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Re: ESMA consultation on the Clearing obligation under EMIR for Interest Rate derivatives

Dear Sir or Madam,

Deutsche Bank welcomes the opportunity to provide comments on the above consultation. We agree with most of the analysis and proposals put forward by ESMA.

In particular we support the draft determinations on the classes of derivatives proposed for mandatory clearing as they are broadly consistent with clearing obligations introduced in other jurisdictions. The proposed phase-in periods are also sufficient.

We support the proposal to split the frontloading window into periods A and B and the fact that frontloading will not apply to non-financials. Much of the uncertainty around frontloading has been removed as a result of ESMA's proposed approach.

Some pricing, legal and operational challenges will still remain around frontloading if the current approach is maintained. We are concerned that category 2 counterparties (financials which are not clearing members and certain AIFs) could be compelled to clear as soon as possible rather than benefitting fully from the 18 month phase-in. This would be inconsistent with the objective of supporting the clearing obligation's smooth implementation by providing an 18 month phase-in. To maintain a degree of frontloading while preserving the benefits of an adequate phase-in, frontloading could be restricted to category 1 counterparties (clearing members) by using the minimum remaining maturity threshold to remove frontloading for category 2 counterparties.

Please do not hesitate to let us know if you have any questions about these points or if there are any issues related to this topic which you would like to discuss further.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Daniel Trinder'.

Daniel Trinder
Global Head of Regulatory Policy



Introduction

Please make your introductory comments below:

1 The clearing obligation procedure

Question 1: Do you have any comment on the clearing obligation procedure described in Section 1?

We agree with ESMA's approach. Consulting per asset class is preferable to producing a Regulatory Technical Standard (RTS) and consultation per central counterparty (CCP) notification.

Structure of the interest rate derivatives classes

1.1 Characteristics to be used for interest rate derivative classes

Question 2: Do you consider that the proposed structure defined here for the interest rate OTC derivative classes enables counterparties to identify which contracts fall under the clearing obligation as well as allows international convergence? Please explain.

We agree with ESMA's approach. We note that paragraph 22 of the consultation paper states that a particular contract will only be subject to the clearing obligation if it has the seven characteristics set out in Annex 1 of the draft RTS and is supported by CCPs. Legal certainty would be maximised by setting out this "two-step" approach into the RTS.

1.2 Additional Characteristics needed to cover Covered Bonds derivatives

Question 3: Do you consider that the proposed approach on covered bonds derivatives ensures that the special characteristics of those contracts are adequately taken into account in the context of the clearing obligation? Please explain why and possible alternatives.

Stakeholders (CCPs and covered bond derivatives users, in particular) are invited to provide detailed feedback on paragraph 38 above. In particular: what is the nature of the impediments (e.g. legal, technical) that CCPs are facing in this respect, if any? Has there been further discussions between CCPs and covered bond derivatives users and any progress resulting thereof?

We agree with ESMA's proposal that covered bonds derivatives should not be mandated for clearing at present.

1.3 Public Register

Question 4: Do you have any comment on the public register described in Section 1.3?

While it is appropriate that the addition of a mandatory clearing obligation is achieved via a new RTS and is preceded by a public consultation, speed is likely to be of the essence



where the removal of a mandatory clearing obligation is required. As ESMA notes, the use of a new RTS is ill suited to achieve this in a timely fashion. We support ESMA's commitment to flag this as an issue in need of attention in the 2015 EMIR review.

2 Determination of the OTC interest rate classes to be subject to the clearing obligation

Question 5: In view of the criteria set in Article 5(4) of EMIR, do you consider that this set of classes addresses appropriately the systemic risk associated to interest rate OTC derivatives? Please include relevant data or information where applicable. Please include relevant data or information where applicable.

We agree with the draft clearing determinations proposed by ESMA. In particular, we welcome the broad international consistency that the determinations should achieve.

3 Determination of the dates on which the obligation applies and the categories of counterparties

3.1 Analysis of the criteria relevant for the determination of the dates

Question 6: Do you have any comment on the analysis presented in Section 3.1?

We agree with the analysis presented by ESMA. While it may not be a legal requirement of EMIR, we believe that the number of CCPs available to clear a class of derivative should be one of the most relevant factors which ESMA considers when deciding whether to propose a mandatory clearing obligation.

3.2 Determination of the categories of counterparties (Criteria (d) to (f))

Question 7: Do you consider that the classification of counterparties presented in Section 3.2 ensures a smooth implementation of the clearing obligation? Please explain why and possible alternatives.

We welcome ESMA's efforts to provide a sufficient phase-in for counterparties and we understand the approach to categorising counterparties which it has proposed. However, absent a centralised repository where the category status of counterparties is indicated, market participants will find it difficult to establish the classification of their counterparties. ESMA would be best placed to maintain a publicly-searchable database as this would ensure consistent classification across the market. At a minimum, to provide clarity on category 1 counterparties (i.e. clearing members), ESMA could aggregate the data already available from authorised CCPs.

ESMA could also consider proposing an amendment to Article 10 of the Commission Delegated Regulation (EU) No 153/2103 (RTS on requirements for central counterparties) to require any authorised or recognised CCPs to publish information on (i) the names of its authorised clearing members; and (ii) the products that they are authorised to clear.



3.3 Determination of the dates from which the clearing obligation takes effect

Question 8: Do you consider that the proposed dates of application ensure a smooth implementation of the clearing obligation? Please explain why and possible alternatives.

The proposed phase-in of six months for category 1 counterparties is reasonable. Absent frontloading, the proposed 18 month phase-in for category 2 counterparties would in all likelihood be sufficient to ensure a smooth implementation of the clearing obligation. However, we are concerned that continuing uncertainty around how frontloading will work in practice will prevent the 18 month phase-in from being fully utilised and could compel category 2 counterparties to clear as early as possible so that they can minimise their frontloading obligations. This would be inconsistent with the objective of providing an 18 month phase-in to support the smooth implementation of the clearing obligation.

4 Remaining maturity and frontloading

Question 9: Do you consider that the proposed approach on frontloading and the minimum remaining maturity ensures that the uncertainty related to this requirement is sufficiently mitigated, while allowing a meaningful set of contracts to be captured? If not, please explain why and provide possible alternatives compatible with EMIR.

We welcome the use of the minimum remaining maturity (MRM) threshold to mitigate Frontloading in Period A. This has resolved most of the uncertainty around the frontloading requirements. We also agree with ESMA that non-financial counterparties should not be subject to frontloading requirements. However, we think that frontloading may result in category 2 counterparties being compelled to clear contracts as soon as possible and result in them not being able to benefit fully from the 18 month phase-in. This will occur as a result of pricing difficulties and legal and operational uncertainties that will still exist in Period B. While participants will know which contracts will be subject to the clearing obligation when entering into a contract during Period B, clients will not know whether they will in fact be able to clear the contract when the clearing obligation becomes effective or all the terms on which they will be able to clear the contract.

To address these uncertainties and provide category 2 counterparties with a phase-in period that can be fully utilised, we suggest setting the minimum remaining maturity of contracts entered into during the phase-in period (where at least one counterparty to the contract is a category 2 counterparty) using the approach proposed by ESMA for Period A, thus excluding category 2 counterparties from the frontloading requirement. Restricting frontloading to category 1 counterparties would maintain a degree of frontloading and be consistent with EMIR while scoping out category 2 counterparties which are often buy-side entities.

With the removal of frontloading for category 2 counterparties, a reduced phase-in period for these counterparties may be appropriate. However, sufficient time would still be required to ensure these counterparties are able to put in place clearing arrangements. A phase-in of less than 12 months is unlikely to be adequate. It would have to be sufficiently long to also allow counterparties apply for intra-group exemptions.

Further important points that should be considered include:



- Period B should not start when the RTS is published in the EU Official Journal (OJ) as this date is not pre-defined. Period B should start at least 3 months after the RTS is published in the OJ in order to give market participants sufficient time to draw up legal agreements;
- It is important that the status of intra-group exemptions is clear before the RTS enters into force in order to give certainty on whether intra-group trades will need to be subject to the frontloading requirements.

5 OTC equity derivative classes that are proposed not to be subject to the clearing obligation

Question 10: Do you have any comment on the analysis on the Equity OTC derivative classes presented in Section 5?

We agree with ESMA's decision not to propose a mandatory clearing obligation for equity derivative classes at this stage.

6 OTC Interest rate future and option classes that are proposed not to be subject to the clearing obligation

Question 11: Do you have any comment on the analysis on the OTC Interest rate future and options derivative classes presented in Section 6?

We agree with ESMA's decision not to propose a mandatory clearing obligation for interest rate future and option classes at this stage.

Annex I - Commission mandate to develop technical standards

N/A

Annex II - Draft Regulatory Technical Standards on the Clearing Obligation

Question 12: Please indicate your comments on the draft RTS other than those already made in the previous questions.

It would be beneficial if ESMA provided clarity on the interaction between both RTS. As currently drafted market participants have struggled to understand whether the two RTS will be adopted together or whether the RTS in the Credit Default Swaps consultation paper will supersede the RTS in the Interest Rate Swaps consultation paper. It is also unclear what approach will be taken to any potential future proposal on extending the mandatory clearing obligation. Clarity on these issues is important as they impact how the phase-in and frontloading provisions are to be applied where these cover different types of product categories with differing starting dates for the clearing obligation.

The product classes listed in the tables in Annex I should be numbered in order to ease the reference for possible future Commission Delegated Regulations that may add additional product classes and specify new implementation periods.

Annex III - Impact assessment

Question 13: Please indicate your comments on the CBA.



N/A