 5Y, 6Y , 7Y, 10Y, 12Y , 15Y , 20Y , 30Y
Case C6	spot starting (T+2)	USD	Libor 6M	Semi-annual/ Annual	30/360 ACT/360	Quarterly/ Semi-annual	2Y , 3Y , 4Y , 5Y , 6Y , 7Y , 10Y , 12Y , 15Y , 20Y , 30Y
Case C7	IMM	USD	Libor 3M	Semi-annual/ Annual	30/360 ACT/360	Quarterly/ Semi-annual	2Y , 3Y , 4Y , 5Y , 6Y , 7Y , 10Y , 12Y , 15Y , 20Y , 30Y
Case C8	IMM	USD	Libor 6M	Semi-annual/ Annual	30/360 ACT/360	Quarterly/ Semi-annual	2Y , 3Y , 4Y , 5Y , 6Y , 7Y , 10Y , 12Y , 15Y , 20Y , 30Y

Q 8: 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?

6.3 Fixed-to-float IRS denominated in GBP

142. In the table below the liquid sub-classes identified on Libor-GBP are presented. For each sub-class the following parameters are determined:

- Number of trades;
- Number of counterparties;
- Daily notional amount;
- Percentage of days traded.

SWAP_TYPE	Trade start type	NOTIONAL_CCY_1	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D	Num trades	Num of CPY	Daily Notional Amount	% Days Traded
fixed-float IRS	SPOT (t+0)	GBP	Libor 6M	6M	ACT/365F	6M	10Y	403	50	65,410,152	73.08%
fixed-float IRS	SPOT (t+0)	GBP	Libor 6M	6M	ACT/365F	6M	2Y	89	37	68,029,892	35.38%
fixed-float IRS	SPOT (t+0)	GBP	Libor 6M	6M	ACT/365F	6M	30Y	295	42	9,119,978	61.29%
fixed-float IRS	SPOT (t+0)	GBP	Libor 6M	6M	ACT/365F	6M	5Y	232	57	39,160,471	56.15%

143. ESMA complemented this liquidity analysis with feedback from stakeholders that supports adding a number of additional tenors (highlighted in red in the table below) which are sufficiently liquid.

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D
Case D1	spot starting (T+0)	GBP	Libor 6m	Semi-annual	ACT/365F	Semi-annual	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 10Y, 15Y, 20Y, 30Y

144. Furthermore, stakeholders provided insights that also IRS in GBP reference the Libor 3M should be considered liquid for the purposes of the TO. While fewer trades take place for those contracts, ESMA considers that there is sufficient streaming of (indicative) prices to consider them liquid and therefore suggests to include those sub-classes in the TO.

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5D
Case D2	spot starting (T+0)	GBP	Libor 3m	Quarterly	ACT/365F	Quarterly	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 10Y, 15Y, 20Y, 30Y

Q 9: 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.

145. From the tables above it is evident that fewer sub-classes are liquid compared to the US trading obligation as ESMA's liquidity analysis did not reveal sufficient liquidity for contracts with additional combinations of fixed leg payment frequency and floating leg reset frequency.

146. Therefore, ESMA proposes to start initially with a more narrowly defined set of sub-classes for the TO that may then be gradually extended. ESMA acknowledges that this approach may result in internationally inconsistent TO regimes. ESMA is therefore

interested in stakeholder views on whether also the contract specifications in each possible combination in the table below that are subject to the TO in the US should also be considered for the TO in the EU (for the same tenors as defined in the previous tables; the table below highlights in red those additional features which are not caught by cases D1 and D2 in the tables on the previous page)

	Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency
Case D3	spot starting (T+0)	GBP	Libor 6m	Quarterly/ Semi-annual	ACT/365F	Quarterly/ Semi-annual
Case D4	spot starting (T+0)	GBP	Libor 3m	Quarterly/ Semi-annual	ACT/365F	Quarterly/ Semi-annual

Q 10: 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?

6.4 Fixed-to-float IRS denominated in other currencies

147. Contracts on Libor settled in JPY are deemed to be illiquid.

Q 11: Do you agree with this proposal? If not, please explain why and provide an alternative proposal

148. Single Stibor tenors can be considered as liquid but since less than three benchmark tenors qualified as liquid they are overall considered to be illiquid.

7 Determination of the classes of credit derivatives to be subject to the TO

149. ESMA conducted an analysis to determine if the first off-the-run series should be considered liquid for the whole first off-the-run period or only for the first 30 days during which it is the first off-the-run series.

150. For the purpose of this analysis data was collected from MTFs during the period 1 January – 31 December 2016 for the two indices which are subject to the CO and which were deemed to be liquid, thus subject to the TO in the DP.
151. For the series with volume during the on-the-run period, the percentage of volume executed during the on-the-run period and during the off-the-run period was calculated. ESMA noticed that for two series 100% of volume was executed during the on-the-run period and no volume during the off-the-run period. For additional 5 series, where 100% of the off-the-run volume was executed during the first off-the-run period, the percentage of volume traded during the first 30 days is lower than the volume traded over the period during which the series is the first off-the-run series. In particular, the percentage traded during the first 30 days was between 16 and 94%.
152. Consequently, given the high volatility of the percentage ESMA considers that the index should be liquid for the entire first off-the-run period.

Q 12: Do you agree with this proposal? If not, please explain why and provide an alternative proposal.

8 Date from which the TO applies and phase-in

153. Article 32(1)(b) of MiFIR requires ESMA to specify “the dates from which the TO takes effect, including any phase-in and the categories of counterparties to which the obligation applies, where such phase-in and such categories of counterparties have been provided for in the regulatory technical standards in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012 (EMIR).”
154. The RTS establishing the CO under EMIR provide for a phase-in for four different categories of counterparties. The CO applies already for counterparties of category 1 for both IRD and CDS. Furthermore, for IRD denominated in EUR, GBP, JPY and USD the CO already applies to counterparties of category 2.
155. In the DP, ESMA outlined that the earliest date for applying the TO could be either 3 January 2018 or the date on which the CO takes effect for those counterparties for which the CO is not yet effective. ESMA considered that no further phase-in for the TO was necessary, unless market participants considered it necessary for operational purposes.
156. Most stakeholders providing feedback to the DP did not agree with the short phase-in proposed by ESMA and considered it necessary to give market participants more time before the TO becomes effective. Stakeholders considered that a longer phase-in would be needed for counterparties subject to the TO to set up arrangements with trading venues, and for trading venues to develop their offerings and trading frameworks, notably for buy-side clients. Some respondents also raised concerns that a ‘big bang’ effect should be avoided where both, the MiFID II provisions as well as the TO, apply from 3 January 2018. Furthermore, some respondents recommended waiting until the Commission has taken equivalence decisions, in particular in respect of the US, to avoid the fragmentation of

liquidity. Proposals for a longer phase-in ranged from three weeks for counterparties that are already subject to the EMIR CO to more than one year.

157. On the other hand, some respondents were in favour of the phase-in proposed by ESMA and did not consider it necessary to provide for a longer phase-in period.
158. ESMA notes that the TO for derivatives implements a G20 commitment of 2009 which was foreseen to be implemented by 2012 already. The US implemented this G20 commitment in 2014.
159. EU market participants have been aware that the TO has been coming for quite a long period of time since the publication of MiFID II/MiFIR in the Official Journal in 2014. Taking into account that there still is a significant period of time between the publication of this CP and the MiFID II application date, and given that there is a political expectation that the TO becomes effective as soon as possible, ESMA does not intend to propose an additional phase-in period for the classes of instruments and categories of counterparties to which the CO already applies.
160. As far as category 3 counterparties are concerned, on 14 November 2016 ESMA published a final report on the CO for financial counterparties with a limited volume of activity¹². The report highlights the difficulties that some financial counterparties with a limited volume of activity are facing in preparing for the CO and suggests delaying the application of the CO to counterparties of category 3. The draft RTS proposed to apply the CO for counterparties of category 3 for IRD (major currencies and additional currencies) and CDS only as of 21 June 2019. The Commission endorsed ESMA's proposal on 16 March 2017.¹³
161. ESMA intends to replicate this approach for the TO. Therefore, ESMA proposes that the TO will start no earlier than the date of the CO applying for counterparties of category 3 and 4.
162. As a consequence, ESMA proposes the following application schedule:

TABLE 2 DATE ON WHICH THE TRADING OBLIGATION WILL TAKE EFFECT

OTC derivatives class	Category of counterparty			
	Category 1	Category 2	Category 3	Category 4
IRD (EUR, GBP, USD)	Date of application of the RTS on the TO	Date of application of the RTS on the TO	21 June 2019	21 December 2018
Credit derivatives	Date of application of the RTS on the TO	Date of application of the RTS on the TO	21 June 2019	09 May 2019

¹² https://www.esma.europa.eu/sites/default/files/library/2016-1565_final_report_on_clearing_obligation.pdf

¹³ <http://ec.europa.eu/transparency/regdoc/rep/3/2017/EN/C-2017-1658-F1-EN-MAIN-PART-1.PDF>



Q 13: Do you agree to the proposed timeline? If not, please explain why and present your proposal.

9 Annexes

9.1 Annex I

Summary of questions

Q 1: 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.

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

Q 3: Do you agree with this proposal? If not, please explain why and provide an alternative proposal for ESMA to populate and maintain the register.

Q 4: 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.

Q 5: 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.

Q 6: 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?

Q 7: 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.

Q 8: 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?

Q 9: 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.

Q 10: 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?

Q 11: Do you agree with this proposal? If not, please explain why and provide an alternative proposal

Q 12: Do you agree with this proposal? If not, please explain why and provide an alternative proposal.

Q 13: Do you agree to the proposed timeline? If not, please explain why and present your proposal.

CBA Q1: 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.

Category	Number of employees	Total Notional traded 2016 (in thousands euros)	Total number of trades 2016
EMIR Category 1	[1-50]		
	[51-250]		
	[251-1000]		
	>1000		
EMIR Category 2	[1-50]		
	[51-250]		
	[251-1000]		
	>1000		
EMIR Category 3	[1-50]		
	[51-250]		
	[251-1000]		
EMIR Category 4	[1-50]		
	[51-250]		
	[251-1000]		
	>1000		

Trading Venue	[1-50]		
	[51-250]		
	[251-1000]		
	>1000		

CBA Q2: Based on the draft RTS, what 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?

% of trading captured by the TO	Year 2016
% of total notional amount traded in derivatives captured by the TO	
% of total number of transactions in derivatives captured by the TO	
% of total notional amount traded in interest rate derivatives captured by the TO	
% of total number of transactions in interest rate derivatives captured by the TO	
% of total notional amount traded in credit default swaps captured by the TO	
% of total number of transactions in credit default swaps captured by the TO	

CBA Questions 3 and 4 are to be answered by investment firms and significant non-financial counterparties.

CBA Q3: Out of the trading activity expected to be captured by the TO, as identified under Q2, what % 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?

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 3 rd 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				
% of total number of transactions captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue				

CBA Q4: Compliance with the TO may require some further trading arrangements. Which of the following statements would you consider relevant regarding the steps you might take to that end? Please add any comment as appropriate.

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			

2. I intend to become a member/participant/client of one (or multiple) EU trading venue(s) for the first time			
3. I intend to become a member/participant/client of additional EU trading venues			
4. I intend to seek access to EU trading venues through Direct Electronic Access (DEA)			
5. I intend to combine membership (2.or 3) with DEA (4.)			
6. I am considering other arrangements; Please explain those arrangements in the Comments section			

CBA Question 5 is to be answered by trading venues.

CBA 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?

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

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CBA Questions 6 to 9 are to be answered by all respondents.

CBA Q6: Based on the draft RTS, what impact do you expect from the TO in the short and medium term? Please elaborate as appropriate under Positive or Negative impact.

TO Impact	Positive Impact	Negative impact
Impact on your business model/ organisation/ client relationship		
Impact on revenue		
Impact on market structure (e.g. principal vs. agency trading etc)		
Impact on market liquidity and execution costs		
Other impacts. Please elaborate		

CBA Q7: Is there any specific provision in the draft RTS that you would expect to be a source of significant cost? If so, please elaborate

CBA Q8: Please provide an indication, even a rough one, of compliance costs (in thousands of euros)

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					
Recurring costs (on an annual basis)					

CBA Q9: Taking into account the size of your firm, would you qualify overall compliance costs with the draft RTS as low, medium or high?

Please enter here "Low", "Medium" or "High"

9.2 Annex II

Mandate to develop draft regulatory technical standards

Article 32 of MiFIR

1. *ESMA shall develop draft regulatory technical standards to specify the following:*

- (a) Which of the class of derivatives declared subject to the clearing obligation in accordance with Article 5(2) and (4) of Regulation (EU) No 648/2012 or a relevant subset thereof shall be traded on the venues referred to in Article 28(1) of this Regulation;*
- (b) The date or dates from which the trading obligation takes effect, including any phase-in and the categories of counterparties to which the obligation applies where such phase-in and such categories of counterparties have been provided for in regulatory technical standards in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012.*

ESMA shall submit those draft regulatory technical standards to the Commission within six months after the adoption of the regulatory technical standards in accordance with Article 5(2) Regulation (EU) No 648/2012 by the Commission.

Before submitting the draft regulatory technical standards to the Commission for adoption, ESMA shall conduct a public consultation and, where appropriate, may consult third-country competent authorities.

2. *In order for the trading obligation to take effect:*

- (a) The class of derivatives pursuant to paragraph 1(a) or a relevant subset thereof must be admitted to trading or traded on at least one trading venue as referred to in Article 28(1); and*
- (b) There must be sufficient third-party buying and selling interest in the class of derivatives or a relevant subset thereof so that such a class of derivatives is considered sufficiently liquid to trade only on the venues referred to in Article 28(1).*

3. *In developing the draft regulatory technical standards referred to paragraph 1, ESMA shall consider the class of derivatives or a relevant subset thereof as sufficiently liquid pursuant to the following criteria:*

- (a) The average frequency and size of trades over a range of market conditions, having regard to the nature and lifecycle of products within the class of derivatives;*

(b) The number and type of active market participants including the ratio of market participants to products/contracts traded in a given product market;

(c) The average of the size of the spreads.

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.

ESMA shall determine whether the class of derivatives or relevant subset is only sufficiently liquid in transactions below a certain size.

4. ESMA shall, on its own initiative, in accordance with the criteria set out in paragraph 2 and after conducting a public consultation, identify and notify to the Commission the classes of derivatives or individual derivative contracts that should be subject to the obligation to trade on the venues referred to in Article 28(1), but for which no CCP has yet received authorisation under Article 14 or 15 of Regulation (EU) No 648/2012 or which is not admitted to trading or traded on a trading venue referred to in Article 28(1).

Following the notification by ESMA referred to in the first subparagraph, the Commission may publish a call for development of proposals for the trading of those derivatives on the venues referred to in Article 28(1).

5. ESMA shall in accordance with paragraph 1, submit to the Commission draft regulatory technical standards to amend, suspend or revoke existing regulatory technical standards whenever there is a material change in the criteria set out in paragraph 2. Before doing so, ESMA may, where appropriate, consult the competent authorities of third countries.

9.3 Annex III

High level cost-benefit analysis

This section provides a high-level cost-benefit analysis (CBA) of the draft RTS on the trading obligation (TO) for derivatives. A more detailed CBA will be published together with the final draft RTS and ESMA’s Final report.

ESMA intends to include in the final CBA some quantitative data to provide a more refined assessment of the impact of the draft RTS on market participants. To that end, market participants are invited to respond to the questions below.

Questions for the final Cost-Benefit Analysis

CBA Q1: 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.

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

EMIR Category 4	[1-50]		
	[51-250]		
	[251-1000]		
	>1000		
Trading Venue	[1-50]		
	[51-250]		
	[251-1000]		
	>1000		

CBA Q2: Based on the draft RTS, what 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?

% of trading captured by the TO	Year 2016
% of total notional amount traded in derivatives captured by the TO	
% of total number of transactions in derivatives captured by the TO	
% of total notional amount traded in interest rate derivatives captured by the TO	
% of total number of transactions in interest rate derivatives captured by the TO	

% of total notional amount traded in credit default swaps captured by the TO	
% of total number of transactions in credit default swaps captured by the TO	

CBA Questions 3 and 4 are to be answered by investment firms and significant non-financial counterparties.

CBA Q3: Out of the trading activity expected to be captured by the TO, as identified under Q2, what % 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?

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				
% of total number of transactions captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue				

CBA Q4: Compliance with the TO may require some further trading arrangements. Which of the following statements would you consider relevant regarding the steps you might take to that end? Please add any comment as appropriate.

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			
2. I intend to become a member/participant/client of one (or multiple) EU trading venue(s) for the first time			
3. I intend to become a member/participant/client of additional EU trading venues			
4. I intend to seek access to EU trading venues through Direct Electronic Access (DEA)			
5. I intend to combine membership (2.or 3) with DEA (4.)			
6. I am considering other arrangements; Please explain those arrangements in the Comments section			

CBA Question 5 is to be answered by trading venues.

CBA 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?

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

CBA Questions 6 to 9 are to be answered by all respondents.

CBA Q6: Based on the draft RTS, what impact do you expect from the TO in the short and medium term? Please elaborate as appropriate under Positive or Negative impact.

TO Impact	Positive Impact	Negative impact
Impact on your business model/ organisation/ client relationship		
Impact on revenue		
Impact on market structure (e.g. principal vs. agency trading etc)		

Impact on market liquidity and execution costs		
Other impacts. Please elaborate		

CBA Q7: Is there any specific provision in the draft RTS that you would expect to be a source of significant cost? If so, please elaborate

CBA Q8: Please provide an indication, even a rough one, of compliance costs (in thousands of euros)

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					
Recurring costs (on an annual basis)					

CBA Q9: Taking into account the size of your firm, would you qualify overall compliance costs with the draft RTS as low, medium or high?

Please enter here "Low", "Medium" or "High"

High-Level Cost-Benefit Analysis

Pursuant to Articles 10(1) and 15 of the Regulation establishing ESMA¹⁴, ESMA is empowered to develop draft regulatory technical standards (RTS) or draft implementing technical standards (ITS) where the European Parliament and the Council delegate power to the Commission to adopt the RTS/ITS by means of delegated acts under Article 290 TFEU in order to ensure consistent implementation and application in the areas specifically set out in the legislative acts within the scope of action of ESMA. The same Article obliges ESMA to conduct open public consultations on draft RTS/ITS and to analyse the related potential costs and benefits, where appropriate. Such consultations and analyses should be proportionate in relation to the scope, nature and impact of the draft RTS/ITS.

This section contains a cost-benefit analysis (CBA) of the draft RTS with regard to the TO for derivatives.

1. Executive Summary

Article 28 of MiFIR introduces an obligation for financial counterparties and for some non-financial counterparties to execute non-intra group transactions in derivatives pertaining to a class of derivatives subject to the TO on regulated markets, MTFs, OTFs or equivalent third-country venues. Article 32 of MiFIR sets out the conditions to be met and the criteria to be taken into account for a derivative contract to be subject to the TO. The purpose of the draft RTS is to further specify the derivative contracts (derivatives) subject to the clearing obligation (CO) to be made subject to the TO and the date(s) from which the TO takes effect.

This document has five sections: an introduction to the topic discussed (Introduction), the baseline to consider when determining the incremental costs and benefits arising from the draft RTS (Baseline), an identification of the stakeholders subject to those amendments and how they may be affected (Stakeholders), an analysis of the costs and benefits arising from the incremental obligation attributed to the draft RTS vs. the baseline defined previously (Cost Benefit Analysis) and a final section on literature review. The stakeholders identified are trading venues, members and participants of trading venues, financial counterparties, significant non-financial counterparties and other market participants.

2. Introduction

¹⁴ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

Parties to the G20 Pittsburgh summit on 25 September 2009 reached an agreement to move trading in standardised OTC derivative contracts to exchanges or electronic trading platforms where appropriate. To fulfil the Union's G20 commitments on derivatives, MiFIR mandates trading between financial counterparties and large non-financial counterparties in all derivatives subject to the CO and which are sufficiently liquid to take place on trading venues and equivalent third country venues. Article 32 of MiFIR outlines the process for deciding which derivatives should be subject to the TO and sets out the criteria to be taken into account by ESMA when developing draft RTS to specify which derivatives should be subject to the TO.

Based on those criteria, the draft RTS proposes an exhaustive list of derivatives that should be subject to the TO.

The costs and benefits section provides a high-level analysis of the potential effects of the draft RTS on the stakeholders directly and indirectly affected. A more detailed cost-benefit analysis (CBA) will be provided in the Final Report taking into account the responses to the Consultation Paper (CP), including to the CBA questions above. In practice, however, it may sometimes be very difficult to disentangle the effects of the Level 1 legislation, for which an impact assessment covering the general aspects of the Regulation has been already performed and published by the European Commission¹⁵, and the effects of the Level 2 RTS.

ESMA notes that the costs incurred by market participants in relation to the TO may partly depend on whether the key derivative third-country trading venue will be benefiting from an equivalence decision by the Commission by the time the TO takes effect. However, this issue is not within ESMA's remit and is therefore not taken into consideration in the CBA.

3. Baseline

From a legal perspective, the legislation to consider is Article 28 of MiFIR that introduces a TO for certain derivative contracts, and Article 32 setting out the process for determining the derivative contracts subject to the TO, as supplemented by the Commission Delegated Regulation (EU) 2016/2020 of 26 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on criteria for determining whether derivatives subject to the CO should be subject to the TO¹⁶ (RTS 4).

Under Article 32(1) of MiFIR, ESMA is empowered to develop draft RTS to specify i) which derivatives subject to the CO should be subject to the TO and (ii) the date(s) at which the TO takes effect.

Article 32 (2) of MiFIR establishes that the derivative contract must be admitted to trading or traded on a trading venue and be sufficiently liquid. Article 32(3) of MiFIR provides for the criteria to be taken into account by ESMA when assessing whether a derivative is sufficiently

¹⁵ See http://ec.europa.eu/internal_market/securities/docs/isd/mifid/SEC_2011_1226_en.pdf

¹⁶ OJ L 313, 19.11.2016, p. 2–5

liquid for mandatory trading on a trading venue, i.e. average frequency and size of trades, number and types of active market participants and average size of spreads.

In preparing the draft RTS, ESMA is required to take into consideration the anticipated impact that the TO may have on the liquidity of the derivative and the commercial activities of end-users which are not financial entities. Finally, ESMA must determine whether the derivative is only sufficiently liquid in transactions below a certain size.

The additional obligation created by the draft RTS is the exact list of derivatives that will be subject to the TO and the date(s) from which the TO takes effect. However, it is extremely difficult to disentangle the costs arising respectively from the Level 1 text and from the draft RTS. ESMA considers that most of those costs are linked to the Level 1 text.

Article 32(4) of MiFIR foresees that ESMA shall, on its own initiative, identify and notify to the Commission derivative contracts that should be subject to the TO, although those contracts would not be centrally cleared or admitted to trading or traded on a trading venue. At this stage, ESMA did not deem it necessary to make use of this empowerment.

4. Stakeholders

The stakeholders identified are:

- Trading venues: Trading venues trading derivatives subject to the TO will likely receive, and have to process, additional membership requests. Trading venues may have to hire additional supporting staff should there be a substantial increase in members/participant and trading volume. Those potential additional efforts are expected to be far outweighed by the positive impact of the TO on trading venues, through increased trading volume and revenues.

Some trading venues that currently do not offer trading in derivatives subject to the TO may be incentivised to do so.

- Financial counterparties:
 - o Where those entities are already members/participants of trading venues trading the derivative contracts subject to the TO, they will benefit from the increased liquidity available on those trading venues, without additional direct costs
 - o Where those entities currently do not trade derivatives subject to the TO on trading venues, they will incur direct additional costs such as IT connectivity costs, membership fees. For firms that trade those derivatives infrequently, those additional costs could be significant and firms might consider switching to alternative instruments or amending their business model.

Whenever they currently trade derivatives to be subject to the TO OTC, market participants may also have to amend their trading model for instance by

switching from voice trading to electronic trading, which may have organisational, IT and staff impact. While the draft RTS specifying the TO does not prescribe the trading protocols to be used by trading venues, it is nevertheless likely that the TO will likely offer less flexibility in the way derivatives may be traded. Moving to on-venue trading may also impact the revenue structure of financial counterparties, with a potential increase in (i) fee based revenue vs spread based revenue, and (ii) their revenue sources as more transparent on-venue trading will likely increase competition.

- Significant non-financial counterparties: Where significant non-financial counterparties trade derivatives subject to the TO for purposes other than hedging, they may decide to become a member/participant or alternatively, amend the way they currently trade those derivatives, for instance by entrusting their execution to a trading venue member/participants on an agency basis or switching to slightly different instruments.
- Counterparties not subject to the TO and end-investors more generally: Those stakeholders will be impacted to the extent that the increased pre-trade transparency framework resulting from the combined effect of Level 1 and of the derivatives subject to the TO under the draft RTS has an impact on total cost of trading in such derivatives and on the ability of such market participants to appropriately mitigate risks. Those market participants may also try, or be offered, to switch to slightly different instruments to escape the TO.

5. Cost-Benefit Analysis

The draft RTS sets out the list of derivatives subject to the TO and the dates from which such obligation takes effect.

A- List of derivatives subject to the TO

Under Article 32(2) of MiFIR, two main tests must be carried out to determine whether a class of derivatives subject to the CO should also be subject to the TO: i) a venue test (is the class of derivatives admitted to trading or traded one trading venue?) and ii) a liquidity test (is the class of derivatives sufficiently liquid and has sufficient third party-buying and selling interests?).

a) Venue test

Based on the list of derivatives meeting the liquidity test, below, ESMA considers that all those derivatives are also available for trading on at least one trading venue. This approach is in line with the responses to the CP, since the few instruments initially not considered as traded on a trading venue by some respondents do not meet the liquidity test.

b) Liquidity test

Taking into account the DP comments, the liquidity test conducted for is no longer based on TR data only and includes data on fixed-to-float single currency swaps and OIS collected from

some MTFs for the period 1 July-31 December 2016. The data received has been integrated with TR data covering the same period and data cleaning has been performed to avoid double counting to the extent possible.

The data presents a higher level of granularity than the one used for the DP (e.g. floating rate index and its term, trade date, start type). However, some parameters are still not taken into account as this information, although included in the data set collected from MTFs, are not available in the TR dataset (e.g. day count convention of the floating leg, notional type).

Given that the data collected from MTFs only captures a relatively small part of the overall trading in IRS and that only a small part of TR data could be taken into consideration due to missing fields, ESMA notes that the liquidity analysis conducted in the CP is likely to understate the overall liquidity in IRS. The liquidity analysis has been conducted only for transactions in EUR, GBP, USD, JPY and SEK as no data was received from MTFs for other currencies.

Finally, given the outstanding uncertainties surrounding the data set used for the liquidity assessment, ESMA did not set fixed thresholds to be met for the liquidity criteria (average frequency of trades, average size of trades, number and type of active market participants and average size of spreads) and rather relied on a holistic liquidity assessment, which allows for better consideration and weighting of the various liquidity criteria i.e:

- Number of market participants: in line with some responses to the DP, ESMA agrees that 50 counterparties appears to be a reasonable number, but considers that there may be room for deviation depending on the overall market size and liquidity of the different derivative classes.
- Number of trading venues: ESMA is of the view that having more than one trading venue making a derivative available for trading should not be a prerequisite to consider that the derivative has a liquid market. Nor does it consider that a minimum level of trading activity should be taking place on the trading venue making the derivative available for trading. ESMA however notes that MTF data has now been included in the liquidity assessment, thereby contributing to ensuring that only sufficiently liquid standardised derivatives will be subject to the TO.
- Number of market makers: This criterion has been given a lower rating given the ambiguities around the concept of market makers/liquidity providers and the absence of binding liquidity arrangements at many trading venues.
- Ratio of market participants to average size/frequency of trades and average size of spreads: ESMA did not consider those criteria in the liquidity assessment due to uncertainties of the intended purpose or unavailability of data.

Regarding the anticipated impact of the TO on the liquidity of a class of derivatives, ESMA notes that the TO will likely lead to changes in trading behaviour, but it can reasonably be expected that where a class of derivatives passes the liquidity assessment, there will be no immediate negative impact on liquidity effect due to the TO. To the contrary, more centralised

and transparent markets may contribute to decreased trading costs and increased liquidity (see also Section 6 on Literature review).

Taking into account the criteria and considerations above, the draft RTS proposes an initial list of derivatives that would be subject to the TO. This list includes:

- For interest rate derivatives, the fixed-to-float IRS in EUR, GBP and USD with the most standardised characteristics and benchmark tenors in which liquidity is most concentrated.

Based on the liquidity analysis conducted with the caveat expressed above on data comprehensiveness, fewer sub-classes are determined to be liquid compared to the TO in the US for IRS denominated in EUR, USD and GBP. This may appear counterintuitive in particular for IRS denominated in EUR but can be explained by the differences in the processes leading to a class of derivatives being subject to the TO in the US and in the EU, where ESMA is required to conduct a more structured liquidity test.

ESMA is aware of the potential drawbacks of a misalignment of derivatives subject to the TO in the EU and in the US with respect to cross-border harmonisation and integrated global derivative markets. Therefore, ESMA suggests initially starting with a more narrowly defined set of IRS subject to the TO. Once ESMA can broaden its liquidity analysis based on more trading data, the trading mandate may subsequently be broadened.

To limit operational costs and the risk of regulatory arbitrage, ESMA considered that only IRD classes with at least three liquid benchmarks should be subject to the TO. As a consequence, no fixed-to-float IRS in currency other than EUR, GBP and USD are considered liquid.

- For credit derivatives, based on an assessment of trade frequency and the availability of those contracts on trading venues, the current on-the-run series and the latest off-the-run series of the two Index CDS that are subject to the CO are considered sufficiently liquid to be made subject to the TO.

It is worth noting that ESMA is not explicitly empowered to develop a tailored TO regime for package transactions. Nor does ESMA's mandate indicate that there may be room for exempting certain components of package transaction components from the TO, as the CFTC does. Accordingly, the draft RTS on the TO abstains from dealing with package transactions.

Policy Objective	Ensuring trading in derivatives that are sufficiently liquid takes place on venue for more efficient markets.
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Technical Proposal	<p>Under the draft RTS, the most standardised IRD in EUR, GBP and USD and the current on-the-run series and latest off-the-run series in two Index CDS (EUR) will be subject to the TO.</p> <p>See Annex of the draft RTS for more details.</p>
<i>Benefits</i>	<p>The draft RTS provides clarity, legal certainty and predictability with respect to derivatives subject to the TO and further contributes to supervisory convergence.</p> <p>The draft RTS is based on a holistic approach to liquidity rather than on fixed thresholds, which allows better taking into account and weighting the various liquidity criteria.</p> <p>The draft RTS takes a cautious approach by only including IRS in EUR, USD and GBP with standardised characteristics and benchmark tenors that concentrate highest liquidity based on available data, with a potential extension of the trading mandate in a second step. This approach allows spreading implementation costs and operational burden over a longer period of time and thereby contributes to reducing potential disrupting impact on market participants.</p> <p>In specific currencies (e.g. SEK), the three liquid tenor criterion for an IRD to be subject to the TO will reduce the operational burden for firms trading derivatives in those currencies.</p>
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>CAs may incur additional on-going staff supervisory costs to ensure that derivatives subject to the TO are traded on an EU trading venue or an equivalent third-country venue.</p> <p>ESMA considers those costs to be mainly driven by Level 1.</p>
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Trading venues offering trading in derivatives subject to the TO will likely incur one-off IT and human costs to process additional membership requests, including from buy-side clients.</p> <p>They may also incur on-going staff and IT costs for monitoring a larger number of members/participants and increased trading volume on their systems.</p> <p>ESMA considers those costs to be mainly driven by Level 1.</p>
<i>Cost to other stakeholders</i>	<p>A number of market participants may incur one-off staff costs, including staff training, legal costs and IT costs to connect to trading venues, or additional trading venues trading derivatives subject to the TO.</p>

	<p>Those market participants will incur on-going staff costs to ensure compliance with trading venues' rules, as well as on-going IT maintenance costs, in addition to on-going membership fees.</p> <p>For firms that trade derivatives subject to the TO infrequently, those additional costs may be significant and may lead them to switch to less perfect OTC derivative hedging or to reconsider their business model.</p> <p>ESMA considers those costs to be mainly driven by Level 1.</p>
<p><i>Indirect costs</i></p>	<p>The lack of alignment with derivatives that are MAT in the US and inconsistent cross-border implementation of the TO will increase operational costs for market participants. The absence of cross-border harmonisation may lead to less integrated and less efficient global derivative markets.</p> <p>The uncertainty surrounding the treatment of package transactions with respect to the TO may be a source of costs for some market participants.</p> <p>The lack of consistency between the liquidity tests for transparency and TO purposes may result in different treatments for the same class of derivatives, creating uncertainty and costs to market participants. ESMA notes that, in any case, the static nature of the list of derivatives subject to the TO combined with the dynamic annual review of derivatives liquidity for transparency purposes create an on-going risk of inconsistency between the two assessments.</p> <p>ESMA considers those last two indirect costs to be mainly driven by Level 1.</p>

B- Trading obligation and transparency

As required by Article 32(3) of MiFIR, ESMA also considered whether a class of derivatives is only sufficiently liquid in transactions below a certain size.

Taking into account some of the responses to the DP, ESMA revisited the suggestion initially made to exempt transactions above a certain size from the TO. ESMA concurs with the views expressed by some stakeholders that there is no need to systematically exempt transactions above a certain size from transparency requirements as MiFIR already provides for pre-trade transparency waivers for orders that are above pre-trade LIS and differed publication for transactions above post-trade LIS.

This approach is in line with the CFTC approach. In the US, block transactions in derivatives MAT still have to be traded on Designated Contracts Market (DCM) or a SEF but do not have to meet the related execution requirements, i.e. do not have to be traded on an RFQ to three or an Central Limit Order Book (CLOB) facility.

Policy Objective	Ensuring an appropriate level of transparency for derivatives subject to the TO.
Technical Proposal	No specific exemption from the TO for trades above a certain size.
<i>Benefits</i>	<p>The draft RTS provides clarity, legal certainty and predictability with respect to derivatives subject to the TO and further contributes to supervisory convergence.</p> <p>The MiFIR transparency framework remains unaffected by the TO. The draft does not add an additional layer of complexity in the design, and implementation, of the MiFIR transparency regime. In addition, it ensures a consistent approach with the US with respect to block transactions in derivatives subject to the trading obligation.</p> <p>As a consequence, the draft RTS will reduce implementation costs for market participants.</p>
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	No additional cost identified for regulators.
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	None identified for trading venues.
<i>Cost to other stakeholders</i>	None identified.
<i>Indirect costs</i>	<p>No indirect costs identified with respect to pre-trade transparency as MiFIR already provides for the possibility to waive pre-trade transparency requirements for transactions above a certain size.</p> <p>With respect to post-trade transparency, market participants will be able to benefit from deferred publication of transactions that are LIS. Compared to the option where those LIS transactions would not have been published at all, ESMA consider that the marginal indirect costs are not significant as post-trade transparency is more</p>

	likely to generate indirect costs for markets participant when trading in illiquid and non-standardised instruments.
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C- Date from which the TO takes effect

The TO for derivatives implements a G20 commitment of 2009, which was expected to be implemented by 2012. The US implemented this G20 commitment in 2014.

Taking into account the already late implementation of the TO in the EU, and the fact that there is still a significant period of time between the publication of the CP and the MiFID II application date, ESMA does not consider it appropriate to further delay the TO implementation after MiFID II applies on 3 January 2018. ESMA also took note of the political expectation that the TO becomes effective as soon as possible.

However, as the TO can only apply to derivatives subject to the CO, the draft RTS takes into account the phase-in for the four different categories of counterparties set out in the Commission Delegation Regulations¹⁷ establishing the CO under EMIR, including the further delay endorsed by the Commission for counterparty category 3¹⁸.

Accordingly, under the draft RTS, for counterparties of categories 1 and 2 the TO would take effect on the date of entry into force of the RTS on TO, i.e. the day following the publication of the RTS in the OJ. For counterparties of categories 3 and 4, for which the CO will start to apply far after 3 January 2018, the TO will take effect on the same day as the CO, i.e. on 21 June 2019 for category 3 and respectively on 21 December 2018 (IRD) and 9 May 2019 (Credit derivatives) for category 4.

Policy Objective	Ensuring a timely application of the TO in the EU.
Technical Proposal	<p>For counterparty categories 1 and 2, the TO takes effect on the date of entry into force of the RTS on TO.</p> <p>For counterparty categories 3 and 4, the TO takes effect on the date of entry into force of the CO.</p> <p>See Article 2 of the draft RTS for more details.</p>

¹⁷Commission Delegated Regulation (EU)2015/2205 of 6 August 2015
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2205&from=EN>;

Commission Delegated Regulation (EU)2016/592 of 1 March 2016
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0592&from=EN>

Commission Delegated Regulation (EU)2016/1178 of 10 June 2016
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1178&from=EN>

¹⁸ <http://ec.europa.eu/transparency/reqdoc/rep/3/2017/EN/C-2017-1658-F1-EN-MAIN-PART-1.PDF>

<i>Benefits</i>	The draft RTS ensures that the TO takes effect as soon as possible once MiFIDII/MiFIR applies.
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>CAs may incur additional on-going staff supervisory costs to ensure that the respective phase-ins for the TO are met by each category of counterparty.</p> <p>We consider those additional costs to be non-significant.</p>
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Trading venues will have to process potential additional membership requests from counterparty category 1 and 2 and consider the potential extension of the list of derivatives made available for trading at the same time they will be finalising preparation for MiFID II/MiFIR implementation.</p> <p>Although this may be a source of additional one-off costs, we do not expect those costs to be significant compared to the potential additional business activity arising from the TO.</p>
<i>Cost to other stakeholders</i>	<p>Market participants belonging to counterparty categories 1 and 2 will need to set up arrangements with trading venues at the same time they finalise arrangements prior to the MiFID II/MiFIR application date. This may be a source of additional costs as more resources may be needed over a limited period of time. Those costs would however be limited by the choice made in the draft RTS to have a more narrow set of derivatives subject to the TO compared to the CFTC and not to opt for full alignment of the trading mandate between the EU and the US right from the start.</p> <p>Counterparties of categories 1 and 2 will incur search costs to check publication of the RTS in the OJ. We do not expect those costs to be significant and those market participants may decide to anticipate the TO by a few days or weeks to avoid such costs.</p>
<i>Indirect costs</i>	None identified

6. Literature review : Bank of England staff working paper

- Background

In January 2016, the Bank of England produced a staff working paper analysing the impact of the implementation of the US trade mandate of the Dodd-Frank Act and the mandatory trading

of certain interest rate swaps that came into effect on 15 February 2014 on interest rate swap market liquidity¹⁹.

The analysis used transaction data for USD and EUR denominated vanilla spot interest rate swaps obtained from the London Clearing House (LCH) and the Depository Trust & Clearing Corporation (DTCC).

Under the Dodd-Frank Act, Swaps subject to the trade execution mandate must be traded on a Swap Execution Facility (SEF) or a designated contract market (DCM). SEFs are multilateral trading platforms that operate a multi dealer request for quote (RFQ) functionality and a Central Limit Order Book (CLOB). On a SEF, the RFQ functionality requires that a request for quote is sent to at least three market participants. This easily enables the client asking for a quote to compare prices among dealers and thus promote competition for order flow among dealers. Dealers cannot see each others' quotes and do not know which other dealers have received the request.

The CLOB and the RFQ functionalities operate in conjunction for swaps subject to the trading mandate. The SEF must provide the RFQ requester with any firm resting bid or offer in the order book, together with any other quote received from the RFQ platform.

Transactions are subject to real-time reporting and public dissemination.

According to the authors, SEFs change the microstructure of the market in two ways. First, they increase transparency by allowing market participants to more easily compare prices quoted by dealers. Second, SEFs allow end-users to compete directly with dealers in supplying liquidity, although most of the liquidity provision is still being done by dealers.

- Results

The authors analysed the impact of those market microstructure changes on the liquidity and trading patterns in interest swaps markets. Their key findings are summarised below:

- The introduction of trading on SEFs improved liquidity, in particular for USD swaps that were mandated to trade on SEFs, i.e. for the swaps that were already the most liquid, with total execution costs decreasing by \$20-\$40 million daily for USD mandated swap and by \$7-13\$ million daily for end-users;
- The trading mandate has led the EU and US swap markets to be somewhat less integrated – some non-US persons became less willing to trade with US persons as this would require them to trade on a SEF. However this increased fragmentation did not have a detrimental effect on trading costs (liquidity).

¹⁹ Bank of England Staff Working Paper No 580 Centralized trading, transparency and interest rate swap market liquidity: evidence from the implementation of the Dodd-Frank Act by Evangelos Benos, Richard Payne and Michalis Vasios <http://www.bankofengland.co.uk/research/Pages/workingpapers/2016/swp580.aspx>

- The authors tested whether improved transparency reduced the importance of dealers in matching the ultimate counterparties. Results show a reduction in inter-dealer trading equally spread across different maturities and currency (this could in turn explain the lower execution costs after SEFs). However, evidence does not permit to firmly conclude that this reduction in interdealer trading was due to mandated trading on SEFs; it could be also driven by the new RFQ functionality that forces dealers to quote more competitive spreads and in turn this leads to narrower spreads.

As a conclusion, the authors note that the increased transparency, and particularly the pre-trade transparency, and competition that SEFs brought about significantly improved trading conditions for swaps, especially for those that were forced to trade on them, i.e. the most liquid ones. They also note that the result that increased pre-and post-trade transparency improves liquidity is consistent with work undertaken by other academics on other asset classes.

9.4 Annex IV

Draft technical standards

COMMISSION DELEGATED REGULATION (EU) .../...

of []

**supplementing Regulation (EU) No 600/2014 of the European Parliament
and of the Council on markets in financial instruments with regard to
regulatory technical standards on the trading obligation for derivatives
(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012²⁰, and in particular Article 32(1) thereof,

Whereas:

- (1) Regulation (EU) No 600/2014 provides for an obligation to trade on a regulated market, a multilateral trading facility, an organised trading facility or an equivalent third-country trading venue certain classes of derivatives which have been declared subject to the clearing obligation in accordance with Regulation (EU) No 648/2012. This trading obligation only applies to classes of derivatives that are sufficiently liquid and available for trading on at least one trading venue in the European Union.
- (2) For interest rate derivatives subject to the clearing obligation, liquidity is concentrated in derivative contracts which have the most standardised characteristics. It is therefore important to take those characteristics into consideration when establishing the list of derivatives subject to the trading obligation.
- (3) Similarly, liquidity in interest rate derivatives subject to the clearing obligation is concentrated in derivative contracts having certain benchmark tenors. It is therefore appropriate to limit the application of the trading obligation to derivatives with those benchmark tenors. In order to distinguish derivative contracts starting immediately after the execution of the trade from derivative contracts starting at a predetermined date in the

²⁰ OJ L 173, 12.6.2014, p. 84

future, the tenor of a contract should be calculated based on the effective date at which the obligations under the contract come into effect. However, it is important not to make use of benchmark tenors as strict thresholds but rather as point of reference for targeted intervals to adequately take into account the derivatives' liquidity pattern and to avoid circumvention of the trading obligation.

- (4) For credit derivatives, with respect to the two index credit default swaps (CDS) that are subject to the clearing obligation, liquidity is concentrated in the current on-the-run series and the latest off-the-run series. It is therefore appropriate to limit the application of the trading obligation to derivatives belonging to those series only.
- (5) Under the clearing obligation in accordance with Regulation (EU) No 648/2012, four categories of counterparties have been identified and a phased-in application of the provisions established so as to accommodate the specific needs of each type of counterparties. Since the trading obligation can only take effect once the clearing obligation has become effective, it is appropriate to ensure that the provisions of this Regulation do not apply before the application of the clearing obligation in relation to the four categories of counterparties identified in accordance with Regulation (EU) No 648/2012.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²¹,

HAS ADOPTED THIS REGULATION:

Article 1

Classes of derivatives subject to the trading obligation

The classes of derivatives set out in Annex I shall be subject to the trading obligation.

²¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Dates from which the trading obligation takes effect

In respect of transactions in interest rate and credit derivatives subject to the trading obligation, the date from which the trading obligation takes effect shall be the later date of the following dates:

- (a) the date when this Regulation applies;
- (b) the date from which the clearing obligation for the derivatives takes effect in relation to a category of counterparties in accordance with Article 3 of Commission Delegated Regulation (EU) No 2015/2205²² as well as Article 3 of Commission Delegated Regulation (EU) No 2016/592²³.

Article 3

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall apply from 3 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

²² Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13–21).

²³ Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 103, 19.4.2016, p. 5–11).

ANNEX

List of classes of derivatives subject to the trading obligation

Table 1

Fixed-to-float interest rate swaps denominated in EUR

Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5 days
spot starting (T+2)	EUR	Euribor 3M	Annual	30/360 ACT/360	Quarterly	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 10Y, 15Y, 20Y, 30Y
spot starting (T+2)	EUR	Euribor 6M	Annual	30/360 ACT/360	Semi-annual	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 8Y, 9Y, 10Y, 12Y, 15Y, 20Y, 30Y

Table 2

Fixed-to-float interest rate swaps denominated in USD

Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5 days
spot starting (T+2)	USD	Libor 3M	Semi-annual	30/360 ACT/360	Quarterly	2Y, 3Y, 4Y, 5Y, 7Y, 10Y, 30Y
IMM	USD	Libor 3M	Semi-annual	30/360 ACT/360	Quarterly	5Y, 6Y, 30Y
spot starting (T+2)	USD	Libor 3M	Annual	30/360 ACT/360	Quarterly	2Y, 3Y, 4Y, 5Y, 7Y, 10Y, 30Y
IMM	USD	Libor 3M	Annual	30/360 ACT/360	Quarterly	5Y, 6Y, 30Y

Table 3

Fixed-to-float interest rate swaps denominated in GBP

Trade start type	Settlement Currency	Floating reference rate with term	Fixed leg payment frequency	Fixed rate day count	Floating leg reset frequency	Benchmark tenor +/- 5 days
spot starting (T+0)	GBP	Libor 6M	Semi-annual	ACT/365F	Semi-annual	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 10Y, 15Y, 20Y, 30Y
spot starting (T+0)	GBP	Libor 3M	Quarterly	ACT/365F	Quarterly	2Y, 3Y, 4Y, 5Y, 6Y, 7Y, 10Y, 15Y, 20Y, 30Y

Table 4

Index CDS

Type	Sub-type	Geographical zone	Reference index	Settlement Currency	Series	Tenor
Index CDS	Untranchcd index	Europe	iTraxx Europe Main	EUR	on-the-run series first off-the-run series	5y
Index CDS	Untranchcd index	Europe	iTraxx Europe Crossover	EUR	on-the-run series first off-the-run series	5y