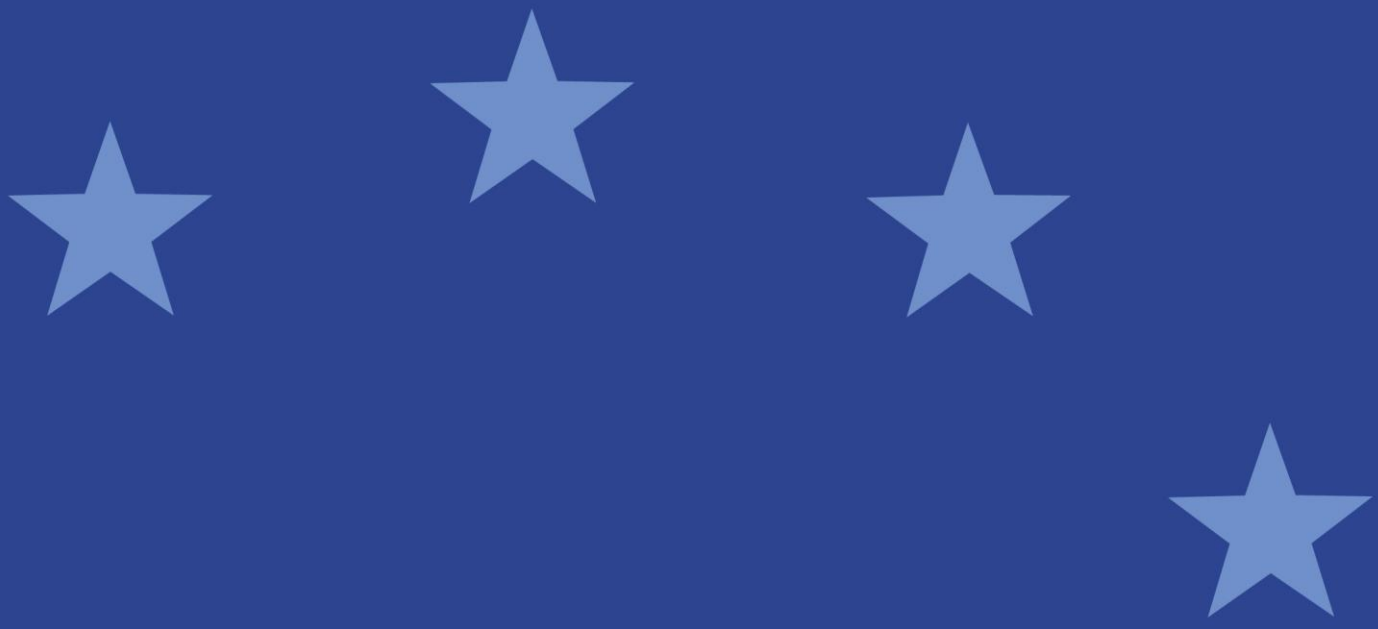
esma European Securities and Markets Authority

Discussion Paper

The trading obligation for derivatives under MiFIR



20 September 2016 | ESMA/2016/1389

Responding to this paper

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

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

ESMA will consider all comments received by **21 November 2016**.

Respondents are invited to use the reply form also published on the ESMA website. 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 discussion 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
BIS	Bank of International Settlements
CA	Competent Authority
CEA	Commodity Exchange Act
CCP	Central Counterparty
CDS	Credit Default Swap
CFTC	Commodity Futures Trading Commission
CFD	Contract-for-difference
CO	Clearing obligation
CSA	Committee of Securities Administrators (Canada)
CTP	Consolidated Tape Provider
DCM	Designated Contract Market
DP	Discussion paper
DTF	Derivatives Trading Facility (Canada)
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
ETP	Electronic Trading Platform
EU	European Union
FC	Financial Counterparty
FC-	Small Financial Counterparty
FIBO	Financial Instruments Business Operator (Japan)
FINMA	Financial Market Supervisory Authority (Switzerland)
FMIA	Financial Market Infrastructure Act (Switzerland)
FRA	Forward rate agreement
FSA	Financial Services Agency (Japan)
FSB	Financial Stability Board
FX	Foreign Exchange

IRS	Interest Rate Swap
JFSA	Japanese FSA
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
NFC	Non-Financial Counterparty
NFC-	Small Non-Financial Counterparty
NFC+	Non-Financial Counterparty subject to the clearing obligation, as referred to in Article 10(1)(b) of EMIR
OIS	Overnight interest swap
OTC	Over-the-counter
OTF	Organised trading facility
RFI	Registered Financial Institution (Japan)
RFQ	Request for quote
RM	Regulated Market
RTS	Regulatory Technical Standard
SEC	US Securities and Exchange Commission
SBS	Security-based swap
SEF	Swap Execution Facility
SSTI	Size specific to the instrument
TR	Trade Repository
TO	Trading obligation

1 Executive Summary

Reasons for publication

This discussion paper seeks stakeholders' views on ESMA's first proposals of how to implement the trading obligation for derivatives as foreseen in Articles 28 and 32 of Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and on ESMA's preliminary analysis of some classes of derivatives that could become subject to the trading obligation.

The input from stakeholders should help ESMA to proceed with drafting a proposal for a regulatory technical standard implementing the trading obligation for derivatives, including a cost-benefit-analysis. The submission of supportive data would be particularly appreciated and kept confidential where required.

Contents

Sections 3 gives an overview of the trading obligations for derivatives already in place in other countries. Section 4 explains the rules in place for the closely linked clearing obligation for derivatives and Sections 5 and 6 go through the various requirements imposed by Article 32 of Regulation (EU) No 600/2014. Section 7 contains the first quantitative analysis of the OTC derivatives market. Sections 8 and 9 discuss the date of application of the trading obligation and the treatment of package transactions.

Next Steps

ESMA will analyse the feedback received to this consultation and aims to publish a consultation paper in the first quarter of 2017. A draft technical standard, if deemed appropriate, should be submitted to the European Commission in the summer of 2017.

2 Introduction

Background/Mandate

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.

The trading obligation procedure

1. The application of the trading obligation (TO) is defined by Article 32 of MiFIR which outlines the process for deciding which derivatives should be declared subject to mandatory trading. According to Article 32(1) of MiFIR once a class of derivatives has been mandated as subject to the clearing obligation (CO) under EMIR, ESMA must determine whether those derivatives (or a subset of them) should be subject to the TO, meaning they can 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(2) of MiFIR specifies that whether or not a class of derivatives subject to the CO should also be made subject to the TO obligation will be determined by two main factors:

    i. The venue test: the class of derivatives must be admitted to trading or traded on at least one admissible trading venue; and

    ii. The liquidity test: whether the derivatives are ‘sufficiently liquid’ and there is sufficient third party buying and selling interest.

2. 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. Article 32(6) of MiFIR empowered ESMA to draft RTS to further specify the criteria for determining whether there is sufficient third-party buying and selling interest in the 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.

3. The relevant draft standard prepared by ESMA (draft RTS 4 in the package of draft technical standards submitted by ESMA to the European Commission on 28 September 2015) was endorsed by the European Commission on 26 May 2016. The additional factors specified in that "abstract" TO in RTS 4 will have to be taken into consideration for the future "concrete" trading obligation standards that may be drafted as the result of this process started by ESMA.

4. 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 stating whether those derivatives should also be made subject to the TO and if so, when.

5. The legislative deadline of when to prepare the standards for the TO has not been amended in the context of the overall delay of MiFID II. However, the application of any TO standard has been affected by the MiFID II delay so that any TO can at the earliest only apply from 3 January 2018. Therefore, ESMA considered that a better regulatory approach to finalise its legislative project is to draft the TO standards 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.

6. 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 that ESMA may use this possibility at a later point in time if considered necessary.

7. The Discussion Paper (DP) is structured as follows: Section 3 presents the TO in other jurisdictions. Section 4 presents ESMA's work to date on the CO and defines the set of derivative classes that will be assessed for the TO. Sections 5 and 6 discuss the two tests to be met: the venue test is discussed in Section 5, while Section 6 presents the liquidity test. Section 7 presents the results of a first initial liquidity assessment based on data from trade repositories (TR data) and includes some selected liquidity criteria. Section 8 discusses the date from which the TO should take effect and the possibility of a phase-in. The DP concludes with Section 9 which briefly touches upon the treatment of package transactions under the TO.

3 The trading obligation in other jurisdictions

8. The TO for derivatives goes back to a commitment undertaken by the G-20 in 2009. This section provides a brief description of trading obligations and clearing obligations in other jurisdictions that were put in place since then.

9. According to the Financial Stability Board (FSB) as of the end of September 2015, 12 out of 24 FSB member jurisdictions have in force a legislative framework and central clearing determination standards for over 90% of the OTC derivatives transactions in their jurisdiction. Of those 12, six belong to the European Union (EU), so therefore there were six jurisdictions outside of the EU with central clearing determination standards for over 90% of their OTC derivatives transactions. These jurisdictions were Australia, Brazil, China, Japan, Singapore and the US.

10. Five jurisdictions (Argentina, India, Indonesia, South Africa and Turkey) were well advanced with standards and criteria adopted with respect to at least some transactions, while seven jurisdictions were at preliminary stages of implementation. By June 2016, Mexico, Russia and Switzerland were expected to have joined the group of jurisdictions with central clearing frameworks in force for over 90% of OTC derivatives in their jurisdictions; Canada, Hong Kong and Korea expect to do so by end-2016.

11. In China, Japan, Korea and the US, central clearing requirements apply to certain OTC interest rate derivatives. The US also has requirements for certain OTC credit derivatives. However, India's central clearing requirements apply only to certain FX derivatives.

12. In terms of the TO, only the US, Japan, Switzerland, Mexico, Argentina and China have enacted legislation to mandate trading through a specific facility for interest rate derivatives that meet certain characteristics. The US also has a mandatory TO for certain index credit default swaps. Canada has consulted on a TO and Australia reviewed its OTC market in 2014 and both decided not yet to impose a TO. Singapore and Hong Kong will evaluate a mandatory TO at a later stage.

United States

CFTC

13. In the US, Section 723(a)(3) of the Dodd-Frank Act added section 2(h)(8) to the Commodity Exchange Act (CEA) (the "trade execution requirement"), which requires that a swap transaction subject to the clearing requirement, under CEA section 2(h)(1)(A), be traded on either a Designated Contract Market (DCM) or Swap Execution Facility (SEF), unless no DCM or SEF ''makes the swap available to trade'' or the transaction is subject to a clearing exception under section 2(h)(7). On 4 June 2013, the CFTC published final regulations implementing the trade execution requirement, which, among other things, sets the factors that a DCM or SEF shall consider, as appropriate, when making a swap available to trade. The six factors enumerated in Regulation 37.10(b) are:

    i. whether there are ready and willing buyers and sellers;

ii. the frequency or size of transactions;

iii. the trading volume;

iv. the number and types of market participants;

v. the bid/ask spread; and

vi. the usual number of resting firm or indicative bids and offers.

14. While each enumerated factor is an indicator of trading activity and may be relevant in the determination, no single factor is dispositive as the DCM or SEF can consider any one factor or any combination of factors in the determination that a swap is made available to trade (MAT). This is a difference compared to the European system is that the initiative comes from the trading venue first by making an instrument available to trade.

15. The process to determine whether a swap has been made available to trade is as follows: a DCM or SEF submits its determination to the CFTC that a swap is MAT. A SEF and DCM must demonstrate that it lists or offers that swap for trading on its trading system or platform. A SEF and DCM must also show that it considered the factors listed above. Once a swap is determined to be MAT, all other DCMs and SEFs shall comply with the trade execution requirements in listing or offering such swap for trading – i.e. if a DCM or SEF lists such a swap it must do so in conformance with the trading methodologies discussed above. A swap that has been MAT will remain subject to the trade execution requirements until all DCMs and SEFs that had listed or offered that swap for trading no longer list or offer that swap for trading.

16. In respect of credit derivatives, a trading venue amended its MAT submission after public consultation, and clarified that in the case of CDX and iTraxx Indices their MAT designation is for the current "on the run" CDX and iTraxx index series and the most recent "old" series (i.e. the series that preceded the current on the run series), but only for so long as those series have that position. Therefore, if a given series is the most current "on the run" series, it would be subject to the MAT designation until two subsequent index "rolls" to a new series have occurred.

17. The list of instruments self-certified as made available to trade and subject to the trade execution requirement as of 28 January 2014 appears in the tables below.

Specification	**Fixed-to-Floating Interest Rate Swap (USD)**		
Currency	U.S. Dollar (USD)	U.S. Dollar (USD)	U.S. Dollar (USD)
Floating Rate Indexes	USD LIBOR (3M, 6M)	USD LIBOR (3M, 6M)	USD LIBOR (3M)

Trade Start Type	Spot Starting (T+2)	IMM Start Date (next two IMM dates)	IMM Start Date (next two IMM dates)
Optionality	No	No	No
Fixed Leg			
Payment Frequency	Semi-Annual, Annual	Semi-Annual, Annual	Semi-Annual
Day Count Convention	30/360, Actual/360	30/360, Actual/360	30/360
Floating Leg			
Reset Frequency	Quarterly, Semi-Annual	Quarterly, Semi-Annual	Quarterly
Day Count Convention	Actual/360	Actual/360	Actual/360
Dual Currencies	No	No	No
Notional	Fixed Notional	Fixed Notional	Fixed Notional
Fixed Rate	Par	Par	Standard Coupon[1]
Tenors[2]	2, 3, **4**, 5, **6**, 7, 10, 12, 15, 20, 30 years	2, 3, **4**, 5, **6**, 7, 10, 12, 15, 20, 30 years	1, 2, 3, **4**, 5, 7, 10, 15, 20, 30 years

Specification	**Fixed-to-Floating Interest Rate Swap (Non-USD)**	
Currency	Euro (EUR)	**Sterling (GBP)**

[1] Standard Coupon refers to the then-current fixed coupon rates for Market Agreed Coupon ("MAC") contracts.
[2] Par coupon swaps with a tenor of 4 or 6 years that are made available to trade are limited to the 3M USD LIBOR floating rate index; Quarterly Reset Frequency; and the following fixed leg conventions: (1) Semi-Annual and 30/360; or (2) Annual and Actual/360.

Floating Rate Indexes	EURIBOR (3M, 6M)	**GBP LIBOR** (3M, 6M)
Trade Start Type	Spot Starting (T+2)	**Spot Starting (T+0)**
Optionality	No	**No**
Fixed Leg		
Payment Frequency	Semi-Annual, Annual	**Quarterly, Semi-Annual**
Day Count Convention	30/360, Actual/360	**Actual/365F**
Floating Leg		
Reset Frequency	Quarterly, Semi-Annual	**Quarterly, Semi-Annual**
Day Count Convention	Actual/360	**Actual/365F**
Dual Currencies	No	**No**
Notional	Fixed Notional	**Fixed Notional**
Fixed Rate	Par	**Par**
Tenors[3]	2, 3, **4**, 5, **6**, 7, 10, 15, 20, 30 years	**2, 3, 4, 5, 6, 7, 10, 15, 20, 30 years**

[3] Euro (EUR)-denominated, par coupon swaps with a tenor of 4 or 6 years that are made available to trade are limited to the following fixed leg conventions: Annual and 30/360.

Specification	**Untranched Credit Default Swap Indices**	
Reference Entities	Corporate	Corporate
Region	North America	Europe
Indices	CDX.NA.IG CDX.NA.HY	iTraxx Europe iTraxx Europe Crossover
Tenor	CDX.NA.IG 5Y CDX.NA.HY 5Y	iTraxx Europe 5Y iTraxx Europe Crossover 5Y
Applicable Series	At any time, the then-current on-the-run series and the preceding series that was replaced by the current one	

18. There are exemptions from the execution requirement for block trades of MAT swaps that meet the appropriate threshold requirements. A block trade[4] is defined, in part, as a transaction that involves a swap that is listed on a SEF or DCM, occurs away from the SEF's or DCM's trading system or platform, is executed pursuant to the SEF's or DCM's rules and procedures, and has a notional or principal amount at or above the minimum block size applicable to such swap. CFTC regulation 43.6. divides swap asset classes into categories, and assigns a minimum block trade size threshold to each category. The rule also establishes "cap sizes" for notional and principal amounts that will mask the total *actual notional* size of a swap transaction if it exceeds the cap size for a given swap category. The notional size of such a trade will be reported as larger than the cap size, rather than by its particular notional amount.

19. A "package transaction" is defined by the CFTC, for purposes of current no-action relief provided, as a transaction involving two or more instruments: (1) that is executed between two or more counterparties; (2) that is priced or quoted as one economic transaction with simultaneous execution or near simultaneous execution of all components; (3) that has at least one component that is a swap that is MAT and therefore is subject to the trade execution requirement; and (4) where the execution of each component is contingent upon the execution of all other components. Swaps components that are made available to trade must be executed on a swap execution facility or a designated contract market pursuant to certain methods of execution. The CFTC currently provides no-action relief from the trade execution requirement for swap components of certain categories of package transactions.

[4] Per CFTC 17 CFR Part 43.

20. The counterparties subject to the trade execution requirement are US counterparties dealing with both US and non-US counterparties trading on a SEF.

21. A trade subject to the trade execution requirement must be executed on a SEF by either (1) an Order Book or (2) a Request for Quote system (RFQ) that operates in conjunction with an Order Book. An RFQ must be communicated to no less than three market participants. On a DCM, such swaps must be executed on an Order Book[5]. The DCM shall provide a competitive, open and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralised market of the DCM.

22. A SEF shall require that a broker or dealer who seeks to either execute against its customer's order or execute two of its customers' orders against each other through the SEF's Order Book, following some form of pre-arrangement or pre-negotiation of such orders, be subject to at least a 15 second time delay between the entry of those two orders into the Order Book, such that one side of the potential transaction is disclosed to and executable against other market participants before the second side is submitted for execution. A SEF may adjust the time period of the 15 second time delay requirement if it meets certain requirements, however, it must be for a time to allow market participants to have a meaningful opportunity to execute against such an order. The CFTC is currently reviewing the MAT process and has announced its intention to make proposals in 2016. In particular, the following elements are under discussion: greater CFTC involvement for MAT Determination, including further qualitative and quantitative factors to make a MAT determination, consult markets on MAT notifications and create a process to undo a MAT determination.

SEC

23. Under the Dodd-Frank Act, the SEC regulates "security-based swaps" (SBS) and the CFTC regulates "swaps." On 11 June 2012, the SEC issued the "Statement of General Policy on the Sequencing of the Compliances Dates for Final Rules Applicable to Security-Based Swaps" (the "General Statement"), in which the SEC articulated its "anticipated" sequencing of the implementation of the trade execution requirements applicable to security-based swaps.

24. Regarding the Trade Execution Requirement, the General Statement provided that such requirement, with respect to any SBS that is required to be cleared, should not be triggered until (1) the SEC finalises standards for determining when a security-based swap has been "made available to trade" on an exchange or security-based swap execution facility, (2) the SEC has determined that the relevant security-based swap has been MAT and (3) such determination has become effective.

[5] Pursuant to subpart J of part 38 of the CFTC's regulations, which implements DCM Core Principle 9 under section 5(d)(9) of the Commodity Exchange Act (CEA).

25. Therefore, certain SBSs that are required to be cleared would need to be transacted on a SEF or an exchange. Other types of SBS may be transacted on a SEF or an exchange, or on an OTC basis by negotiation between two counterparties.

26. The SEC proposed that MAT determinations should be made pursuant to "objective" standards, as opposed to individual platforms driving the process via listing. The SEC, has not so far defined what those standards would entail, explaining that more data would be needed. Some commenters provided examples of what criteria might be considered, including product liquidity, trade frequency, trade size, bid/offer spreads and the number of market makers. One of the possibilities that seems to be considered by the SEC is a "committee approach" for making MAT determinations, which would provide for a group of diverse market participants (i.e. sell side, buy side, end users, etc.) to consider objective criteria before proposing to subject an SBS to be MAT.

Japan

27. In Japan, the amendment to the Financial Instruments and Exchange Act in 2012 introduced the regulatory framework for the trading obligation. The Japanese FSA (JFSA) determines which instruments fall under the TO and conducts a public consultation. In order to be considered, the instruments need to be cleared (Japan Securities Clearing Corporation). Electronic Trading Platforms (ETPs) are the equivalent of US SEFs in Japan. The mandatory use of ETPs started on 1 September 2015, covering JPY plain vanilla Interest Rate Swaps.

28. The JFSA's MAT process is almost identical to its mandatory clearing process, which includes a public comment process, which the JFSA considers before making its final recommendation.

29. The JFSA determined that fixed-to-floating IRS cleared by the Japan Securities Clearing Corporation and 6-month LIBOR (with tenors of 5, 7 and 10 years) are the only products which were suited to become subject to MAT at this time.

30. The entities subject to the obligation are Financial Instruments Business Operators (FIBOs) and Registered Financial Institutions (RFIs). However, FIBOs and RFIs may be exempt if any of the following is met: (1) the transaction is booked in a trust account; (2) the transaction is an intra-group transaction satisfying conditions; (3) one party is not an obliged operator, (4) the average outstanding notional amount of OTC derivatives transaction held by one party is less than JPY 6 trillion; (5) there is a disruption to the electronic trading facility systems or any other special circumstances to be designated by the JFSA.

31. In terms of requirements on trading venues, operators of ETPs need to satisfy a set of conditions: a minimum capital of JPY 300 million, have some internal rules, books and records and the publication of information on transactions. ETPs need to have an order book or RFQ model for no less than three counterparties but this requirement is not applied to block trades.

Canada

32. Canada has consulted on this topic on 29 January 2015. The Committee of Securities Administrators (CSA) published Consultation Paper 92-401 Derivatives Trading Facilities which discusses the development of a regulatory framework for OTC derivatives trading platforms, Derivatives Trading Facilities (DTFs) (comparable to SEFs in the United States). The Consultation Paper also discusses the proposed approach for requiring market participants to use DTFs to enter into certain classes of OTC Derivatives.

33. Prior to requiring that any class of OTC derivative be traded exclusively on a DTF, the Committee recommends that members of the CSA review trading and clearing data covering an appropriate time period, including the level of liquidity of OTC derivatives in the Canadian market, the current volume and turnover in derivatives of various asset classes in Canada, the number and type of market participants transacting in OTC derivatives in Canada, and the extent to which multilateral execution methods are currently being used for OTC derivatives transactions.

34. In determining whether to require a class of OTC derivatives to be traded exclusively on a DTF, the Committee recommends that the CSA consider factors including whether the class of OTC derivatives is subject to a clearing mandate, sufficiently liquid and standardised, subject to a similar trading mandate in other jurisdictions, or already trading through the facilities of a DTF or foreign trading platform.

35. The Committee recommends that sufficiently liquid and standardised OTC derivatives be subject to a requirement to be traded exclusively through a DTF. At the present time, the Committee does not believe it has sufficient data with respect to liquidity levels in the OTC derivatives market in Canada to be able to assess whether the introduction of mandatory DTF trading for a particular class of OTC derivatives would be appropriate.

Switzerland

36. On 19 June 2015 the Swiss Parliament approved the Swiss answer to EMIR and the Dodd-Frank Act, the Financial Markets Infrastructure Act (FMIA). The FMIA entered into force on 1 January 2016.

37. The FMIA applies to counterparties with legal seat in Switzerland, including branches of Swiss legal entities abroad. Swiss branches of foreign legal entities are as a general rule not captured by the regulation. It differentiates between Financial Counterparties (FC+), small Financial Counterparties (FC-), Non-Financial Counterparties (NFC+) and Small Non-Financial Counterparties (NFC-). The platform trading requirement would apply only to FC+ and NFC+.

38. A non-financial counterparty (NFC) is deemed to be a small non-financial counterparty (NFC-) if its average gross position of outstanding OTC derivative contracts calculated on a rolling basis over 30 working days is below the applicable threshold in each of the following categories (subject to certain exclusions, e.g. in relation to hedging transactions):

Type of Contract	Threshold

Credit Derivative Contracts	CHF 1.1 billion in gross notional value
Equity Derivative Contracts	CHF 1.1 billion in gross notional value
Interest Rate Derivative Contracts	CHF 3.3 billion in gross notional value
FX Derivative Contracts	CHF 3.3 billion in gross notional value
Commodity Derivative Contracts and other OTC	CHF 3.3 billion in gross notional value

39. A financial counterparty (FC) is deemed to be a small financial counterparty (FC-) if its aggregate average gross position in all outstanding OTC derivative contracts calculated on a rolling basis over 30 working days is below the threshold of CHF 8 billion on a financial group level. Counterparties that are not small are hereinafter referred to as FC+ or NFC+, respectively.

40. The product scope is limited to derivatives transactions. It applies to futures and options, forwards and swaps, as well as to contracts-for-difference (CFDs), spread betting as well as other exotic financial instruments. The following instruments are out of scope: structured products and structured deposits, and, more generally, securitised derivatives, e.g. warrants, credit-linked notes or notes issued in connection with synthetic securitizations, which commonly use credit derivatives to achieve the same economic effect as a transfer of title to credit receivables, as well as OTC commodities derivatives that provide for physical delivery, excluding any option for either party to settle the transaction in cash. The FMIA expressly specifies that securities borrowing and lending are not derivative agreements. Furthermore, the FMIA provide for partial exemptions for FX forwards and swaps, provided they are settled on a payment versus payment basis. These instruments are exempted from the trading requirement.

41. The FMIA provides the legal basis to introduce the duty to trade "standardised" derivatives contract on trading platforms[6]. Large counterparties must trade eligible derivatives via trading venues or an operator of an OTF authorised or recognised by the Financial Market Supervisory Authority (FINMA). Transactions with small counterparties and intra-group transactions are not subject to platform trading[7]. Similar to the clearing obligation, FINMA will decide whether a derivative class will fall under the trading venue requirement, according to the degree of standardisation and liquidity of the class. The provisions regarding platform trading only enter into force if this is requested by international standards[8].

[6] Art. 112 FMIA and Art. 108 - 112 FMIO
[7] Art. 112, 113 and 115 FMIA
[8] Art. 164 para. 3 FMIA

Mandatory trading obligation in other jurisdictions

Source: IOSCO

Platform trading requirements - interest rate (As of 30 June 2015)

Country	Product features																Eligible organised platforms	Exemptions (Note: The application of the exemptions below may be subject to conditions and restrictions. Please refer to the reference documents for details. Temporary exemptions are not covered in the			Effective date
	Product type	Currency	Floating rate index	Trade start type	Optionality	Fixed leg		Floating leg								Other product characteristics, if any		Exemption of transactions not subject to central clearing requirements	Block trades exemption	Other exemptions (please specify)	
						Payment frequency	Day count convention	Payment/ reset frequency	Day count convention	Dual currencies	Notional	Fixed rate	Tenor	Holiday calendar	Business day convention						
Argentine	Fixed-to-floating interest rate swap	ARS	BADLAR	Spot (T 0)	No	Daily	30/30 actual/360	Monthly	Actual/ 360	No	Fixed notional	Par	30 days to 5 years				MAE	No	No	No	Every month
Argentine	FRA	ARS	BADLAR	Spot (T 0)	No	Daily	30/30 actual/360	Monthly	Actual/ 360	No	Fixed notional	Par	30 days to 5 years				MAE	No	No	No	Every month
China	Fixed-to-floating interest rate swap	RMB	RMB Shibor, RMB Repo rate and RMB benchmark rate published by the PBC, mainly RMB FR007 and RMB Shibor (O/N, 3M)	Spot starting (T+2)	No	equivalent to the payment frequency of floating leg	actual/365	Quarterly or due (Shibor O/N, FR007), quarterly (Shibor 3M)	Actual/ 360 (Shibor O/N, Shibor 3M), Actual/365 (FR007)		Fixed notional	Par	not specified, mainly within 5 years	China	modified following		CFETS	Yes	No		18 Jan 2008, 28 Jan 2014
Mexico	Fixed-to-floating swap	Mexican Peso (MXP)	TIIE	None	No	28 days	None	28 days	None	No	Fixed notional	Par	From 56 days to 30 years	None	None		Electronic Trading Platforms (Brokers) authorized by the CNBV and in operation, http://pes/EntidadSector/ConsultaEntidad?Sector=47,%20	Yes	Under review by competent authorities	None	Trading requirements for Standardized Derivative Transactions will enter into force in accordance with the following: i) on April 1, 2016 for Standardized Derivative Transactions executed between Entities or between an Entity and a national institutional investor, and ii) on November 16, 2016 for the Standardized Derivative Transactions executed between an Entity and a Foreign Financial Entity.

42. ESMA will take the above procedures and TO determinations into consideration when performing its work under Article 32 MiFIR.

43. In particular, ESMA will consider the principles established in relation to credit derivatives as well as package transactions. However, stakeholders should bear in mind that the Article 32 MiFIR process is very specific and, therefore, the European TO will have features that differ from some of those established in other jurisdictions.

4 The clearing obligation

44. The TO under MiFIR is closely linked to the clearing obligation (CO) under Regulation (EU) No 648/2012 (EMIR) since the introduction of the CO for a class of OTC derivatives triggers the need to assess whether this class of derivatives should also be subject to the TO.

45. Article 5 of EMIR requires ESMA to draft regulatory technical standards (RTS) specifying the classes of OTC derivatives that should be subject to the CO under Article 4 of EMIR. The assessment of whether a class of derivatives should be subject to the CO is triggered by the notification that a CA authorised a CCP to clear a class of OTC derivatives. ESMA is required to take the following criteria into consideration when assessing whether a class of derivatives should be subject to the CO:

    i. The degree of standardisation of the contractual terms and operational processes of the relevant class of OTC derivatives;

    ii. The volume and liquidity of the relevant class of derivatives;

    iii. The availability of fair, reliable and generally accepted pricing information in the relevant class of OTC derivatives

46. These 3 criteria are further detailed in Article 7 of Commission Delegated Regulation (EU) 149/2013.

47. When the assessment conducted under the clearing obligation procedure of Article 5 leads ESMA to conclude that a class of derivatives should be subject to the CO, it is required to develop draft RTS specifying:

    i. The class of OTC derivatives that should be subject to the clearing obligation referred to in Article 4 of EMIR;

    ii. The date or dates from which the clearing obligation takes effect, including any phase in and the categories of counterparties to which the obligation applies; and

    iii. The minimum remaining maturity of the OTC derivative contracts referred to in Article 4(1) b (ii) of EMIR.

48. The procedure for the TO in Article 32(1) of MiFIR provides for a similar mandate for specifying the TO but does not include letter c) (‘frontloading’) since it is not of relevance in the context of the TO.

<u>OTC derivatives classes subject to the clearing obligation</u>

49. To date ESMA has assessed whether the following classes of OTC derivatives should be subject to the CO: Interest rate derivatives in major currencies (EUR, GBP, JPY and USD) and in additional EEA currencies (CZK, DKK, HUF, NOK, PLN, SEK), foreign-exchange non-deliverable forwards, some equity derivatives as well as credit default swaps (CDS).

50. For the purpose of determining which of these classes of OTC derivatives should be subject to the clearing obligation, the following criteria[9] were taken into account:

    i. the volume and liquidity,

    ii. the level of standardisation,

    iii. the availability of pricing data for each class that was analysed.

51. In addition, to complete the determination process and set an appropriate phase-in per category of counterparties, additional criteria were taken into account, in particular:

    iv. the level of experience of counterparties and the market capacity for clearing these classes.

52. Last but not least, ESMA has been supportive of the shared objective amongst relevant jurisdictions to achieve international consistency in setting the respective scopes of clearing mandates. Therefore, when finalising the draft RTS, ESMA has also taken into account, to the extent possible, the existence of a CO on these classes in other jurisdictions.

53. With regard to the clearing obligation procedure, ESMA relied on two types of data sources for conducting the assessment: publicly available data from the BIS and the FSB, as well as data from trade repositories, enabling the analysis of the volume and liquidity of these classes at the global level as well as within the EU.

54. Following this assessment ESMA submitted three draft RTS to the European Commission:

    i. OTC interest rate swaps denominated in EUR, GBP, JPY and USD: ESMA submitted the draft RTS on 1 October 2014 to the Commission. The Commission endorsed the draft RTS on 6 August 2015 and the CO for these classes of OTC derivatives entered into force on 21 December 2015. The CO for these classes took effect on 21 June 2016 for counterparties in the first category, clearing members, and the applicable dates for the other categories will follow as per the phase-in defined in the draft RTS.

    ii. OTC interest rate swaps denominated in NOK, PLN and SEK: ESMA submitted the draft RTS on 10 November 2015 to the Commission. The Commission endorsed the draft RTS on 10 June 2016 and it was published in the Official Journal on 20 July 2016. The CO for these classes shall take effect starting from 9 February 2017 for counterparties in the first category and other respective dates defined in the draft RTS for other categories.

    iii. CDS on European corporate indices: ESMA submitted the draft RTS on 1 October 2015 to the European Commission. The Commission endorsed the draft RTS on 1 March 2016 and the CO for these classes of OTC derivatives entered into force on 9

[9] The second sub paragraph of Article 5(4) of EMIR lists additional criteria that ESMA may also take into consideration.

May 2016. The CO for these classes will take effect on 9 February 2017, and the applicable dates for the other categories will follow as per the phase-in defined in the draft RTS.

55. ESMA did not propose draft RTS to make equity derivatives and FX non-deliverable forwards subject to the CO.[10]

56. Table 1 and Table 2 Credit OTC derivatives classes subject to the clearing obligation provide a detailed overview of the CO for the classes of OTC derivatives in scope. Looking forward, and as explained in the consultation papers and final reports on the CO previously published[11], ESMA can modify the scope of the CO.

57. Indeed, ESMA can use the bottom-up approach, the top-down approach as well as the review of the current scope of the CO and, following further analysis and consultations where appropriate, determine a different scope for the CO. For instance, classes previously not determined to be subject to the CO can be added later under appropriate justifications. The overarching principle being the reduction of systemic risk, the set of classes subject to the CO can evolve and ESMA will continue to analyse classes and consult accordingly.

Categories of counterparties and dates of application

58. ESMA distinguishes for the purpose of the CO four categories of counterparties:

    i. Category 1: Counterparties which, on the date of the entry into force of the technical standard, are clearing members, for at least one of the classes of OTC derivatives subject to the CO, of a least one of the CCPs authorised or recognised before the date to clear at least one of those classes. Counterparties are included in category 1 on a per asset class approach.[12]

    ii. Category 2: Counterparties not belonging to Category 1 which belong to a group whose aggregate month-end average of outstanding gross notional amount of non-centrally cleared derivatives for the three months following the date of publication of the RTS in the official journal is above EUR 8 billion and which are any of the following:

        a. Financial counterparties

[10] See the final report published by ESMA in October 2014 for details on the rationale for not including equity derivatives: https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-1184_final_report_clearing_obligation_irs.pdf. For FX non-deliverable forwards see the feedback statement published by ESMA in February 2015: https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-234_-_feedback_statement_on_the_clearing_obligation_of_non_deliverable_forward.pdf.

[11] The consultation papers and final reports related to the clearing obligation are available at the following address: https://www.esma.europa.eu/regulation/post-trading/otc-derivatives-and-clearing-obligation

[12] E.g. counterparties that are only a clearing member for those IRS classes subject to the clearing obligation but not a clearing member for those credit classes subject to the clearing obligation belong only to category 1 for the purpose of the clearing obligation for IRS classes.

b. Alternative investment funds (AIFs) as defined in Article 4(1)(a) of Directive 2011/61/EU (AIFMD) that are non-financial counterparties.

iii. Category 3: Counterparties not belonging to Category 1 or 2 which are any of the following:

a. Financial counterparties

b. AIFs as defined in Article 4(1)(a) of the AIFMD that are non-financial counterparties.

iv. Category 4: Non-financial counterparties that do not belong to Category 1, 2 or 3.

59. The dates on which the CO takes effect differs for the different categories of counterparties. The technical standards provide for a phase-in for all categories of counterparties, starting with a phase-in for counterparties of category 1 (6 months for swaps and 9 months for CDS), and following with a phase-in of the counterparties of category 2 to 4, only gradually included in the CO.[13]

60. Table 3 provides an overview of the phase-in per category of counterparty for the classes of OTC derivatives subject to the CO.[14]

Minimum remaining maturity and the frontloading requirement

61. The minimum remaining maturity (MRM) is a parameter used to calibrate the length of the so-called "frontloading" requirement period, i.e. the fact that the CO may apply to contracts entered into or novated before the CO takes effect.[15] To reflect the different levels of sophistication and trading activity of the counterparties in the different categories, only counterparties in the categories 1 and 2 are subject to an actual frontloading obligation.

62. Table 4 provides a summary of the applicable MRM and frontloading requirements.

Public Register

63. ESMA maintains and consolidates all the information related to the CO in the Public Register[16]. In particular, it includes the trade characteristics of all the classes subject to the CO, the composition of the category of counterparties, the applicable phase-in for each category and for each RTS on the CO, and last but not least the relevant details on the frontloading requirements. Stakeholders can find updated and consolidated in one

[13] Where a contract is concluded between two counterparties included in different categories, the date from which the clearing obligation takes effect for that contract is the later date.
[14] ESMA is currently consulting on postponing the date of application for the clearing obligation for counterparties of category 3. https://www.esma.europa.eu/sites/default/files/library/2016-1125_cp_on_clearing_obligation_for_financial_counterparties.pdf
[15] As per EMIR Article 4(1)(b) the clearing obligation will apply to contracts entered into/novated either: on or after the date from which the clearing obligation takes effect; or on or after the notification under Article 5(1) but before the date from which the clearing obligation takes effect if the contracts have a remaining maturity determined in accordance with Article 5(2)(c).
[16] The Public Register is accessible under the Post Trading section of the Registers and Databases webpage of ESMA's portal: https://www.esma.europa.eu/databases-library/registers-and-data or directly at the following address: https://www.esma.europa.eu/sites/default/files/library/public_register_for_the_clearing_obligation_under_emir.pdf

document all the relevant information, including the details laid out in Tables 2 to 4 of the discussion paper.

TABLE 1 OTC INTEREST RATE DERIVATIVES (IRD) CLASSES SUBJECT TO THE CLEARING OBLIGATION

Type	Reference Index	Settlement currency	Maturity	Settlement Currency Type	Optionality	Notional type	Status of the RTS
Basis	EURIBOR	EUR	28D-50Y	Single currency	No	Constant or variable	Published in the Official Journal
Basis	LIBOR	GBP	28D-50Y	Single currency	No	Constant or variable	Published in the Official Journal
Basis	LIBOR	JPY	28D-30Y	Single currency	No	Constant or variable	Published in the Official Journal
Basis	LIBOR	USD	28D-50Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	EURIBOR	EUR	28D-50Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	LIBOR	GBP	28D-50Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	LIBOR	JPY	28D-30Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	LIBOR	USD	28D-50Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	NIBOR	NOK	28D-10Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	WIBOR	PLN	28D-10Y	Single currency	No	Constant or variable	Published in the Official Journal
Fixed-to-Float	STIBOR	SEK	28D-15Y	Single currency	No	Constant or variable	Published in the Official Journal
FRA	EURIBOR	EUR	3D-3Y	Single currency	No	Constant or variable	Published in the Official Journal
FRA	LIBOR	GBP	3D-3Y	Single currency	No	Constant or variable	Published in the Official Journal
FRA	LIBOR	USD	3D-3Y	Single currency	No	Constant or variable	Published in the Official Journal
FRA	NIBOR	NOK	3D-2Y	Single currency	No	Constant or variable	Published in the Official Journal

FRA	WIBOR	PLN	3D-2Y	Single currency	No	Constant or variable	Published in the Official Journal
FRA	STIBOR	SEK	3D-3Y	Single currency	No	Constant or variable	Published in the Official Journal
OIS	EONIA	EUR	7D-3y	Single currency	No	Constant or variable	Published in the Official Journal
OIS	Fed Funds	USD	7D-3y	Single currency	No	Constant or variable	Published in the Official Journal
OIS	SONIA	GBP	7D-3y	Single currency	No	Constant or variable	Published in the Official Journal

TABLE 2 CREDIT OTC DERIVATIVES CLASSES SUBJECT TO THE CLEARING OBLIGATION

Type	Sub-type	Geographical zone	Reference index	Settlement Currency	Series	Tenor	Status of the RTS
Index CDS	Untranched index	Europe	iTraxx Europe Main	EUR	17 onwards	5y	Adopted by the Commission
Index CDS	Untranched index	Europe	iTraxx Europe Crossover	EUR	17 onwards	5y	Adopted by the Commission

TABLE 3 DATE ON WHICH THE CLEARING OBLIGATION TAKES EFFECT

OTC derivatives class	Category of counterparty			
	Category 1	Category 2	Category 3	Category 4
IRD (EUR, GBP, JPY, USD)	21 June 2016	21 December 2016	21 June 2017	21 December 2018
IRD (NOK, PLN, SEK)	9 February 2017	9 August 2017	9 February 2018	9 August 2019

CDS (iTraxx)	9 February 2017	9 August 2017	9 February 2018	9 May 2019

TABLE 4 MINIMUM REMAINING MATURITY

OTC derivatives class	**Category of counterparty**			
	Category 1 or 2		**Category 3**	**Category 4**
	Before publication in OJ	**After publication in OJ**		
IRD (Basis)	50y (only major currencies)	6m (only major currencies)	50y (only major currencies)	-
IRD (Fixed-to-Float)	50y (15y for contracts in NOK, PLN, SEK)	6m (major currencies and additional currencies)	50y (15y for contracts in NOK, PLN, SEK)	-
IRD (FRA)	3y (major currencies and additional currencies)	6 m (major currencies and additional currencies)	3y (major currencies and additional currencies)	-
IRD (OIS)	3y (only major currencies)	6 m (only major currencies)	3y (only major currencies)	-
Credit derivatives	5y and 3m	6m	5y and 3m	-

5 Derivatives admitted to trading on RMs/MTFs/OTFs

64. 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.

65. Against this backdrop, three main issues arise in order to make this requirement effective:

    i. at which level of granularity this requirement should be applied;

    ii. how to determine which derivatives are admitted to trading or traded on a trading venue; and

    iii. how to take into consideration that MiFID II / MiFIR is creating a new type of trading venue for derivatives (namely, the Organised Trading Facilities or OTF) which will only become effective with the application of MiFID II / MiFIR (3 January 2018).

66. Firstly, regarding the level of granularity used to determine whether a class of derivatives should be considered admitted to trading or traded on a trading venue, ESMA is of the view that the classes identified for the purposes of the CO and reproduced in Tables 1 and 2 above can be used as a starting point.

67. However, contrary to the CO, ESMA intends to only consider benchmark dates – plus a number of days around those benchmark dates - for the class of interest rate derivatives for the TO, i.e. contracts with an unbroken tenor.[17] ESMA is aware that this approach differs from the approach used in RTS 2[18] for calibrating the transparency regime for non-equity instruments which includes all contracts irrespective of their maturity date. Hence, only a subset of those instruments that are in scope for the transparency requirements under RTS 2 is considered for the TO.

68. Secondly, more clarity is needed on the interpretation of the concept of 'admitted to trading or traded on at least one trading venue'. In ESMA's understanding, based on a survey of the market, all derivatives subject to the CO can be traded or are available to trade on RMs and MTFs at present. However, it is not clear whether actual trading takes place and whether all maturities/tenors can be traded. ESMA is therefore interested in stakeholders' views on this topic and on whether all derivatives and maturities subject to the CO can be considered as admitted to trading or actually traded on a trading venue for the purpose of the TO.

69. Thirdly, the "admitted to trading or traded on at least one trading venue" criterion will focus initially on products admitted to trading or traded on RMs and Multilateral Trading Facilities (MTF) only. OTFs are not considered at this stage even though MiFID II introduces OTFs as a new trading venue category which will start operating with the application of MiFID II as from 3 January 2018. Once OTFs have started operating, ESMA would consider

[17] This approach is explained in more detail in section 7.
[18] The European Commission endorsed RTS 2 on 14 July 2016.

revising any technical standards as the new OTF category may have an impact on the liquidity of trading.

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?

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.

6 Liquidity assessment overview

70. 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)." Sections 6.1-6.5 present the abstract criteria that ESMA will have to take into account when determining whether a derivative or a class of derivatives is sufficiently liquid for the purpose of the TO. Section 6.6 discusses the interaction between the transparency regime and the TO. A first preliminary liquidity assessment based on a subset of the liquidity criteria is presented in Section 7.

71. The concept of 'sufficient liquidity' is further developed in Article 32(3) of MiFIR and in draft RTS 4[19] which require ESMA to take the following criteria into consideration when establishing whether a class of derivatives should be subject to the TO:

    i. the average frequency of trades over a range of market conditions;

    ii. the average size of trades over a range of market conditions;

    iii. the number and type of active market participants; and

    iv. the average size of spreads.

72. Furthermore, the second last subparagraph of 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".

73. Finally, the last subparagraph of Article 32(3) of MiFIR requires ESMA to assess whether the class of derivatives is only sufficiently liquid in transactions below a certain size.

74. Article 22 of MiFIR, which is further specified in draft RTS 3[20] on the volume cap mechanism, and the provision of information for the purposes of transparency and other calculations provides CAs with the right to require information from trading venues, APAs and CTPs for the transparency regime and the trading obligation. Article 2(2) of draft RTS 3 specifically empowers CAs to request from trading venues, APAs and CTPs the data ESMA is required to take into account for the purpose of determining the derivatives which should be subject to the trading obligation in accordance with draft RTS 4.

75. For the assessment of the TO pending the application of MiFIR for those derivatives or classes of derivatives that are already subject to or will soon be subject to the CO ESMA intends to base the assessment mainly on trade repository (TR) data. In addition, ESMA intends to reach out to RMs and MTFs to ask for information on a voluntary basis should that be required.

[19] https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf
[20] The European Commission endorsed RTS 3 on 13 June 2016.

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

76. A first liquidity assessment comprising the criteria average frequency and size of trades over a range of market conditions is presented in Section 7. This section includes the methodology ESMA used and an initial determination of the classes of derivatives that may be subject to the TO based on that analysis. The liquidity assessment is based on the same liquidity criteria applied on a sub-class level used for the purpose of the transparency regime and set out in Annex III of RTS 2. Furthermore, ESMA considers using additional liquidity criteria for assessing the average frequency and size of trades over a range of market conditions.

6.2 Number and type of active market participants

77. Article 32(3)(b) of MiFIR requires ESMA to consider the number and type of active market participants, including the ratio of market participants to products/contracts traded in a given product market. This criterion is further specified in Article 4 of draft RTS 4 which requires ESMA to take the following elements into account:

    i. The total number of market participants trading in that class of derivatives is not lower than two;

    ii. The number of trading venues that have admitted to trading or are trading the class of derivatives;

    iii. The number of market makers and other market participants under a binding written agreement or an obligation to provide liquidity.

78. Articles 4(2) of draft RTS 4 further specifies that the analysis should “compare the ratio of market participants to the findings in the data obtained for the analyses of average size of trades and the average frequency of trades”.

79. This criterion is of relevance to cover products that may be traded less frequently, but where there may still be a liquid market in terms of readily available buyers and sellers and market makers.

Number and type of market participants

80. Draft RTS 4 requires as a minimum two market participants. However, the total number of market participants determining whether a class of derivatives should be subject to the trading obligation may be higher and different for different classes of derivatives. Market participants in that context refer to members or participants of a trading venue and/or clients of an OTF (in the future). However, ESMA intends to also look at type of market participants and to assess the number and type of financial and non-financial counterparties active in the different classes of derivatives subject to the clearing obligation.

81. ESMA intends to assess the information on number and type of active market participants by using TR data which includes some information on the identity of counterparties. Field 2 and 3 of Table 1 of the Annex of Commission Delegated Regulation (EU) No 148/2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (EMIR) with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories, include information on the reporting counterparty and on the other counterparty. Counterparties are required to use their LEI or the client code when reporting this information.

82. Based on the information available in TRs, it should be possible to identify the number and types of market participants trading in that particular class of derivatives. Section 7 also contains a first assessment on the number and type of market participants based on TR data. In addition, ESMA considers approaching trading venues to get further information on their participants and members.

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?

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.

Number of trading venues

83. Article 4(1)(b) of draft RTS 4 requires ESMA to consider the number of trading venues that have admitted to trading or are trading the class of derivatives or a relevant subset thereof. Already Article 32(2)(a) of MiFIR requires that the class of derivatives subject to the clearing obligation needs to be traded on at least one trading venue to be considered for the purpose of the trading obligation. Therefore, in any case all classes of derivatives that will be subject to the liquidity assessment for the purpose of the TO will at least be admitted to trading or traded on one trading venue.

84. For assessing the number of trading venues, ESMA intends to leverage on the outcome of the analysis under Section 5. ESMA considers that the more trading venues offer for trading or trade a class of derivatives, the more liquid that class can be considered.

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?

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?

Number of market makers

85. Article 4(1)(c) of draft 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. Draft RTS 8 specifies market making agreements and market making schemes. According to Article 7 of draft RTS 8 trading venues are required to publish on their website the terms of market making schemes, the names of the firms that have signed market making agreements and the financial instruments covered by those agreements. Hence, once MiFID II is applied, information on the number of market makers for the relevant classes of derivatives will be available.

86. Since MiFID II will only be applied as from 3 January 2018, this information is however not yet available. Based on the assessment under Section 5, ESMA envisages considering the market making agreements of those trading venues where the relevant class of derivatives is admitted to trading or traded. ESMA intends to approach those trading venues to obtain the necessary information.

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).

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?

Ratio of market participants to average size/frequency of trades

87. Finally, Article 4(2) of draft RTS 4 requires ESMA to compare the ratio of market participants to the findings in the data obtained for the analyses of average size of trades and the average frequency of trades. This element aims at ensuring overall consistency when developing the RTS on the trading obligation by linking the liquidity assessment of the class of derivatives to the analysis undertaken on the number and type of market participants. ESMA intends to carry out this analysis on the basis of the results of the liquidity assessment on TR data presented in Section 7.2.

88. Where the results of this comparison are consistent, i.e. either high liquidity and a high number of market participants or low liquidity and only few market participants, this will give a clear indication on whether the relevant class of derivatives should be subject to the trading obligation. In case of contradictory outcomes, i.e. low liquidity and many market participants or high liquidity and few market participants, this does not per se exclude that the class of derivatives may be covered by the trading obligation but will require a more in-depth analysis of the class of derivative in question.

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

6.3 Average size of spreads

89. 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 Article 5 of draft RTS 4 which requires ESMA to take the following elements into account:

    i. The size of weighted spreads, including volume weighted spreads, over different periods of time;

    ii. spreads at different points in time of trading sessions.

90. This criterion is the most complex one for the purpose of the liquidity assessment under the trading obligation, in particular given the difficulty in obtaining this data. Given ESMA's lack of data on spreads, ESMA is mandated in Article 5(2) of draft RTS 4 to use a proxy for the assessment of this criterion.

91. ESMA is aware that in the absence of actual data on spreads, the determination of an approximate proxy is not straight forward. On the other hand, it has to be taken into account that spreads may become narrower because of increased transparency and the imposition of the trading obligation for a particular class of derivatives. ESMA therefore believes that, in particular when proxies are used for determining the average size of spreads, less weight should be given to this criterion as compared to the criteria set out in Sections 6.1-6.3.

92. ESMA is considering using information on spreads provided by data vendors and trading venues, but is wondering whether better sources of information on spreads are available. Finally, ESMA is seeking input for the purpose of determining a proxy in case no spread information is available.

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

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

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

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

93. ESMA understands that co-legislators added this consideration to ensure that non-financial end users would not unintentionally be restricted in their trading opportunities necessary for their commercial activity as a consequence of introducing the trading obligation. In case of a drop of liquidity non-financial end users may be restricted in their trading opportunities.

94. For the purpose of the CO non-financial counterparties are included in Category 3 (for AIFs that are non-financial counterparties) and Category 4. Mandatory clearing for those counterparties will only be gradually introduced.

95. For the assessment of the anticipated possible effects on non-financial end users, ESMA intends to use the information on the type and number of market participants, average frequency and average size of transactions.

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

6.5 Market liquidity in relation to transaction size

96. The last subparagraph of Article 32(3) of MiFIR requires ESMA to determine whether the class of derivatives or a subset thereof is only sufficiently liquid in transactions below a certain size. ESMA believes that the concept of transactions below a certain size should be closely linked to concept of waivers and deferrals from transparency, which are specified in draft RTS 2.

97. Waiver and deferrals from trade transparency aim at protecting market participants from negative market impact when disclosing their order or transactions to the public. While it is widely recognized that pre- and post-trade transparency contribute to the price formation process and thereby improve market functioning, it is important to recognise that trade transparency may expose market participants that are involved in the disclosed orders/transactions to the risk that the market moves against them. To avoid such developments and to avoid that some market participants may retreat from markets to avoid being exposed to such effects, orders and transactions may benefit under certain circumstances from waivers and deferrals.

98. MiFIR provides for waivers and deferrals for three types of orders and transactions: orders/transactions in instruments for (i) which there is no liquid market, (ii) that are above the size specific to the instrument (SSTI); and (iii) that are large in scale (LIS). Those waivers and deferrals will also be applicable for derivatives declared subject to the trading obligation. For liquid interest rate derivatives and CDS the pre-trade SSTI and LIS are determined as the greatest of the trade size below which lies the percentage of the transactions corresponding to the 30th or respectively the 70th trade percentile and the threshold floor. The post-trade SSTI and LIS thresholds for those classes of instruments

are determined as the greatest of the trade size below which lies the percentage of the transactions corresponding to the 80th or respectively the 90th trade percentile, the trade size below which lie the percentage of volume corresponding to the 60th or respectively 70th volume percentile and the threshold floor.

99. The CFTC in the US exempts 'block trades' from the execution requirement on SEFs or DCMs where a transaction involves a swap that is listed on a SEF or DCM, occurs away from the SEF's or DCM's trading system or platform, is executed pursuant to the SEF's or DCM's rules and procedures, and has a notional or principal amount at or above the minimum block size applicable to such swap. In the post-implementation period the CFTC intends to set the minimum block size at the size greater than the 67th volume percentile for that category of swaps.

100. ESMA considers exempting transactions that are above the post-trade LIS threshold from the TO which would ensure pretty close alignment with the US regime.

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?

6.6 Ensuring consistency between the transparency regime and the TO

101. While ESMA is trying to ensure a high level of consistency between transparency and the TO, a misalignment between both may exist and stem from two sources:

i. differences in the liquidity test used; and

ii. differences in scope (if only a subset of contracts subject to transparency are considered for the TO).

102. Firstly, the definition of the liquidity test for the TO in MiFIR is very similar to the definition of a 'liquid market' for non-equities under Article 2(1)(17)(a) of MiFIR, with four small differences:

i. Article 32(3)(a) refers to trades instead of transactions (however it is assumed the terms are used interchangeably);

ii. Article 32(3)(b) refers to the number and type of active market participants, "including the ratio of market participants to products/contracts traded in a given product market" rather than "including the ratio of market participants to traded instruments in a particular product";

iii. When referring to the use of spreads, Article 32(3)(c) does not qualify the criterion with 'when available'; and

iv. Article 32(2)(b) speaks of “sufficient third-party buying and selling interest”, whereas a liquid market is defined in Article 2(17)(a) as one having “ready and willing buyers and sellers on a continuous basis”.

103. Furthermore, the TO requires ESMA to take into account some additional criteria, such as the anticipated impact of the TO on the liquidity of a class of derivatives and the commercial activities of end users which are not financial entities.

104. Secondly, ESMA is considering only benchmark tenors for the purpose of the TO. Hence, only a subset of derivatives that are in the scope of RTS 2 may be subject to the TO, as RTS 2 covers both benchmark tenors and broken dates.

105. It has been so far ESMA’s understanding that, in order to be subject to the TO, the concept of ‘sufficiently liquid’ implies at least an equivalent, if not more stringent, liquidity assessment of a class of derivatives than the one performed to determine a liquid market for trade transparency purposes. In ESMA’s understanding so far, only derivatives for which there is a liquid market under RTS 2 and that are hence subject to transparency should be eligible for the TO. In this DP, ESMA wants to leave open the option that the liquidity test for ‘sufficiently liquid’ (for the TO) can be less stringent than the test to determine a liquid market for trade transparency purposes. Under the approach used in this DP, the same quantitative thresholds as in RTS 2 are applied to assess whether a class of derivatives is sufficiently liquid. Since the population size for carrying out the liquidity assessment for the TO - only derivative contracts on benchmark dates - is significantly smaller than the universe used to calibrate transparency in RTS 2, at least for interest rate derivatives contracts, this implies a de facto stricter liquidity test.

106. However, any misalignment between TO and RTS 2 has an impact on Article 9(1)(c) of MiFIR and transparency waivers. According to Article 9(1)(c) of MiFIR: *“Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for (…) (c) derivatives which are not subject to the trading obligation and other financial instruments for which there is not a liquid market”*.

107. It has been so far ESMA’s understanding that Article 9(1)(c) of MiFIR referring to derivatives not subject to the TO does not allow to waive transparency obligations for all derivatives that are not subject to the TO but is limited to the subset of derivatives that is subject to the CO but for which the TO does not apply. The second part of Article 9(1)(c) referring to all other instruments for which there is not a liquid market, includes, in ESMA’s understanding, all other derivatives not subject to the CO. This is also reflected in recital 7 of RTS 2.

108. Different options could be considered to deal with this situation. A first option could be to accept the inconsistencies between the transparency regime and the TO as unavoidable and take no further action. This approach will result in the possibility to waive pre-trade transparency for some classes of derivatives that are subject to the CO but not subject to the TO, either because they are not benchmark contracts or because they do not pass the liquidity test under the TO. These contracts may however be considered liquid under the liquidity test of RTS 2. Hence, this approach may result in different treatments

for the same class of derivative, creating uncertainty and costs to market participants. It furthermore appears inconsistent to grant OTC-derivatives that are considered liquid enough to be subject to the CO a preferential status compared to OTC-derivatives not considered liquid enough for the purpose of the CO, but which meet the liquidity test for the purpose of transparency.

109. A second option could consist in implementing some measure that would increase the level of consistency between the transparency regime and the TO. Only the combination of both the measures below could to an extent remove inconsistencies between both standards.

i. Change in thresholds. Lowering the thresholds for the liquidity assessment for the TO in such a way that the TO is not limited to derivatives for which there is a liquid market under RTS 2 and thereby ensuring a consistent treatment of benchmark contracts for both the TO and the transparency regime. This would on the one hand result in a broader application of the TO, increasing overall transparency in the derivatives market, given the more stringent transparency requirements for on-venue trading. On the other hand this would allow an application of Article 9(1)(c) where derivatives subject to the TO could have their transparency obligation waived for not having a liquid market in the trade transparency sense.

ii. Change in approach. Aligning the set of instruments that may be subject to the TO and the transparency requirement by using the same sub-class approach for the TO as used for RTS 2. This means that also contracts with a broken tenor could be considered for the TO. While this approach may result in reducing the inconsistency created by Article 9(1)(c), it may be questionable whether OTC-contracts with broken tenors may be sufficiently liquid for the TO. Furthermore, this would result in a deviation from the approach of including benchmark dates used by some other jurisdictions for implementing the TO.

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?

110. Irrespective of the final liquidity criteria applied for both liquidity assessments, there is an additional risk that inconsistencies between the TO and the transparency regime emerge over time if the periodicity for performing the liquidity assessments diverges. Since the liquidity assessment for the transparency regime is carried out annually, it is possible that the liquidity classification of a class of derivatives changes from one year to another while the determinations under the TO may become outdated. Further inconsistencies may also emerge in case of a temporary suspension of transparency under Articles 9(4) and 11(2) of MiFIR, since there is no similar provision in MiFIR to temporarily suspend the TO.

111. ESMA considered using a dynamic approach for the TO to try to address some of these issues, and to provide for a yearly liquidity test for the TO aligned with the liquidity test for the transparency regime. However, after due assessment of the legal empowerment for specifying the classes of derivatives subject to the TO, ESMA considered that such a dynamic approach would be outside of ESMA's prescribed mandate.

112. Therefore, ESMA considers that the TO RTS will have to use a static approach specifying those classes of derivatives that were sufficiently liquid at the time of carrying out the liquidity assessment for the TO. Any material changes on the liquidity status of those derivatives over time may then result in amending, suspending or revoking the RTS as specified under Article 32(5) of MiFIR.

7 Liquidity assessment – preliminary analysis

113. The preliminary analysis of liquidity that follows is based on transaction level data reported to TRs as provided in daily activity reports. These reports allow, as opposed to stock information recorded in trade state reports, to capture a complete flow of transactions reported during a certain timespan. This approach was chosen as ESMA needs to assess liquidity across all maturities for a particular class of derivatives.

114. The dataset used covers a time period from 01/07/2015 to 31/12/2015 and is filtered based on both reporting and execution dates. ESMA considers that a period of six months captures trading under different market conditions and is therefore long enough to conduct a liquidity assessment for the trading obligation.

7.1 Overview of the dataset

115. The dataset used includes the classes of derivatives that are subject to the clearing obligation, i.e. basis interest rate swaps, fixed-to-float interest rate swaps, forward rate agreements (FRAs) and overnight indexed swaps (OIS) and chosen CDS indices but covers contracts on all maturities and all currencies. It does however differentiate between those currently subject to the CO and other contracts/currencies.

116. The analysis is based on OTC data only (based on transactions which have as venue of execution 'XXXX' or 'XOFF') and does not include transactions executed on RMs as the TO will apply only to OTC-derivatives. Therefore, the assessment of liquidity may not cover all transactions in a particular derivative or class of derivatives. This approach is similar to the approach followed in the assessment of the classes of derivatives suitable for the CO.

117. After selecting the relevant data, the following steps were carried out for cleaning the dataset:

i. Intragroup and compressed transactions were excluded in order to focus on price forming transactions.

ii. Only trades reported with action type "new" were taken into account. Further duplicate reports were eliminated (i.e. transactions having the same Trade ID and IDs of two reporting counterparties).

iii. Absolute notional values reported were taken and converted to EUR based on the average ECB exchange rates for the period. A few outlier values were eliminated, based on the distribution of total notional values (namely values either exceeding five times the standard deviation from the mean or values below 500 EUR).

iv. Counterparties which were identified by client's codes and not LEI were eliminated – this step assures the uniqueness of identifiers in counterparties' identification.

Addressing reporting of cleared trades

118. When analysing the liquidity for a certain class of derivatives using TR data, it is important to address the issue of duplicative reporting of cleared trades. This issue may happen under EMIR given the existing reporting structure. This is relevant as according to Recital 27 of MIFIR, "The [trading] obligation (…) should not apply to the components of non-price forming post-trade risk reduction services (…)".

119. Under EMIR, a bilateral trade that is subsequently cleared can be reported several times, each time under a new Trade ID. As an illustration, a bilateral trade between a Counterparty 1 (CT1) and Counterparty 2 (CT2), both within the EEA, which is subsequently cleared, can be reported several times with several trade IDs that cannot be easily matched. It could be reported first as a bilateral trade between CT1 and CT2, and then as two cleared trades, one between CT1 and its CCP and one between CT2 and its CCP, with both sides of the trades reporting in each case. This can be further complicated when counterparties use the services of clearing members, thus adding further reports to the dataset.

120. In order to address this issue and exclude duplicated trades from the dataset, several options were examined, namely:

Option 1 – Excluding all cleared trades where one of the counterparties is a CCP. In this case, trades marked as cleared (i.e. field "Cleared" marked with "Y"), where CT1 (i.e. field 'Counterparty ID') or CT2 (i.e. field 'ID of the other counterparty') is a CCP are excluded from the dataset. Thanks to the publicly available list of CCPs, those transactions can be easily identified. This option, however, has the drawback that it does not exclude all transactions related to indirect clearing.

Option 2 – Excluding all cleared trades where one of the counterparties is a CCP or a clearing member. In this case, trades marked as cleared where either CT1 or CT2 is a CCP or where CT1 or CT2 is identified with the same ID as the ID of the clearing member are excluded from the dataset. Because there is no publicly available list of clearing members, this information can only be obtained through a field 'Clearing member ID', which is not mandatory, and therefore not always populated. Therefore such trade can only be identified when the field 'Clearing member ID' is populated and if is matches the ID of one of the counterparties to the trade. This option allows for a more precise elimination of transactions related to indirect clearing.

Option 3 – Excluding all trades marked as cleared from the dataset. This option is the one eliminating the largest number of transactions. In principle, in the case of OTC transactions, the two counterparties to the trade know who their counterparty is, and their bilateral trade should be always reported, before any clearing arrangement is reported. Such bilateral trade should then be reported as not-cleared.

It is unclear however whether reporting participants are respecting those rules in all cases. One of the potential drawbacks in this case is that it could be that we are eliminating too many records. In some cases, some counterparties may not report themselves and rely on the transaction reported by the CCP, so if we eliminate all cleared trades we are removing too many records. In addition, there may be issues with how 'cleared' trades are reported. Some bilateral trades that are intended to be cleared afterwards may be reported

as 'Cleared', because counterparties may understand that the transaction will be cleared, and these records are deleted in this case.

The impact of reduction in records for each of those options is summarised in Table 5 below. Option 2 was chosen because it removes a number of records that is in between Option 1 and 3 and allows a more precise data selection (contrary to Option 1 it captures also the situation of non-direct clearing, and contrary to Option 3 it is not based on solely one field but takes into account a combination of fields). The resulting data set is used for the analysis that is presented in the sections that follow. Table 5 presents the impact per sub-asset class of eliminating duplicated trades under the different options evaluated.

TABLE 5 OPTIONS CONSIDERED FOR DATASET SELECTION WITH REGARDS TO CLEARED TRADES

Option / Class	Values	Fixed to float IRS	%	OIS	%	Basis IRS	%
Basis dataset	Num. trades	1,485,929	100%	107,434	100%	60,224	100%
	Total notional (M EUR)	105,964,011	100%	93,833,056	100%	10,852,505	100%
Option 1	Num. trades	518,664	35%	37,643	35%	16,606	28%
	Total notional (M EUR)	30,372,722	29%	21,939,958	23%	2,787,516	26%
Option 2	Num. trades	**475,515**	**32%**	**36,643**	**34%**	**16,243**	**27%**
	Total notional (M EUR)	**28,678,944**	**27%**	**21,638,885**	**23%**	**2,717,602**	**25%**
Option 3	Num. trades	410,559	28%	34,608	32%	12,667	21%
	Total notional (M EUR)	23,919,854	23%	20,371,501	22%	2,238,091	21%

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?

7.2 Liquidity assessment of interest rate derivatives

121. The liquidity assessment was performed on sub-asset classes that are already covered by the CO and which are hence eligible to the TO, according to Article 32(1)(a) of MIFIR.

122. ESMA looked at imposing the TO on a tenor basis and differentiated between approaches looking just at benchmark dates or rather at the benchmark date +/- a number of days.

123. Tenors were computed as the difference between the maturity and execution dates, and represent thus the time remaining to maturity at the outset of the contract. The number of years was calculated by dividing the number of days between maturity and execution by 365.25 days, as swaps consider leap years. This approach follows the one taken for the specification of the TO in other jurisdictions. To that initial tenor, ESMA also added +/- X days, and compared the results of both analyses in terms of percentage of trades captured.

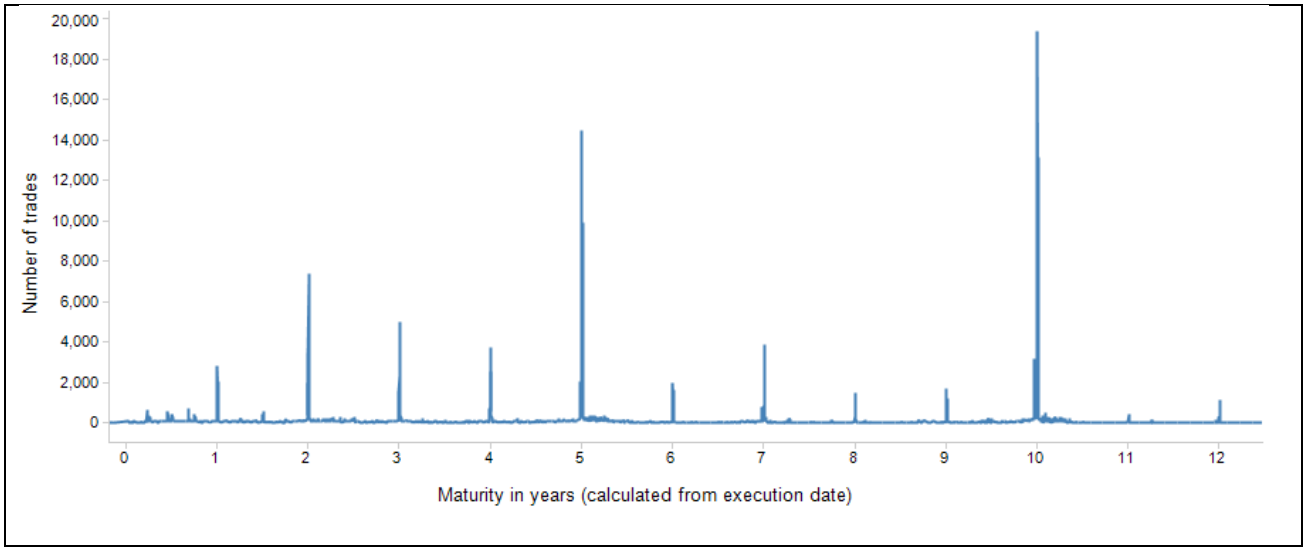
Q17: Do you agree with the approach taken with regard to calculating tenors?

124. In other jurisdictions, such as the US, the TO only applies to benchmark dates as those account for most of the volume. However, based on the ESMA dataset from TRs, in Europe we see significant volume also on other dates. Some of the explanations are transactions related to novation and unwinds, asset swaps and swap futures. Also, some transactions are spot, others happen on IMM dates, futures expiry dates or relate to trades that match the exact expiry of a bond. In addition, there could be also issues related to misreporting.

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

125. Figure 1 shows peaks in terms of number of trades around benchmark dates. However, there are still a significant number of trades that occur throughout the period on other non standardised dates.

FIGURE 1 DURATION OF CONTRACTS – EXAMPLE OF IRS FIXED TO FLOAT



126. Table 6 displays the percentage of trades and notional amounts captured based on different methodologies for the tenors (we consider only transactions with selected benchmark tenors +/- X days), compared to all transactions in the defined intervals for each sub-asset class).

TABLE 6 COMPARISONS OF DATASET: NUMBER OF TRADES AND NOTIONAL VALUES

		All transactions	Tenor +/-5D	(%)	Tenor +/- 10D	(%)	Tenor +/- 20D	(%)
Fix to Float	Number trades	**475,519**	213,046	45%	238,885	50%	262,822	55%
	Not. Amount (M EUR)	**28,678,943**	13,127,934	46%	14,699,400	51%	16,134,328	56%
OIS	Number trades	**36,657**	10,994	30%	12,295	34%	13,989	38%
	Not. Amount (M EUR)	**21,638,885**	4,509,536	21%	5,714,380	26%	7,918,159	37%
Basis IRS	Number trades	**16,243**	6,384	39%	7,344	45%	8,074	50%
	Not. Amount (M EUR)	**2,717,602**	1,024,408	38%	1,206,093	44%	1,312,751	48%

127. As can be seen from Table 6, there is a relatively large number of trades that fall in between the benchmark tenors, which could be explained by the reasons mentioned above. There is also a great dispersion in terms of number of trades and notional amount covered under the different approaches for different asset classes.

Liquidity assessment methodology

The following paragraphs present briefly the different steps carried out for the liquidity analysis. The same approach was followed for all the sub-classes assessed for this DP.

i. First, ESMA determined which sub-classes already subject to the CO should be considered as liquid on the basis of the criterion of average **number of trades per day**, (i.e. the average number of trades during the six months period covered in the analysis). ESMA used as a first indicative threshold the one set out in Annex III of draft RTS 2 to determine liquidity. In the case of interest rate derivatives, the threshold in line with RTS 2 is therefore set at 10 trades per day and is the same for all sub-asset classes assessed (i.e. 1300 trades during the period, based on 130 trading days in a 6 months period). Only sub-classes that passed this first test were considered for the further analysis.

ii. For those classes of derivatives that passed the first test, the following criteria were assessed:

- **Average notional amount per day (EUR)** – defined as the total notional value reported divided by 130. This criterion is measuring the average size of trades over a range of market conditions as set out in Article 32(3)(a) of MiFIR. The threshold for this criterion varies from sub-class to sub-class.

- **Days traded** – defined as the percentage of different dates (registered in the execution timestamp) with trading activity over the whole assessment period. This criterion is also used as an estimate for the average frequency of trades as set out in Article 32(3)(a) of MiFIR. The threshold suggested for this metric and applied across all sub-asset classes assessed is 80% of days with trading activity, i.e. 104 days, except CDS where we consider both 70% and 80%.

- **Number of distinct counterparties** – defined as the number of different Counterparty IDs with trading activity for the selected sub-classes over the 6 months period. In order to ensure that counterparties are counted only once, only values recorded with valid LEIs were taken into account. This criterion aims at measuring the number of market participants as set out in Article 32(3)(b) of MiFIR. Draft RTS 4 requires as a minimum two distinct counterparties. At this stage, ESMA did not assign a minimum

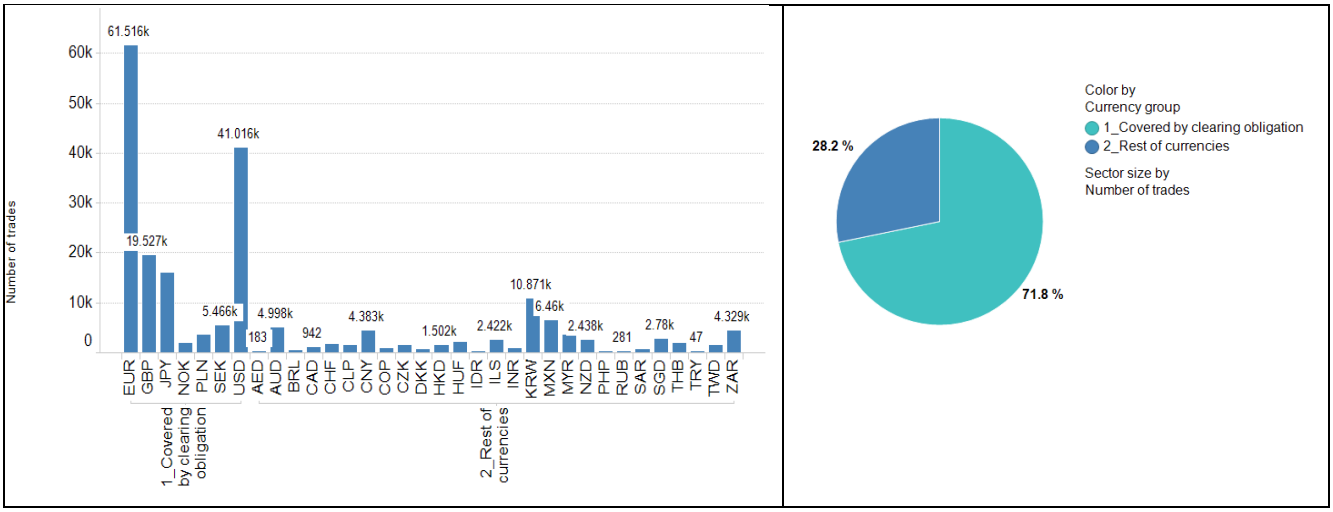
amount of counterparties but simply presents the number of distinct counterparties per sub-class seen in the dataset.

These are the only liquidity criteria used for this preliminary liquidity assessment. ESMA intends for the purpose of the Consultation Paper and for finalising the draft RTS to take the full spectrum of liquidity criteria into account as set out in Article 32(3) of MiFIR and further specified in draft RTS 4. Given that only a subset of the required criteria was considered in this analysis, the results presented provide an initial overview on the potential scope of the TO and should be interpreted with caution.

A. FIXED-FLOAT INTEREST RATE SWAPS

128. Single currency fixed-float IRS are one of the most commonly traded derivatives and are already to a great extent subject to the CO. Figure 2 shows the number of transactions in single currency fixed-to-float IRS transactions reported in the EU during the second half of 2015 per underlying currency. The vast majority of trading takes place in the four major currencies EUR, USD, GBP and JPY. The three other currencies covered by the CO (NOK, PLN, SEK) while representing a significantly smaller amount of trades, are the second largest group of currencies traded within the EU. Altogether the transactions that are already or may be in a near future subject to the CO represent about 72% of all transactions in terms of number of trades.

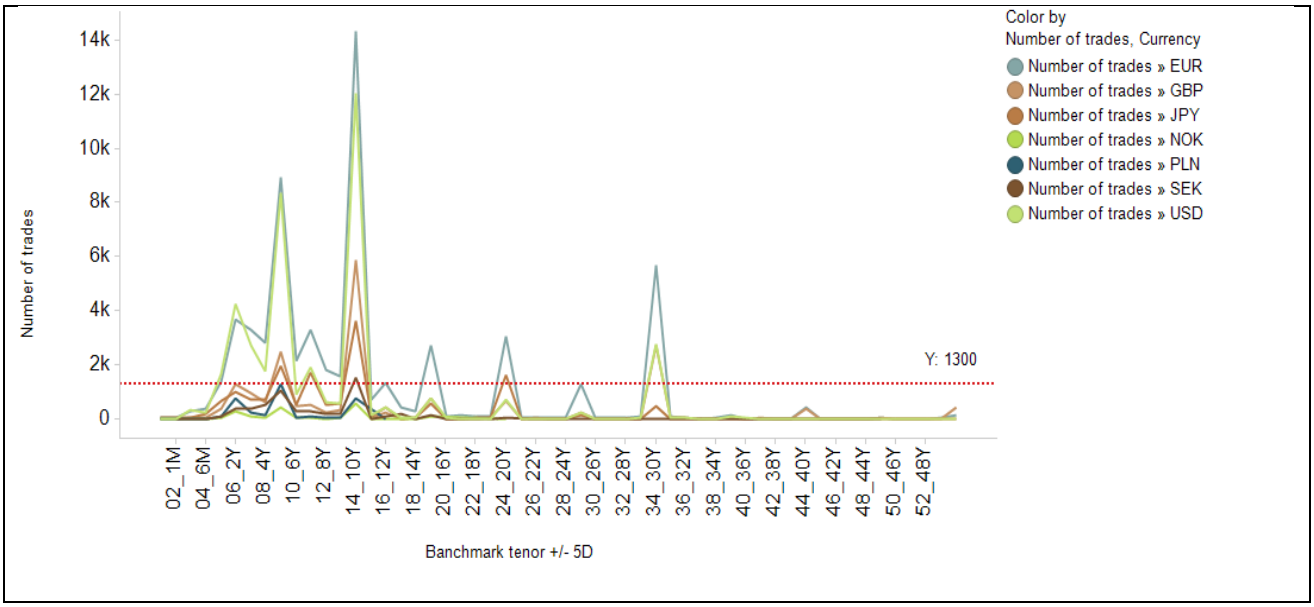
FIGURE 2 FIXED-FLOAT IRS – NUMBER OF TRADES PER CURRENCY AND CLEARING OBLIGATION COVERAGE - TENOR POINTS +/- 5 DAYS



129. Figure 2 shows which sub-classes subject to the CO met the threshold for the first criterion of average trades per day. Only those sub-classes where the registered activity exceeded 1300 trades over the observation period (those above the red line) where considered for the further liquidity analysis.

130. As can be seen from Figure 3, fixed-float IRS in EUR, USD, GBP and JPY meet this criterion with liquidity peaks for contracts with a tenor of 5, 10 and 30 years.

FIGURE 3 FIXED-FLOAT IRS – DISTRIBUTION OF TRADES WITH TENOR POINTS +/- 5 DAYS, PER CURRENCY



131. In a second step, the remaining sub-classes where assessed against the additional criteria presented above. In the case of fixed-float IRS the following criteria in line with RTS 2 were used:

i. Average notional amount per day (EUR) of at least EUR 50 mio.

ii. Days traded – transactions take place on at least 80% of trading days, i.e. 104 days.

iii. Number of distinct counterparties – the absolute minimum to be met is set at two distinct counterparties.

132. Table 7 presents the outcome of the analysis based on the three criteria shown above and broadly confirms the liquidity peaks identified on the basis of the first liquidity criterion of number of trades. All subclasses assessed meet the three additional criteria and all contracts listed in Table 7 would be considered as sufficiently liquid for the TO. It appears that number of trades is a good indicator for identifying which classes should be considered liquid.

133. However, TR data does not provide sufficient information on a number of further specifications that ESMA is considering for the purpose of the TO. For instance, TR data does not provide information on payment frequency, reset frequency, day count convention, and trade start type. ESMA is therefore interested in stakeholders' view on possible sources for obtaining the necessary information on the most common terms for the classes shown as well as proposals on which specifications are considered necessary to specify the TO.

TABLE 7 FIXED-FLOAT IRS – LIQUIDITY ASSESSMENT FOR TENOR POINTS +/- 5 DAYS FOR MORE THAN 10 TRADES PER DAY, PER CURRENCY

Currency	Benchmark tenor +/- 5D_IRS	Number of trades in 2H'2015	Trades per day (min 10)	Avg notional per day in EUR (min 50 mio)	Days traded (min 80%=104)	Num of distinct counterparties
EUR	05_1Y	1,388	10.68	1,973,068,111	130	108
	06_2Y	3,697	28.44	3,773,649,074	131	146
	07_3Y	3,280	25.23	2,953,448,664	130	201
	08_4Y	2,823	21.72	1,771,524,989	133	228
	09_5Y	8,918	68.60	4,269,797,186	141	408
	10_6Y	2,160	16.62	956,167,699	134	150
	11_7Y	3,283	25.25	1,680,702,026	133	215
	12_8Y	1,799	13.84	937,627,660	132	121
	13_9Y	1,567	12.05	901,972,408	132	106
	14_10Y	14,323	110.18	4,476,390,832	135	380
	16_12Y	1,328	10.22	661,914,946	130	91
	19_15Y	2,708	20.83	939,559,243	135	169
	24_20Y	3,055	23.50	777,007,679	131	135
	34_30Y	5,680	43.69	821,154,769	131	149

Currency	Benchmark tenor +/- 5D_IRS	Number of trades in 2H'2015	Trades per day (min 10)	Avg notional per day in EUR (min 50 mio)	Days traded (min 80%=104)	Num of distinct counterparties
GBP	09_5Y	2,487	19.13	843,774,812	130	120
	14_10Y	5,894	45.34	1,348,283,961	132	151
	34_30Y	2,731	21.01	296,724,678	129	118
JPY	09_5Y	1,977	15.21	680,150,845	126	29
	11_7Y	1,736	13.35	490,541,210	127	28
	14_10Y	3,606	27.74	646,482,592	129	42
	24_20Y	1,603	12.33	138,795,111	127	36
SEK	14_10Y	1,545	11.88	228,150,447	124	65
USD	05_1Y	1,683	12.95	1,628,652,727	131	67
	06_2Y	4,249	32.68	2,778,009,082	144	91
	07_3Y	2,704	20.80	1,511,549,703	135	88
	08_4Y	1,746	13.43	878,148,342	136	93
	09_5Y	8,359	64.30	2,798,226,814	143	181
	11_7Y	1,921	14.78	563,727,772	134	87
	14_10Y	12,014	92.42	2,291,172,205	150	175
	34_30Y	2,771	21.32	430,491,796	132	86

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

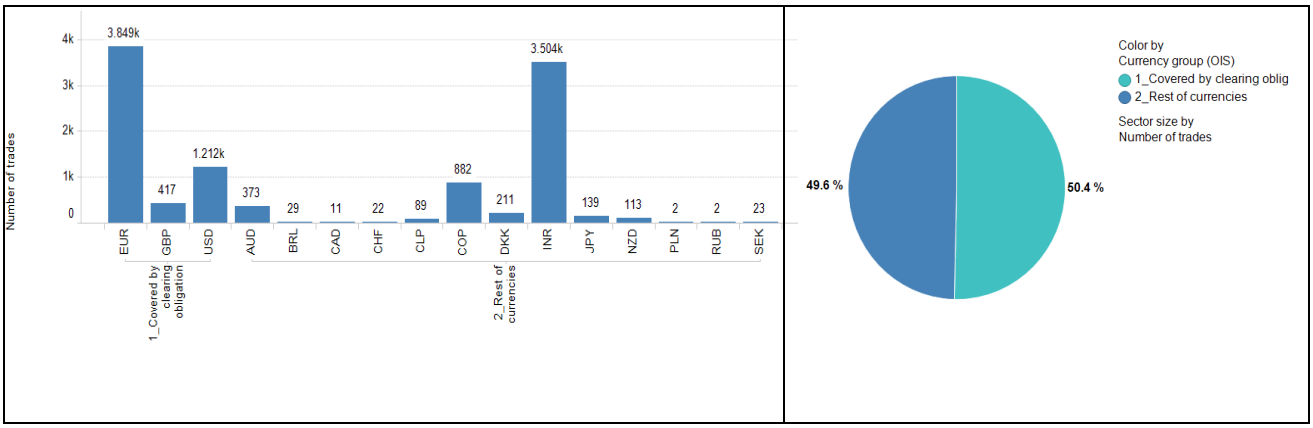
Q20: What thresholds would you propose as the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

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?

B. OVERNIGHT INDEX SWAPS

134. Figure 4 below presents all overnight index swaps (OIS) reported during 2H'2015 in the EU. Trading in OIS is concentrated in EUR, INR, USD and COP[21]. For this sub-asset class only contracts traded in EUR, GBP and USD are subject to the CO and represent almost 50% of total trading in terms of number of trades. Trading in the remaining currencies is low.

FIGURE 4 OIS - NUMBER OF TRADES PER CURRENCY AND CO COVERAGE - TENOR POINTS +/- 5 DAYS



135. Figure 5 below shows the result of applying the first liquidity criterion 'trades per day' to OIS transactions subject to the CO. Only one subclass, OIS in EUR with a tenor of 3 months is above the red line of 1300 trades during the observation period, whereas all the remaining subclasses do not reach that threshold. Therefore, only OIS in EUR with a tenor of 3 months are analysed further.

[21] Colombian Peso (COP)

FIGURE 5 OIS – DISTRIBUTION OF TRADES WITH TENOR POINTS +/- 5D, PER CURRENCY

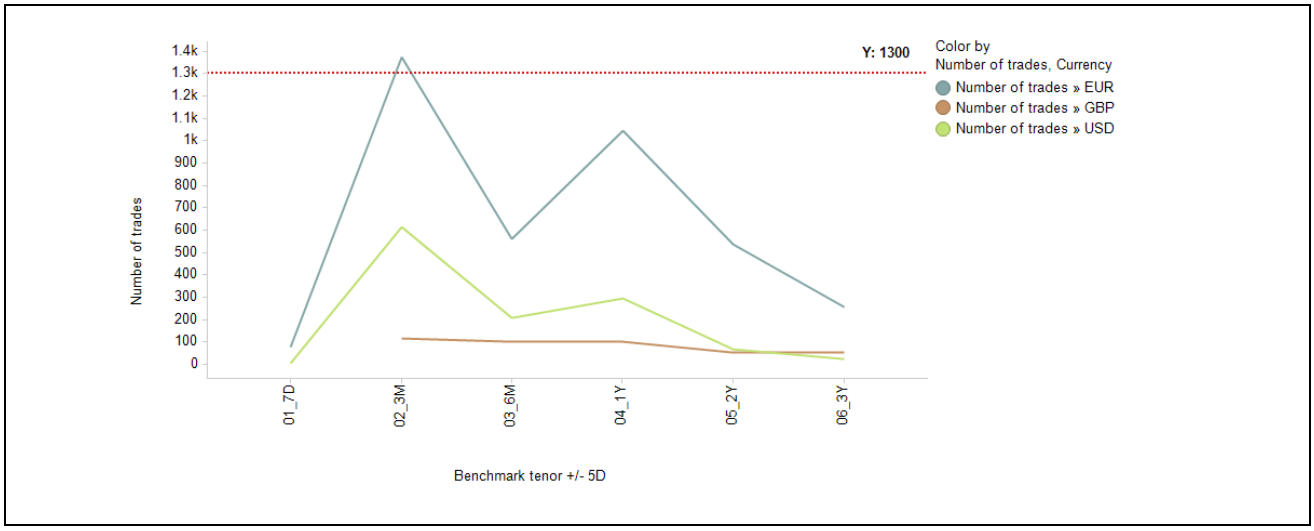


TABLE 8 OIS – LIQUIDITY ASSESSMENT WITH TENOR POINTS +5 DAYS FOR MORE THAN 10 TRADES PER DAY, PER CURRENCY

Currency	Benchmark tenor +/- 5D_OIS	Number of trades in 2H'2015	Trades per day (min 10)	Avg notional per day in EUR (min 50 mio)	Days traded (min 80%=104)	Num of distinct counterparties
EUR	02_3M	1,374	10.57	4,743,981,313	131	69

136. Table 8 this subclass also meets the three additional liquidity criteria. However, it can be observed that the first criterion is barely met for this sub-class with a total of 1,374 trades over the observation period. Therefore, already slight changes in trading in these contracts could result in a different liquidity picture. On the other hand, the three additional liquidity criteria are largely met, which would rather speak in favour of sufficient liquidity for this sub-class. ESMA considers it therefore important to assess further liquidity criteria before considering this sub-class for the TO.

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

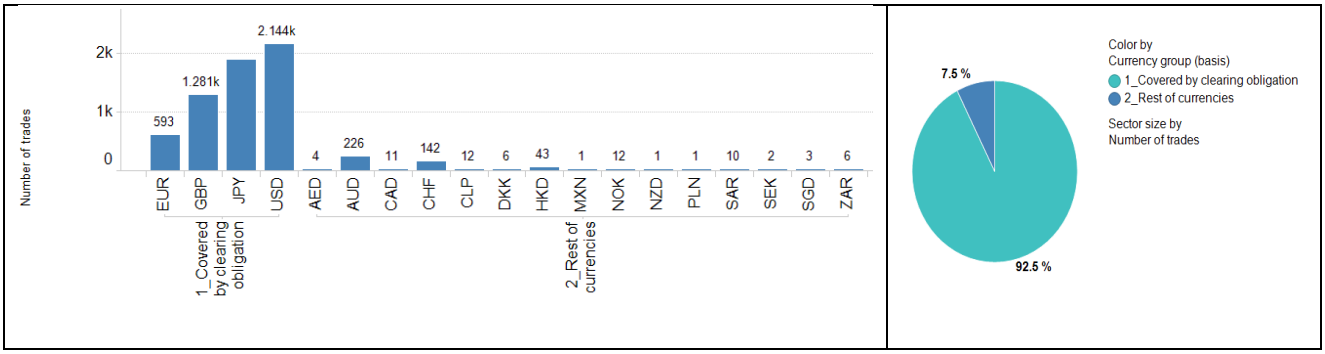
Q23: What thresholds would you propose for the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

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?

C. BASIS INTEREST RATE SWAPS

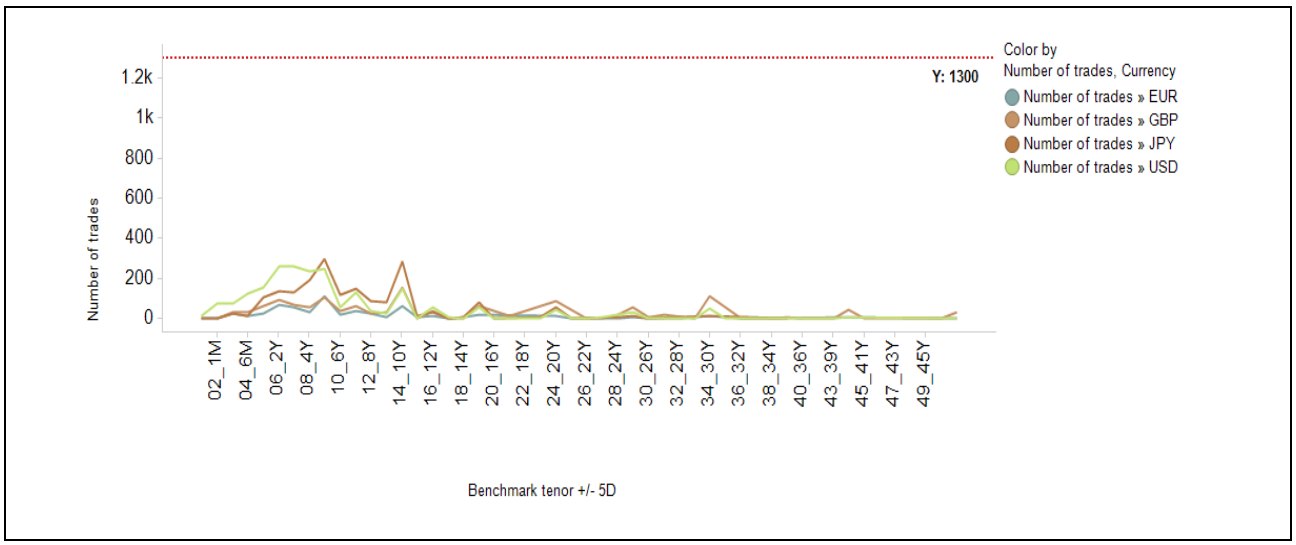
137. The last asset class of interest rates derivatives subject to the clearing obligation is basis (float-float) single currency interest rate swaps. Figure 6 presents all float-to-float single currency IRS transactions reported during the 2H'2015 in the EU. The four most frequently traded currencies in this group are USD, GBP, JPY and EUR and account for almost 92% of the trades reported. Those four currencies, together with some selected major currencies, are further assessed with regards to their liquidity, for the purpose of the TO.

FIGURE 6 BASIS IRS – NUMBER OF TRADES PER CURRENCY AND CO COVERAGE – TENOR POINTS +/- 5D



138. As with previous classes, we first identify tenor points within the sub-asset class and then assess number of trades reported within the analysed period. The threshold for the liquidity assessment is set at the level of 10 trades per day. As can be seen inFigure 7, no sub-class met this criterion and thus no class is considered as sufficiently liquid for TO at this stage.

FIGURE 7 BASIS IRS – DISTRIBUTION OF TRADES WITH TENOR POINTS +/- 5D, PER CURRENCY



D. FORWARD RATE AGREEMENTS

139. FRAs are another asset class which is covered by the CO for selected currencies. ESMA identified a number of issues when assessing this sub-asset class of FRAs and would be interested in receiving feedback from stakeholders in order to obtain a better understanding of trading in FRAs.

140. The complexity of reporting of those transactions is reflected in inconsistencies and different ways of reporting in the ESMA dataset. The duration of a transaction, maturity and effective dates as well as the underlying rate of the transaction do not seem to be reported in a consistent manner.

141. Following discussions with stakeholders, ESMA understands that the overwhelming majority of FRAs transactions are entered into for the purpose of post-trade risk reduction, and in particular to address fixing risk, or basis risk within portfolios in the interest rate, FX and inflation markets. It appears that about 90-95% of the global volume of FRAs are related to post-trade risk reduction services, whereas only about 5% of the global volume refers to actual transactions.

142. Based on this understanding of the FRA-market, ESMA does not currently consider that FRAs should be subject to the TO. This approach would also mirror the approach chosen in some other jurisdictions such as the US which do not include FRAs.

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?

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?

7.3 Liquidity assessment of credit derivatives – based on tenor of underlying

143. The second asset class where selected products have been already covered by the clearing obligation is credit derivatives. The selected index CDS subject to the clearing obligation are analysed for the TO in the following paragraphs.

144. Contrary to interest rate derivatives, the tenor of the underlying instrument was established based on selected indexes reference data and not from dates reported.

TABLE 9 SEGMENTATION OF OTC CREDIT RATE DERIVATIVES (CDS) CLASSES FOR THE PURPOSE OF TESTING THE CRITERIA SET OUT UNDER ARTICLE 32(2)(A) OF MIFIR

Type	Sub-type	Geographical zone	Reference Index	Settlement Currency	Series	Tenor
Index CDS	Untranched Index	Europe	iTraxx Europe Main	EUR	17 onwards	5Y
Index CDS	Untranched Index	Europe	iTraxx Europe Crossover	EUR	17 onwards	5Y

145. TR data on CDS transactions does currently not allow ESMA to identify the underlying index. Therefore, ESMA could not carry out an initial liquidity assessment based on TR data. However, based on discussions with selected stakeholders, ESMA considers that the on-the-run series of both the iTraxx Europe Crossover index in EUR with 5Y tenor as well as the iTraxx Europe Main index in EUR with 5Y tenor can be considered sufficiently liquid. ESMA considers extending the TO to the first thirty working days of the 1st off-the-run-series, or the series that is immediately prior to the current on-the-run series. This appears appropriate in view of significant trading activity at the beginning of the 1st off-the-run period.

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

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.

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

8 Date from which the TO will take effect and phase-in

146. 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.

147. The earliest date from which the TO can apply is the date of application of MiFIR, i.e. 3 January 2018. Furthermore, ESMA considers it important to ensure that the TO is aligned with the CO and to ensure that mandatory trading with respect to a class of derivatives should not apply to a category of counterparties prior to such category of counterparties being subject to mandatory clearing with respect to that class of derivatives. Since the draft RTS on the CO provide for a phase-in for different categories of counterparties, it may therefore be necessary to ensure that the TO applies at the earliest from the date the respective counterparty is subject to the CO.

148. To date ESMA submitted three draft RTS, of which three have been adopted and two published in the official journal. The draft RTS submitted by ESMA provides for a phase-in for four different categories of counterparties which covers a period of three years following the entry into force of the RTS. ESMA considers applying the same categories of counterparties for the purpose of the TO.

149. The CO for interest rate derivatives in major currencies (EUR, GBP, JPY, USD) will start applying for counterparties of category 1 as of 21 June 2016, and the phase-in will end for counterparties of category 4 on 21 December 2018. Concerning credit derivatives, the CO will start applying for counterparties of category 1 at 9 February 2017 and the phase-in will end with the application of the CO to counterparties of category 4 at 9 May 2019. As to interest rate derivatives in other currencies (NOK, PLN, SEK) the CO will start applying 6 months after the entry into force of the RTS to counterparties of category 1 and the phase-in will end with the application 3 years after the entry into force of the CO RTS to counterparties of category 4.

150. Therefore, on the basis that the TO would apply at the earliest at the date at which the CO takes effect, the calendar in Table 10 could be envisaged.

TABLE 10 DATE ON WHICH THE TRADING OBLIGATION WILL TAKE EFFECT – EARLIEST APPLICATION DATES

OTC derivatives class	Category of counterparty			
	Category 1	Category 2	Category 3	Category 4
IRD (EUR, GBP, JPY, USD)	03 January 2018	03 January 2018	03 January 2018	21 December 2018
IRD (NOK, PLN, SEK)	03 January 2018	03 January 2018	09 February 2018	09 August 2019

Credit derivatives	03 January 2018	03 January 2018	09 February 2018	09 May 2019

151. On the other hand, as stressed by some counterparties in their responses to the ESMA December 2014 Consultation Paper and the May 2014 discussion paper, it may be appropriate to provide for a longer phase-in period for operational purposes. This may be necessary as counterparties that will be subject to the TO may require sufficient lead time to update their systems and procedures to comply with the TO, to ensure connection to trading venues and avoid possible bottlenecks of a big bang approach. This may be particularly an issue for smaller to medium-sized market participants. Similarly, trading venues that do not currently offer trading for the relevant class of derivatives would benefit from a longer phase-in which would give them sufficient time to admit such class of derivatives for trading.

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

Q31: Do you consider necessary to provide for an additional phase-in for the TO for operational purposed 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.

9 Package transactions

152. In the feedback received to the consultation paper of December 2014 a large number of stakeholders stressed the importance of clarifying the treatment of package transactions, i.e. transactions comprising several linked and contingent components, aiming at allowing clients or investment firms to reduce transactions costs and manage execution risks. In particular, many respondents stressed the need to allow market participants to continue using package transactions once the TO is in place, and asked to exempt package transactions from the TO where not all components are subject to the TO.

153. ESMA is aware that the CFTC exempted certain package transactions temporarily from the obligation to trade on SEFs and DCMs in the US on the basis of no-action relief letters. It should be noted that the empowerment for ESMA to draft technical standards specifying the classes of derivatives subject to the TO does not explicitly provide for a tailored regime for package transactions. Furthermore, ESMA does not have the same powers as the CFTC and in particular has not the power to (temporarily) exempt package transactions without a clear legal empowerment.

154. However, ESMA considers that there may be some limited room for providing for a tailored approach for packages. This is also reflected in recital 10 of draft RTS 4. Furthermore, in the context of the negotiations of the amendment of the level 1 text to postpone the application of MiFID II and MiFIR to 3 January 2018, co-legislators introduced an additional amendment explicitly providing for the possibility for a tailored treatment of packages for pre-trade transparency. Furthermore, the amendment requires ESMA to develop a draft RTS specifying which packages can be considered liquid and should therefore be subject to pre-trade transparency.

155. In order to further develop the treatment of package transactions for the TO ESMA is seeking input from stakeholders on the types of packages that may be affected in view of the asset classes currently considered for the TO, i.e. IRD and CDS as presented in section 7.

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.

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?

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.

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?

10 Annex

Summary of questions

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?**

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.**

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?**

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.**

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?**

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?**

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).**

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?**

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

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**

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

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

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

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?**

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?**

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?**

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

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

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

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

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?**

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

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

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