

**EFAMA reply to ESMA's consultation paper  
on the trading obligation for derivatives under MiFIR**

First and foremost, we wish to encourage ESMA and the European Commission to provide equivalence determinations criteria as soon as possible.

Additionally, to ensure legal certainty and facilitate analysis, we recommend that the Commission adopt a similar approach for the derivatives trading obligation. We are of the view that the equivalence provided by the Commission should be granted on a country-by-country basis and not by trading venue, for the jurisdictions outlined below and the trading venues within them.

List of jurisdictions to be deemed immediately equivalent:

1. USA
2. Canada
3. Switzerland
4. Australia
5. Hong Kong
6. Japan
7. South Africa
8. Brazil
9. South Korea
10. Mexico
11. New Zealand

Lastly, considering that the EMIR Amendment proposes that the Commission be empowered to suspend the clearing obligation on certain grounds and on the basis of a request from ESMA, this capability would need to be reflected in MiFIR as the obligation to trade on a regulated market would likely result in that trade being required to centrally clear.

We therefore ask that in the eventuality of a temporary suspension of the clearing obligation for a particular class of derivative, that the trading obligation is similarly suspended for that class of derivative.

**Q1.**

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

We agree that TR data is the best source to collect, analyse and publish the data calculations.

However, we consider that the determination of liquidity would be more accurate if defined by the size of the market where the derivative is actively traded, which is an approach closer to the assessment of liquidity for other instruments.

ESMA should also take into consideration that the nature and the diversity of (active) market participants could have more prevalence than the computation of the number of market participants alone.

Therefore, we insist on the need to introduce an additional liquidity test at trading venue level.

**Q2.**

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

No, we disagree.

As expressed above, Transactions above the post-trade LIS threshold should not be subject to the TO.

To the contrary, it is counter-intuitive to remove the protection of large trade execution in the most technical aspect, especially if less technical instruments still benefit from it. In fact, trades above pre-trade LIS or SSTI might even be exempt from the TO.

**Q3.**

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

We do not support ESMA's decision to not provide a golden source for derivatives caught by the Trading Obligation under MiFIR.

Firms should be able to access reliable sources of information preferably on the list kept in the public register.

EFAMA is supportive of every initiative that could ultimately lead to an exhaustive consolidated tape cross-instruments. We consider that not having a golden source for derivatives instruments goes against transparency principles.

**Q4.**

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

We agree.

**Q5.**

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

We agree.

**Q7.**

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

We agree.

**Q9.**

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

We agree.

**Q11.**

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

We agree.

**Q12.**

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

We agree.

**Q13.**

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

We do not agree with the proposed timeline because it does not give market participants, e.g. trading venues sufficient time to develop their offerings and trading frameworks.

We ask ESMA to

- align the time line with time line set for clearing obligations; and
- wait until the Commission has taken equivalence decisions, especially for key markets like the US.

Proposed timeline:

Category 1 – June 2018 at the earliest

Category 2 – December 2018

Category 3 and 4 – 2020

Alternatively, we suggest ESMA to adopt the approach of only considering the TO when at least 2 trading venues activity trade a class of derivative (as opposed to offering it for trading)

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Brussels, 4 August 2017

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