



European Securities and  
Markets Authority

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



## Responding to this paper

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

### **Instructions**

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

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA\_ QUESTION\_MIFID\_TO\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

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

### **Naming protocol**

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

ESMA\_MiFID\_TO\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_MiFID\_TO\_ESMA\_REPLYFORM or

ESMA\_MiFID\_TO\_ESMA\_ANNEX1

### **Deadline**

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

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.



### ***Publication of responses***

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

### ***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings 'Legal notice' and 'Data protection'.



## Introduction

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

< ESMA\_COMMENT\_MIFID\_TO\_0 >

Deutsche Börse Group (DBG), and specifically Eurex Exchanges and Eurex Clearing as part of DBG, welcome the introduction of the Trading Obligation for OTC derivatives under MiFIR and supports ESMA in its efforts to further specify the conditions and procedures for making the trading obligation provisions applicable to OTC derivatives. However, we would like to point to the following issues which we will further elaborate on in our responses to the questions in ESMA's Discussion Paper below.

Firstly, we would like to raise the attention to potential discrepancies between the EU and other jurisdictions outside the EU, where the trading obligation might have already been enforced, such as the US or Japan. In Europe, there is an understanding of how several infrastructure providers can serve the various OTC markets which differs from the limited number of providers currently seen overseas. **This European approach of responding on market participants' trading concerns should remain the guiding principle, without favouring or mandating one trading venue type or infrastructure over the other by regulatory means.**

Secondly, in regards to large in scale (LIS) trades we would like to emphasize the requirement to **carefully design the interplay between transparency and trading obligation requirements; thereby, LIS trades should not be omitted from the trading obligation entirely.** Rather, for the determination of liquidity it is strongly recommended to take into account the whole universe of trades and the degree of development of an asset class to be traded on trading venues; **once the liquidity of asset classes has been determined accordingly, it should be combined with meaningful transparency LIS thresholds to allow for pre-trade transparency to be waived where appropriate.**

ESMA has already put a lot of effort in designing thresholds for pre and post trade LIS in OTC derivatives. This effort has resulted in various threshold levels that allow trading venues to waive pre and post trade transparency where meaningful but allow the market structure to evolve in a way that the trading obligation sets the tone for the asset class to be traded on trading venues in the first place. Cutting out LIS trades from the picture would result in a misrepresentation of the potential products that could be traded on trading venues in principle and hinder the trading obligation to unfold in its full potential in Europe. Thus, we would consider a combination of trading obligation and adequate transparency regime in the following way to be ideal:

ESMA to define which asset classes are generally appropriate for trading on trading venues (i.e. trading eligible under the MiFIR trading obligation);

Trading venues to assess the application of pre or post trade transparency exemptions in order to mitigate any adverse effects, and to apply for waivers and deferrals with competent authorities once the legislation is applicable.

< ESMA\_COMMENT\_MIFID\_TO\_0 >

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

<ESMA\_QUESTION\_MIFID\_TO\_1>

DBG agrees that the transparency obligation should be closely aligned to the trading obligation. In that respect it is advisable to choose the same level of granularity and also include broken tenors to ensure comparability. |

<ESMA\_QUESTION\_MIFID\_TO\_1>

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

<ESMA\_QUESTION\_MIFID\_TO\_2>

To DBG's knowledge this assertion is true. |

<ESMA\_QUESTION\_MIFID\_TO\_2>

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

<ESMA\_QUESTION\_MIFID\_TO\_3>

At the current stage, DBG considers the usage of the Legal Entity Identifier to be appropriate, as part of the TR data. |

<ESMA\_QUESTION\_MIFID\_TO\_3>

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

<ESMA\_QUESTION\_MIFID\_TO\_4>

DBG is of the view that the minimum total number of participants should be set in accordance with RTS 4, setting the minimum at 2 (two) trading participants. This fulfils the minimum requirement of a market place. Once this requirement is fulfilled, other criteria, e.g. liquidity, becomes more important and should be considered. The level of granularity should be in line with transparency obligations. |

<ESMA\_QUESTION\_MIFID\_TO\_4>

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

<ESMA\_QUESTION\_MIFID\_TO\_5>

DBG repeats the arguments put forward in Q1 and Q2. |



<ESMA\_QUESTION\_MIFID\_TO\_5>

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

<ESMA\_QUESTION\_MIFID\_TO\_6>

DBG is of the opinion that 1 (one) trading venue is sufficient for a derivative or a class of derivatives to be considered subject to the TO. Once this requirement is fulfilled, other criteria, e.g. liquidity, become more important and should be considered. |

<ESMA\_QUESTION\_MIFID\_TO\_6>

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

<ESMA\_QUESTION\_MIFID\_TO\_7>

DBG is of the opinion that it depends on the (sub-)class of derivative; i.e. for the OTC-look-alike of a highly liquid instrument the total number of market makers might be significantly lower than for a look-alike of a less actively traded. Thus, trading venues that already offer OTC derivatives should be approached as suggested in paragraph 86 before the application of MiFID II. |

<ESMA\_QUESTION\_MIFID\_TO\_7>

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

<ESMA\_QUESTION\_MIFID\_TO\_8>

DBG is of the opinion that it depends on the (sub-)class of derivative; i.e. for the OTC-look-alike of a highly liquid instrument the total number of market makers might be significantly lower than for a look-alike of a less actively traded. Generally, for highly liquid products only few (or no) market makers should be required per se, whereas illiquid products could require more market makers. |

<ESMA\_QUESTION\_MIFID\_TO\_8>

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

<ESMA\_QUESTION\_MIFID\_TO\_9>

DBG would like to emphasize that the ratio of (market participants) / (average size) will not yield satisfactory results. Example: 100 market participants trading 1000 contracts on average yield the same ratio as 2 participants trading 20 contracts on average.

DBG suggests to consider the ratio of market makers to market participants multiplied by size or frequency. This way less liquid markets with market makers or more liquid market markets with less market makers both receive good scores.

However, as a result of the proposed approach, a floor for minimum market makers needs to be considered for the case of highly liquid markets without market makers. |

<ESMA\_QUESTION\_MIFID\_TO\_9>

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

<ESMA\_QUESTION\_MIFID\_TO\_10>

[DBG is of the opinion that - if possible - data should be made available to carry out the spread calculations as suggested. For example, by trading venues already offering OTC derivatives. ]

<ESMA\_QUESTION\_MIFID\_TO\_10>

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

<ESMA\_QUESTION\_MIFID\_TO\_11>

[Besides the aforementioned data sources, DBG recommends to take the trading venues' market making agreements into account (if available) as these determine the quote requirements for market makers.

However, DBG acknowledges the limitation before MiFID II application. ]

<ESMA\_QUESTION\_MIFID\_TO\_11>

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

<ESMA\_QUESTION\_MIFID\_TO\_12>

[Once MiFID II is applicable, DBG recommends to use the maximum allowable spread from market making agreements that trading venues incorporate. ]

<ESMA\_QUESTION\_MIFID\_TO\_12>

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

<ESMA\_QUESTION\_MIFID\_TO\_13>

[It does not become sufficiently clear to DBG which procedure ESMA proposes to follow. A more pronounced elaboration on the potential alternatives pursued by ESMA would be appreciated. ]

<ESMA\_QUESTION\_MIFID\_TO\_13>

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

<ESMA\_QUESTION\_MIFID\_TO\_14>

[DBG would like to emphasize the requirement to rather carefully design the interplay between transparency and trading obligation requirements, than omitting LIS trades from the trading obligation entirely. It is strongly recommended to take the whole universe of trades into account, in order to define liquidity and the degree of development of an asset class to be traded on trading venues and combine the approach with meaningful transparency LIS thresholds to allow for pre-trade transparency to be waived where appropriate



ESMA already put a lot of effort in designing thresholds for pre- and post- trade LIS in OTC derivatives. This effort has resulted in various threshold levels that allow trading venues to waive pre- and post- trade transparency where meaningful but allow the market structure to evolve in a way that the trading obligation sets the tone for the asset class to be traded on trading venues in the first place. Cutting out LIS trades from the picture would result in a misrepresentation of the potential products that could be traded on trading venues in principle.

It is thus recommended to first define which asset classes are generally appropriate for trading on trading venues (i.e. trading eligible under the MiFIR trading obligation) and if the trading venue deems it meaningful to apply for pre- or post- trade transparency exemptions in order to mitigate any adverse effects, waivers and deferrals can be applied for with competent authorities once the legislation is applicable.

Excluding LIS trades ex ante would not allow for the trading obligation to unfold in its full potential in Europe - a combination of trading obligation and adequate transparency regime would thus be ideal.

This is a key and principle element and is therefore also one of the key introductory comments DBG is providing and repeating at this stage. |

<ESMA\_QUESTION\_MIFID\_TO\_14>

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

<ESMA\_QUESTION\_MIFID\_TO\_15>

It is DBG's view that discrepancies between the MiFIR Transparency Regime and the Trading Obligation should be aligned to the best extent possible. Inconsistencies will cause unnecessary confusion and uncertainty in the implementation and application of the regulation. An alignment reduces complexity considerably. Hence, DBG proposes to both change the approach and the thresholds to remove inconsistencies. The liquidity measure will then determine uniformly whether products are subject to transparency and trading obligation. |

<ESMA\_QUESTION\_MIFID\_TO\_15>

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

<ESMA\_QUESTION\_MIFID\_TO\_16>

DBG supports the suggested approach. |

<ESMA\_QUESTION\_MIFID\_TO\_16>

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

<ESMA\_QUESTION\_MIFID\_TO\_17>

DBG supports the suggested approach. |

<ESMA\_QUESTION\_MIFID\_TO\_17>



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

<ESMA\_QUESTION\_MIFID\_TO\_18>  
[DBG supports the outlined approach. ]  
<ESMA\_QUESTION\_MIFID\_TO\_18>

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

<ESMA\_QUESTION\_MIFID\_TO\_19>  
[The results reflect DBG's assessment. It should be noted that the proposed approach may result in localities without TO. This should generally be avoided, e.g. if USD fixed-to-float was to be subject to TO for 5,6,7,8 and 10y tenor, it should also apply for 9y tenor. ]  
<ESMA\_QUESTION\_MIFID\_TO\_19>

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

<ESMA\_QUESTION\_MIFID\_TO\_20>  
[DBG considers the criteria as appropriate. However, as stated in Q19, localities without TO should be avoided. ]  
<ESMA\_QUESTION\_MIFID\_TO\_20>

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

<ESMA\_QUESTION\_MIFID\_TO\_21>  
[DBG supports the proposal to include the mentioned specifications. It should be checked whether market conventions exist. Where available, market conventions should be used. ]  
<ESMA\_QUESTION\_MIFID\_TO\_21>

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

<ESMA\_QUESTION\_MIFID\_TO\_22>  
[DBG supports the assessment but notes that the different structure of the OIS market should be considered in the assessment to include OIS into the TO. It is our opinion that OIS should be included into the TO. ]  
<ESMA\_QUESTION\_MIFID\_TO\_22>

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

<ESMA\_QUESTION\_MIFID\_TO\_23>

DBG proposes to lower the thresholds to capture OIS in the TO. The minimum number of counterparties should be set in accordance with the answer given in Q4 of this discussion paper to ensure consistency.

Specifically, that the minimum total number of participants should be set in accordance with RTS 4, setting the minimum at 2 (two) trading participants. This fulfils the minimum requirement of a market place. Once this requirement is fulfilled, other criteria, e.g. liquidity, becomes more important and should be considered. The level of granularity should be in line with transparency obligations. |

<ESMA\_QUESTION\_MIFID\_TO\_23>

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

<ESMA\_QUESTION\_MIFID\_TO\_24>

DBG supports the proposal to take the additional criteria into consideration. The criteria should account for the different structure of the OIS market. It is our opinion that OIS should be included into the TO where criteria indicate eligibility. It should be checked whether market conventions exist. Where available, market conventions should be used. |

<ESMA\_QUESTION\_MIFID\_TO\_24>

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

<ESMA\_QUESTION\_MIFID\_TO\_25>

|At this stage, DBG would agree with ESMA's assessment. |

<ESMA\_QUESTION\_MIFID\_TO\_25>

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

<ESMA\_QUESTION\_MIFID\_TO\_26>

|Not applicable, see DBG response to Q25. |

<ESMA\_QUESTION\_MIFID\_TO\_26>

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

<ESMA\_QUESTION\_MIFID\_TO\_27>

|No comment. |

<ESMA\_QUESTION\_MIFID\_TO\_27>

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

<ESMA\_QUESTION\_MIFID\_TO\_28>  
[No comment. ]  
<ESMA\_QUESTION\_MIFID\_TO\_28>

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

<ESMA\_QUESTION\_MIFID\_TO\_29>  
[No comment. ]  
<ESMA\_QUESTION\_MIFID\_TO\_29>

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

<ESMA\_QUESTION\_MIFID\_TO\_30>  
[DBG agrees to align the TO application dates with the CO. ]  
<ESMA\_QUESTION\_MIFID\_TO\_30>

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

<ESMA\_QUESTION\_MIFID\_TO\_31>  
[DBG believes that the proposed timelines provide for sufficient time to avoid bottlenecks and does not consider further phase-ins as necessary. ]  
<ESMA\_QUESTION\_MIFID\_TO\_31>

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

<ESMA\_QUESTION\_MIFID\_TO\_32>  
[At DBG, Eurex and Eurex Clearing offer a type of package transaction involving IRDs and CDSs, the so-called Exchange-for-Swap (EFS). The service is available for selected combinations of Eurex interest rate futures and OTC interest rate swaps as well as credit swaps.

The liquidity for these packages should be determined in the same way as for packaged transactions under transparency regime considerations. ]  
<ESMA\_QUESTION\_MIFID\_TO\_32>

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

<ESMA\_QUESTION\_MIFID\_TO\_33>

[At Eurex, part of DBG, there are currently no packages that only comprise Interest Rate Swaps or Credit Default Swaps. ]

<ESMA\_QUESTION\_MIFID\_TO\_33>

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

<ESMA\_QUESTION\_MIFID\_TO\_34>

[DBG agrees that the TO should also apply to the packages, if the components are subject to the TO. Notwithstanding any transparency waivers that might be applicable. ]

<ESMA\_QUESTION\_MIFID\_TO\_34>

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

<ESMA\_QUESTION\_MIFID\_TO\_35>

[DBG is of the opinion that if one of the components is subject to the TO, the package transaction should also be subject to the TO. Notwithstanding any transparency waivers that might be applicable. ]

<ESMA\_QUESTION\_MIFID\_TO\_35>