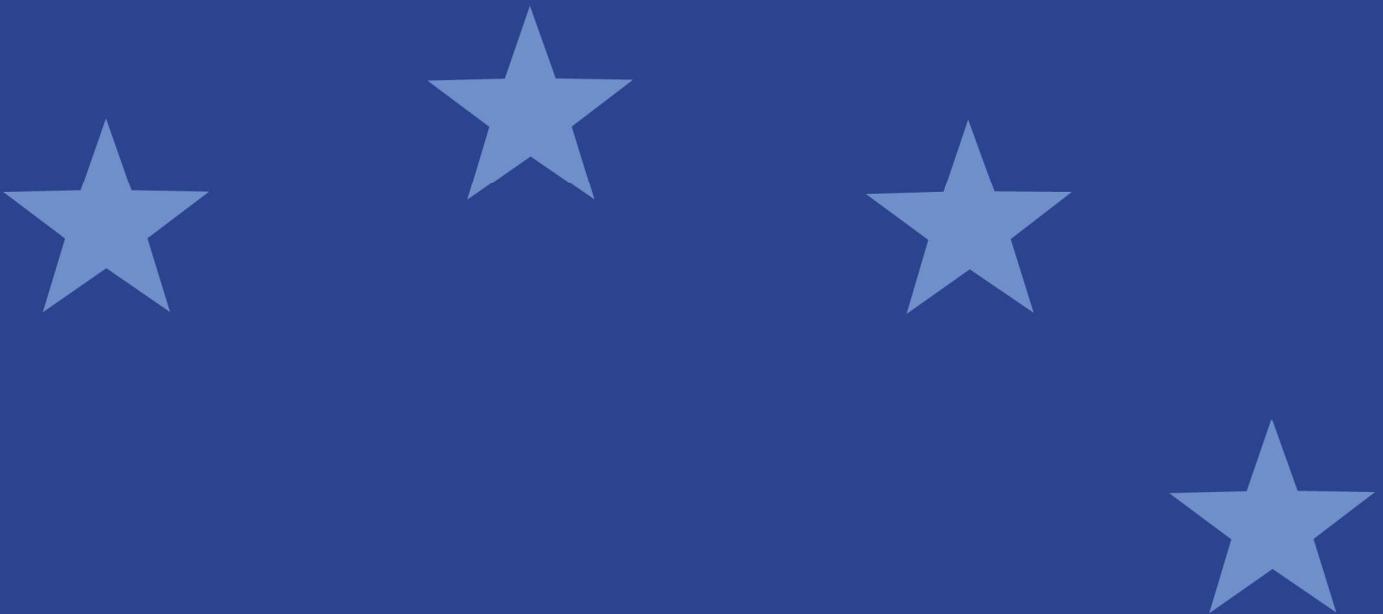




European Securities and  
Markets Authority

## Reply form to the Consultation Paper on the Clearing Obligation under EMIR (no. 1)



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the questions listed in the Consultation Paper on the Clearing Obligation under EMIR (nO. 1), published on ESMA's website.

Comments are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

To help you navigate this document more easily, bookmarks are available in "Navigation Pane" for Word 2010 and in "Document Map" for Word 2007.

ESMA will consider all comments received by **18 August 2014**.

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

## How to use this form to reply

Please note that, in order to facilitate the analysis of the responses, ESMA will be using an IT tool that does not allow processing of responses which do not follow the formatting indications described below.

Therefore, in responding you are kindly invited to proceed as follows:

- use this form to reply and send your response in Word format;
- type your response in the frame "TYPE YOUR TEXT HERE" and do not remove the tags of type <ESMA\_QUESTION\_1> Your response should be framed by the 2 tags corresponding to the question; and
- if you have no response to a question, do not delete the tags and leave the text "TYPE YOUR TEXT HERE" between the tags.

## 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](http://www.esma.europa.eu) under the heading 'Legal Notice'.

## **Who should read this paper**

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from financial and non-financial counterparties of OTC derivatives transactions which will be subject to the clearing obligation, as well as central counterparties (CCPs).



### General information about respondent

Name of the respondent	Intesa Sanpaolo Group
Are you representing an association?	No
Activity	Banking sector
Country/Region	Italy



## Introduction

### Please make your introductory comments below:

<ESMA\_COMMENT\_1>

Intesa Sanpaolo is one of the largest European banking groups, active in Italy, Central and Eastern Europe and the Mediterranean area. As one of the main stakeholders in the EU, we welcome the opportunity to comment, although concisely, on the ESMA discussion paper on “The Clearing Obligation under EMIR” regarding IRS (no.1) (ESMA /2014/799).

<ESMA\_COMMENT\_1>

### 1 The clearing obligation procedure

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

<ESMA\_QUESTION\_1>

We totally agree with the clearing obligation procedure described in section 1

<ESMA\_QUESTION\_1>

### 2 Structure of the interest rate derivatives classes

#### 2.1 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.**

<ESMA\_QUESTION\_2>

We believe the proposed set up, aiming to identify the Interest rate OTC derivatives classes subject to clearing obligation, is sufficient. As far as asset classes subject to clear obligation should present some “standardisation and liquidity” features a further granularity is not needed.

<ESMA\_QUESTION\_2>

#### 2.2 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?**

<ESMA\_QUESTION\_3>

As a general remark, Vehicles used in issues of Italian Covered bonds (Obbligazioni Bancarie Garantite) are classified as non financial counterparties.

On the basis of a preliminary analysis of ESMA working papers, in our opinion, it seems difficult to find derivative contracts associated to covered bond programmes that meet all the conditions set out in paragraph 54 simultaneously. Furthermore, certain parts of paragraph 54 do not seem to be sufficiently clear or applicable to all countries (eg paragraphs b), c) , f) ).

Regarding point 54 (a) “ **they are not terminated in case of default of the covered bond issuer**” In general terms in covered bonds the derivative is designed to survive the insolvency of the covered bonds issuer. Therefore, in case of default of the latter the source of payments switches to the cover pool, on which the derivative counterparty has a preferential claim alongside with the covered bondholders. Therefore, as the purpose of the market participants is to avoid any termination of the derivative because of the issuer default, then the concept of default could be narrowed inserting “insolvency related default”, as proposed by the EBF. Same view has been expressed by the European Covered Bond Council.

Regarding point 54 (b) “**the counterparty to the contracts, which counterparty is not the cover pool or the covered bond issuer, ranks at least pari-passu with the covered bond holders**” it is not clear what “which counterparty is not the cover pool or the covered bond issuer” exactly means. If the meaning is that the covered bond issuer itself cannot act as swap counterparty we disagree and certain covered bond programmes would not be compliant. If it means that in case the swap counterparty is the issuer then it should rank junior to the noteholders then this should be checked in the specific priority of payments of each covered bond programme.

Regarding point 54 (c) “**they are registered in the cover pool of the covered bond programme in accordance with national covered bond legislation**” it is not clear what “registered” means. In Italy there is not such a covered bond legislation with a “registration” of the derivative contracts.

Regarding point 54 (f) “**the covered bond programme to which they are associated is subject to a legal collateralisation requirement of at least 102%**” in Italy there is not a legal requirement in terms of “OC”. The legal requirement is in terms of collateralisation and compliance with the mandatory test to be performed on the programme. We could agree with EBF that the 102% OC should be regarded as a “de facto” over collateralisation but not a specific legal requirement. We are not aware such 102% OC to be a legal requirement in other EU countries. Furthermore, as stressed by the European Covered Bond Council, another option is to consider a contractual OC of 102% as an alternative to a legal mandatory OC.

Furthermore a grandfathering period is strongly suggested before any requirement becomes mandatory.

<ESMA\_QUESTION\_3>

### **2.3 Public Register**

**Question 4: Do you have any comment on the public register described in Section 2.3?**

<ESMA\_QUESTION\_4>

No relevant comment

<ESMA\_QUESTION\_4>

### **3 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.**

<ESMA\_QUESTION\_5>

The identified set of asset classes subject to clearing obligation will reduce substantially the systemic risks, given the high share of OTC products included.

<ESMA\_QUESTION\_5>

## **4 Determination of the dates on which the obligation applies and the categories of counterparties**

### **4.1 Analysis of the criteria relevant for the determination of the dates**

**Question 6: Do you have any comment on the analysis presented in Section 4.1?**

<ESMA\_QUESTION\_6>

We consider that shorter phase-in for Category2 can guarantee efficiency and liquidity to the market and to avoid fragmentation of pricing.

<ESMA\_QUESTION\_6>

### **4.2 Determination of the categories of counterparties (Criteria (d) to (f))**

**Question 7: Do you consider that the classification of counterparties presented in Section 4.2 ensures a smooth implementation of the clearing obligation? Please explain why and possible alternatives.**

<ESMA\_QUESTION\_7>

We would ask ESMA to clarify in which category real estate funds and/or property funds should be classified.

<ESMA\_QUESTION\_7>

### **4.3 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.**

<ESMA\_QUESTION\_8>

We strongly recommend including in Category1 only counterparties which are clearing members for the asset class authorised and not for any of the Class+ covered by the current determination. All market participants should have the same phase-in period in order to avoid that competitors become subject to the clearing obligation at different times. For example, let consider two counterparties: A and B. A is clearing member for CDS and client of a clearing member for IRS, while B is client both for IRS and CDS. If A is classified Category1 for any of the Class+ covered by the current determination, we will assist to a sort of inhomogeneity in the application of the law because it will be applied to the counterparty A a different phase-in period with respect to counterparty B for IRS.

<ESMA\_QUESTION\_8>

## 5 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.**

<ESMA\_QUESTION\_9>

In our opinion the change of collateral regime is a significant change on an OTC contract and can have a substantial impact on pricing. We agree with those who stated that frontloading is merely an option that ESMA may or may not use. In any case, we recommend adopting the Period B. We think the minimum remaining maturity is not sufficient to mitigate the effects determined by frontloading, and maybe a private negotiations between parties involved in the contract should be scheduled .

<ESMA\_QUESTION\_9>

## 6 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 6?**

<ESMA\_QUESTION\_10>

First of all, we totally agree with the conclusion of ESMA that imposing a clearing obligation on those contracts cleared by Nasdaq OMX and LCH. Clearnet Ltd is not necessary at this stage. The analysis of the criteria for the clearing obligation is complete and extensive; we have no additional criteria to suggest.

In addition, a special focus should be given to those kinds of exotics options that, given their high sensitivity to pricing model and illiquid market parameters, may turn out to be very different in term of mark to market between counterparties (i.e. cliquet options, digital)

<ESMA\_QUESTION\_10>

## 7 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 7?**

<ESMA\_QUESTION\_11>

No relevant comment

<ESMA\_QUESTION\_11>

## Annex I - Commission mandate to develop technical standards



## **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.**

<ESMA\_QUESTION\_12>

We believe that a counterparty classified as Category 1 should be subject to clearing obligation only for class where the membership is active, i.e. membership in LCHClearnet should generate obligation for IRS only.

<ESMA\_QUESTION\_12>

## **Annex III - Impact assessment**

**Question 13: Please indicate your comments on the CBA.**

<ESMA\_QUESTION\_13>

In relation to "Conditions on clearing membership" we recommend option 4

<ESMA\_QUESTION\_13>