|  |
| --- |
| 11 July 2014|2014/800 Reply Form |

|  |
| --- |
| Reply form to the Consultation Paper on the Clearing Obligation under EMIR (no. 2) |
|  |

|  |
| --- |
| Date: 11 July 20142014/800 Reply Form |

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 (n0. 2), 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 September 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 respondent | Frédéric BOMPAIRE |
| Are you representing an association? | No |
| Activity | Investment Services |
| Country/Region | France |

# Introduction

**Please make your introductory comments below:**

<ESMA\_COMMENT\_1>

Amundi ranks among the top ten asset managers in the world with assets under management exceeding 820 billion € at the end of June 2014. Without being a major actor in the CDS market, Amundi uses credit derivatives and to illustrate there are currently about 800 positions opened in slightly more than 70 different funds. We have organized for appropriate documentation with major counterparties and use electronic platforms in the operational process.

Amundi considers that the overarching aim to enhance financial stability implies to better organize derivative markets and that obligation to compensate is a way to achieve that goal, provided that supervisors take steps to ensure that authorized CCPs will constantly be in a position to face their responsibilities without impacting end investors.

When answering the present consultation document, Amundi does not copy the remarks done in the previous consultation that concerned IRS. We prefer to focus on differences and only reiterate those points that are of prime importance in both cases. Thus, Amundi insists on the following items:

* before declaring an obligation to centrally clear a contract, ESMA should make sure that at least 2 CCPs offer a possibility to clear that contract and that they both offer real full segregation as required in EMIR level1;
* obligation to compensate should not apply to modifications applied to a previous contract that do not amount to a total novation; in that respect “genuine amendments” should be specifically excluded from the scope of the obligation; transactions entered into with a view to compress an existing contract that is not subject to clearing obligation should also not be obliged to clear with a CCP but kept available for bilateral compression;
* funds that we manage are strictly regulated and we feel that there are two clauses that should be taken by CCPs in their operational rules in order to enable UCITS to contract CDS: the close out provision and the cash settlement provision allowing funds not to receive loans in case of an event of credit; another difficulty for UCITS stems from the fact that they cannot deposit in the hands of a CCP cash or collateral received through Repo or swap of collateral;
* CCP rules should also allow for a variety of eligible collateral and ESMA should assess this point;
* an international common view in the matter of mandatory central clearing of derivatives would certainly be welcomed, but the EU should not align to foreign practices for the mere reason of simplification; we consider that the European context must be analysed locally and urge ESMA not to consider equivalence for CCPs which do not offer perfect safety and total segregation, meaning the possibility for the end client to be known from the CCP that would open an account for him and individualise his holdings even if they are administered by a clearing member.
* the obligation to compensate should be limited to the last five series and not start from series 11; this belief is based on the strong evidence of concentration of activities on these series provided by ESMA.

<ESMA\_COMMENT\_1>

# The clearing obligation procedure

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

<ESMA\_QUESTION\_1>

Amundi shares the view of grouping RTS by asset class and avoid consulting on each class a CCP is authorized to clear.

However, we feel it is difficult to engage in a thorough analysis on CDS before full authorization of ICE Clear Europe, the second CCP ready to clear CDSs. <ESMA\_QUESTION\_1>

# Structure of the credit derivatives classes

Question 2: Do you consider that the proposed structure for the untranched index CDS classes enables counterparties to identify which contracts are subject to the clearing obligation as well as allows international convergence? Please explain.

<ESMA\_QUESTION\_2>

Yes, the proposed classification is built on a bottom-up approach that clearly identifies the contracts that would be submitted to mandatory clearing. As far as untranched index CDS are concerned, the text in §16 starts from the existing 4 contracts and there is no ambiguity for market participants on what they represent. The tenor, the currency and the series do complement the exact designation of relevant untranched index CDS. We share the view that, as a principle, new series should be immediately included in the obligation to compensate, provided that ESMA would be empowered to suspend, temporarily or definitely, this obligation whenever the criteria of standardization, liquidity and availability of prices disappear.

We stressed in our response to the mandatory clearing of IRS that it should be for ESMA to exactly define those contracts that are eligible for clearing at the date of the RTS and will be subject to clearing obligation. We consider that for untranched index CDS, ESMA has fully accomplished this task.

However, Amundi reiterates its point that UCITS encounter difficulties, on three accounts, to comply with the clearing obligation. First, because of the “Close out clause” provision : UCITS must be in a position to close any OTC transaction they entered in at any time. This is not easy to organize with a CCP except if the initial trade has been made with the clearing broker. It looks like UCITS will have to breach either UCITS rules or EMIR rules and we urge ESMA to express a clear position on this point already raised several times. Furthermore, loans are not eligible in the portfolio of a UCITS and the cash settlement provision requires a specific documentation (generally a side letter) to be signed by counterparties. Finally, we mention the difficulty for UCITS to trade clearable derivatives because of ESMA’s guidelines on ETF and other UCITS issues that prevent a UCITS from using as collateral either cash or eligible securities that have been obtained through a Repo or a swap of collateral. Amundi insists on the necessity for ESMA to amend its guidelines and allow UCITS to use the proceeds or securities received as collateral or through Repo as collateral deposited in the hands of a CCP. Especially when the UCITS opts for full segregation.

<ESMA\_QUESTION\_2>

# Determination of the classes of OTC derivatives to be subject to the clearing obligation

Question 3: 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 credit OTC derivatives?

Given the systemic risk associated to single name CDS, would you argue that they should be a priority for the first determination as well? Please include relevant data or information where applicable.

<ESMA\_QUESTION\_3>

Yes, Amundi supports the conclusion that only two classes of CDS should be subject to a clearing obligation under EMIR : iTraxx Europe Main and iTraxx Europe Crossover.

We consider that despite the fact that volumes are small compared to IRS they can present a systemic risk. We agree on the fact that single name CDS, High Yield and Financial indices should not be considered for mandatory clearing; on top of the mentioned difficulties in terms of liquidity, wrong way risk and availability of clearing in different CCPs, we consider that they present a higher level of volatility that makes it difficult to calibrate the appropriate level of margin.

However, Amundi is not satisfied with the idea to start from series 11 to impose mandatory clearing. It seems that this proposal does not rely on any other evidence than the fact that starting from series 11, there are 2 CCPs ready to clear these CDS. Figures as provided by ESMA show that the last 5 series do concentrate most of the volumes. For example in table 6 on iTraxx Europe Main, the series 17 to 21 represent an aggregate total of 2.1 trillion $ when the following 6 series, from 11 to 16, amount to less than 15% of that total with 300 billion $ . For iTraxx Europe Crossover, table 7 gives comparable results with series 11 to 16 representing at 72 billion $ about 17% of the total figure of 440 billion $ for the last 5 series numbered 17 to 21. In view of these data we strongly recommend that mandatory compensation apply to series 17 onwards. The more so, that at the application date there will be 2 or 3 more series.

Furthermore, Amundi feels that a specific attention should be paid to the type of eligible collateral accepted by the CCPs that clear those contracts considered for clearing obligation. It is a sensitive issue and ESMA should investigate that point, with a view to ensure that there will be a large enough choice for market participants to provide collateral. It is important in order to avoid collateral shortage and maintain an active and liquid market.

<ESMA\_QUESTION\_3>

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

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

Question 4: Do you have any comment on the analysis presented in Section 4.1?

<ESMA\_QUESTION\_4>

Yes, Amundi has comments on ESMA’s interpretation of the first three criteria listed in article 5(5) of EMIR.

* In §41 to 46 ESMA takes as a guarantee of complete standardization the fact that most CDS trades are confirmed through electronic platforms. In fact the process for CDS is less automated than for IRS. Counterparties must consult the documentation to check the terms of specifications that vary from one master confirmation or one side letter to the other; for example, the “partial cash settlement” clause is not standardized and is always specified when an asset manager trades for the account of a fund; we conclude that phasing in of the obligation to clear CDS must be long enough;
* In § 48 ESMA commits a lapsus when referring to interest rate OTC instead of CDS derivatives;
* We agree with the proportionate approach taken by ESMA when assessing the market dispersion and considering as adequate the number of clearing firms or groups with reference to the size of the market;
* We support ESMA’s view in §60 that Europe senior financial index having been cleared by only one CCP and for a short period of time should not be considered for mandatory compensation. Furthermore the wrong way risk mentioned for financial single names is not negligible with the index that includes most of the active traders on CDS, members of the CCPs;
* The availability of pricing information on CDS is effective through data providers that charge fees that represent a fair amount for actors that do not trade much. The public pricing model mentioned by ESMA does not provide a real access to pricing information, it simply testifies of the existence of a standard approach for pricing; the question of availability of prices is probably a real concern for smaller participants and the obligation to compensate will enable them to benefit from an informed quotation as used by the CCP; hence, it will improve market fluidity;
* When discussing the number of CCPs, ESMA rejects the idea that there must be some competition between several CCPs before deciding on the obligation to compensate and takes it as an element when fixing the date from which the clearing obligation would apply; we strongly oppose this view that may lead to a monopoly or, even worst, to the necessity to clear through a CCP which might not meet the standards we expect; ESMA should always verify the existence of at least 2 CCPs offering total segregation service and their quality before deciding a clearing obligation.

<ESMA\_QUESTION\_4>

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

Question 5: Do you agree with the proposal to keep the same definition of the categories of counterparties for the credit and the interest rate asset classes? Please explain why and possible alternatives.

<ESMA\_QUESTION\_5>

Amundi reiterates its response to question 7 in the IRS consultation.

*Yes, we agree with the distinction between clearing members already in contact with at least one CCP that clears at least one contract subject to clearing obligation, financial institutions and NFC+. The proposed classification is easy to understand for an asset manager : all our funds will be classified in category 2 as will be most of our mandates with a few exceptions for actors outside the scope of EMIR or NFC clients.*

We add that there is in our view no reason not to keep the same categories and insist on the fact that consistency improves legal certainty and reduces operational risk.

<ESMA\_QUESTION\_5>

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

Question 6: 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\_6>

Amundi agrees with the proposed scale of delays and stresses that the current 12 month period between the first two categories (6 months for CM and 18 months for category 2) is far from excessive knowing that legal teams active on EMIR contracts are totally overworked on both sides of the negotiating counterparties.

<ESMA\_QUESTION\_6>

# Remaining maturity and frontloading

Question 7: Do you consider that the proposed approach on frontloading ensures that the uncertainty related to this requirement is sufficiently mitigated, while allowing a meaningful set of contracts to be captured? Please explain why and possible alternatives compatible with EMIR.

<ESMA\_QUESTION\_7>

If the definition of ‘novation’ is clarified, then Amundi agrees with the approach proposed on front loading. It is of vital importance that till the publication of RTS all contracts are exempt from clearing obligation that would totally alter the economical equilibrium of the initial transaction. We would like to submit two important comments, on novation on one side and remaining maturity on the other.

Article 4 (1) of the proposed RTS includes in the scope of clearing obligation ‘OTC derivative contracts entered into or novatedon or after the date of the RTS publication’. The point of legal certainty and economical equilibrium of OTC derivatives would be totally missed if novation were to be misinterpreted. Novation in that circumstance should not include simple change of parameter such as diminution of the notional amount traded, the modification of a date or the give up of the deal… We would like at least recital 11 to refer to BCBS/IOSCO definition of “genuine amendments” in order to give a clear understanding of what novation means. (See, BCBS /IOSCO final report on Margin requirement for non- centrally cleared OTC derivatives, September 2013, page 24 and specially foot note 20 that reads: *Genuine amendments to existing derivatives contracts do not qualify as a new derivatives contract. Any amendment that is intended to extend an existing derivatives contract for the purpose of avoiding margin requirements will be considered a new derivatives contract*. <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD423.pdf> ). Furthermore trades entered into with a view to compress preexisting trades that were not within the scope of the obligation to compensate should be exempted as well; otherwise the result would be an increase of open positions and risk instead of the intended reduction.

When considering systemic risk, we agree to fix the minimum remaining maturity for transactions that need to be compensated to 6 months . But we advocated for a 2 year remaining maturity for IRS and suggest an amendment to article 4.1 : “...*shall be 2 years for OTC derivative contracts listed in section 1 of Annex 1* *and 6 months for OTC derivative listed in section 2 of Annex 1 that have been entered into or novated by the introduction of substantial amendments on or after…”*

Reading §115 together with article 4, Amundi is concerned that the proposed RTS might be misinterpreted. Some confusion may come from the fact that RTS refers to the *date from which the clearing obligation takes place* (article 3) and the *date of entry into force* as defined in article 5 and not to the *date of application of the clearing obligation for this contract and this counterparty* that is mentioned in § 115. We suggest to rephrase recital 12 could be in its last sentence*: “…as of the date on which the clearing obligation takes place for the given contract and counterparties.”*

Eventually, our recent experience on the backloading of trades to be reported to trade repositories has taught us that operational difficulties are numerous and uneasy to solve; and the front-loading of non-cleared contracts into a cleared environment seems more demanding than trade reporting. Thus, in order to avoid to disturb the functioning of CCPs as it happened with TRs, we recommend that ESMA consider to further reduce the scope of front loading and exempt category 2 counterparties or push the front loading obligation to 18 or 12 months after the date of entry into effect of the RTS . This would also improve the stability of trades since it would limit the need to change status, a difficult exercice, for existing deals.

<ESMA\_QUESTION\_7>

# Annex - Commission mandate to develop technical standards

# Annex - Draft Regulatory Technical Standards on the Clearing Obligation

Question 8: Please indicate your comments on the draft RTS other than those already made in the previous questions.

<ESMA\_QUESTION\_8>

We would like to draw regulators’ attention to the risk of conflicting implementation dates for the VM+IM obligation that concerns non centrally cleared OTC derivatives and the central clearing obligation. In order to avoid unnecessary transfers, frontloading should be avoided for deals initially traded on the VM+IM requirement and only new trades should be mandatorily cleared through CCPs.

<ESMA\_QUESTION\_8>

# Annex - Impact assessment

Question 9: Please indicate your comments on the Impact Assessment.

<ESMA\_QUESTION\_9>

Amundi suggests that ESMA assess the availability and diversity of collateral accepted by the CCPs ready to clear the concerned contracts. The liquidity of the market, which is one of the tree criteria to be examined when deciding for clearing obligation, can be largely impaired by shortage of collateral or excessive concentration of eligible collateral on a very limited number of instruments.

<ESMA\_QUESTION\_9>