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| 19 June 2017 | ESMA70-156-166 |

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| Reply form for the Consultation Paper on the trading obligation for derivatives under MiFIR |
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| Date: 19 June 2017 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on the trading obligation for derivatives under MiFIR, published on the ESMA website.

*Instructions*

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

* use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
* do not remove the tags of type <ESMA\_ QUESTION\_MIFID\_TO\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
* if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

* if they respond to the question stated;
* contain a clear rationale, including on any related costs and benefits; and
* describe any alternatives that ESMA should consider.

**Naming protocol**

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA\_MiFID\_TO\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_MiFID\_TO\_ESMA\_REPLYFORM or

ESMA\_MiFID\_TO\_ESMA\_ANNEX1

***Deadline***

Responses must reach us by **31 July 2017.**

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

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that 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 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 headings ‘Legal notice’ and ‘Data protection’.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | **Building Societies Association (UK)**  |
| Activity | Banking sector |
| Are you representing an association? |[x]
| Country/Region | UK |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_MIFID\_TO\_0>

This note sets out the Building Societies Association’s brief response to one specific issue (Q13) dealt with in ESMA’s CP (section 8) that is particularly relevant to our own members. We leave to other stakeholders to comment on other matters in the CP. As a trade association, we are unable to contribute on questions, including on compliance costs, that are targeted at individual firm or trading venue level : our members will have divergent experiences which cannot simply be captured at aggregate level.

1. **The BSA and building societies**

The Building Societies Association (BSA) represents all 44 UK building societies. Building societies have total assets of over £367 billion and, together with their subsidiaries, hold residential mortgages of over £289 billion, 22% of the total outstanding in the UK. They hold over £263 billion of retail deposits, accounting for 18% of all such deposits in the UK. They employ approximately 40,000 full and part-time staff and operate through approximately 1,550 branches.

Building societies are modest end-users of derivatives, for protection purposes only, as currently required by law. They do not, therefore, undertake swap trading or run any kind of derivatives business. In that respect, they are closer to most smaller non-financial counterparties than to the financial counterparties who are active players in derivative markets. By virtue of their modest profile of activity, the great majority of our members fall within EMIR Category 3.

The BSA belongs to, and works with, the European Association of Co-operative Banks. One important difference between UK building societies and many co-operative banks elsewhere in the EU is that building societies also compete with each other, and are not organised into networks with an apex bank that deals with wholesale markets. Consequently, building societies cannot avail of any of the intra-group exemptions provided in EMIR or MiFIR.

<ESMA\_COMMENT\_MIFID\_TO\_0>

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

<ESMA\_QUESTION\_MIFID\_TO\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_1>

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

<ESMA\_QUESTION\_MIFID\_TO\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_2>

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

<ESMA\_QUESTION\_MIFID\_TO\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_3>

1. Do you agree with this proposal? Would you add other parameters e.g. day count convention of the floating leg, notional type (constant vs. variable), fixed rate type (MAC vs. MAC)? If yes, please explain why and provide the parameters.

<ESMA\_QUESTION\_MIFID\_TO\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_4>

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

<ESMA\_QUESTION\_MIFID\_TO\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_5>

1. Would you also consider any of these possible sub-classes as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?

<ESMA\_QUESTION\_MIFID\_TO\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_6>

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

<ESMA\_QUESTION\_MIFID\_TO\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_7>

1. Would you also consider any of these possible sub-classes as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?

<ESMA\_QUESTION\_MIFID\_TO\_8>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_8>

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

<ESMA\_QUESTION\_MIFID\_TO\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_9>

1. Would you also consider the possible sub-classes here below as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?

<ESMA\_QUESTION\_MIFID\_TO\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_10>

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

<ESMA\_QUESTION\_MIFID\_TO\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_11>

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

<ESMA\_QUESTION\_MIFID\_TO\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_12>

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

<ESMA\_QUESTION\_MIFID\_TO\_13>

1. **Section 8 : Phasing-in the TO**

In Table 2 (page 47 of the CP) ESMA proposed an application schedule for the trading obligation (TO) to take effect in relation to the counterparty categories established under EMIR for the purposes of the clearing obligation (CO). As the great majority of building societies fall into EMIR category 3, the CO for IRD and CDS will only apply to them from 21 June 2019. We agree in principle with ESMA’s alignment of the application date for the TO for Category 3 firms with the corresponding date for the application for the CO. But there is one further point arising from the Commission’s subsequent review of EMIR.

1. **Interaction with EMIR Review changes**

The specification of the trading obligation in MiFIR was closely related to, and aligned with, the earlier specification of the clearing obligation in EMIR. MiFIR Article 28(1) applies the trading obligation to all financial counterparties (FCs) but only to **large** non-financial counterparties (NFCs) – where the level of activity exceeds the threshold defined in EMIR Article 10.1(b). So, the scope of the MiFIR trading obligation mirrors (as regards counterparty categories) the scope of the EMIR clearing obligation as originally enacted.

The European Commission’s 2015 EMIR Review led to the recognition that the application of the clearing obligation to very small FCs was proving unnecessarily burdensome, and accordingly in its legislative proposal text[[1]](#footnote-2) of 4 May 2017 the Commission specifically proposes to exempt small FCs below an activity threshold of € 3 billion gross notional outstanding derivatives (i.e. the lower end of Category 3) from the CO. This proposal brings the EU more in line with other leading jurisdictions which had exempted their small FCs from the CO in the first place, and reflects a wide consensus among EU stakeholders, including as to the difficulties that very small FCs within the EU face in obtaining access to clearing.

Similar considerations may well apply to the TO. The benefit (in terms of increased transparency) from requiring very small FCs to transact derivatives only on organised venues or platforms will be marginal, as their level of activity is relatively low[[2]](#footnote-3) (and comparable with that of small NFCs which are to be exempt from the TO). But the cost of the upheaval to existing patterns of bilateral transacting, and plugging into the infrastructure of organised venues, may be significant to the individual small FCs. In short, we doubt that this requirement adds any net value. The dominance of organised trading venues as the only way for large players to trade derivatives may over time change market practice so that bilateral transacting is effectively discontinued, but we question whether for small FCs any compulsion is really necessary.

Given the very close alignment of scope (as to both counterparties and instruments) between the EMIR CO and the MiFIR TO, the logical outcome of the Commission’s proposal would be that very small FCs should also be carved out of the TO (on exactly the same basis as they are to be carved out of the CO, and on which small NFCs are already carved out of the TO). But we see at present no mechanism to achieve this – as the further step, to amend MiFIR Article 28(1) – was not included, whether by oversight or otherwise – in the Commission’s proposal text.

1. **Suggested next steps**

The BSA argued cogently and consistently for the exemption of small or very small FCs from the scope of EMIR – see in particular our detailed response[[3]](#footnote-4) to the 2015 EMIR Review. We warmly welcome the Commission’s EMIR Review proposal of 4 May 2017. And we argue that to fully carry through the logic already recognised within that proposal, the exemption for very small FCs should be carried across to the TO as well.

We therefore urge ESMA to consult with the Commission and the co-legislators with a view to including a suitable amendment to MiFIR Article 28(1) along with any other amendments to the proposal text that may be made during co-decision.

<ESMA\_QUESTION\_MIFID\_TO\_13>

**CBA QUESTIONS**

1. This first question aims at identifying the category of firm/entity you belong to. Please provide the total notional amount traded in derivatives (trading venues + OTC) in 2016 in thousands euros and the related total number of trades in the relevant boxes

<ESMA\_QUESTION\_MIFID\_TO\_14>

|  |  |  |  |
| --- | --- | --- | --- |
| **Category**  | **Number of employees**  | **Total Notional traded 2016 (in thousands euros)**  | **Total number of trades 2016** |
| **EMIR Category 1** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **EMIR Category 2** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **EMIR Category 3** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
|  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **EMIR Category 4** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Trading Venue** | **[1-50]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[51-250]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **[251-1000]** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **>1000** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_14>

1. Based on the draft RTS, which percentage of your derivative trading (notional amount and number of trades) do you expect to be captured by the TO? Please provide the data for derivatives globally, and then for interest rate derivatives and for credit default swaps, using 2016 trading data?

<ESMA\_QUESTION\_MIFID\_TO\_15>

|  |  |
| --- | --- |
| **% of trading captured by the TO**  | **Year 2016** |
| % of total notional amount traded in derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total number of transaction in derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total notional amount traded in interest rate derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total number of transactions in interest rate derivatives captured by the TO | TYPE YOUR TEXT HERE |
| % of total notional amount traded in credit default swaps captured by the TO | TYPE YOUR TEXT HERE |
| % of total number of transactions in credit default swaps captured by the TO | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_15>

CBA Questions 16 and 17 are to be answered by investment firms and significant non-financial counterparties

1. Out of the trading activity expected to be captured by the TO, as identified under Q2, which % is already traded on an EU regulated market, an EU Multilateral Trading Facility (MTF), a US Swap Execution Facility (SEF) or another third-country trading venue?

<ESMA\_QUESTION\_MIFID\_TO\_16>

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Trading activity expected to be captured by the TO**  | **Traded on a regulated market**  | **Traded on an EU MTF**  | **Traded on a US SEF** | **Traded on another 3rd country venue** |
| **% of total trading volume captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue**  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **% of total number of transactions captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue** | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_16>

1. Compliance with the TO may require some further trading arrangements. Which of the following statement would you consider relevant regarding the steps you might be taking to that end?Please add any comment as appropriate.

<ESMA\_QUESTION\_MIFID\_TO\_17>

|  |  |  |  |
| --- | --- | --- | --- |
| Arrangements contemplated to comply with the TO  | Yes  | No | Comments |
| 1. Current membership/Direct Electronic Access (DEA) arrangements are sufficient to comply with the TO  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 2. I intend to become a member/ participant/client of one (or multiple) EU trading venues for the first time | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 3. I intend to become a member/participant/client of additional EU trading venues  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 4. I intend to seek access to EU trading venues through Direct Electronic Access (DEA)  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 5. I intend to combine membership (2.or 3) with DEA (4.) | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| 6. I am considering other arrangements; Please explain those arrangements in the Comments section  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_17>

**CBA Question 18 is to be answered by trading venues**

1. Question 5: Which of the derivatives subject to the TO, based on the draft RTS, are currently available for trading on your trading venue? Do you consider extending trading on your venue to other derivatives subject to the TO?

<ESMA\_QUESTION\_MIFID\_TO\_18>

|  |  |
| --- | --- |
| **Derivatives potentially subject to the TO currently available for trading on your venue** | **Derivatives potentially subject to the TO that may become available for trading on your venue** |
| TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_18>

**CBA Questions 19 to 22 are to be answered by all respondents**

1. Based on the draft RTS, which impacts do you expect from the TO in the short and medium term? Please elaborate as appropriate under Positive or Negative impact.

<ESMA\_QUESTION\_MIFID\_TO\_19>

|  |  |  |
| --- | --- | --- |
| TO Impact  | Positive Impact  | Negative impact  |
| Impact on your business model/ organisation/ client relationship  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Impact on your revenues | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Impact on market structure (e.g. principal vs. agency trading etc). | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Impact on market liquidity and execution costs. | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Other impacts. Please elaborate  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_19>

1. Is there any specific provision in the draft RTS that you would expect to be a source of significant cost? If so, please elaborate.

<ESMA\_QUESTION\_MIFID\_TO\_20>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_20>

1. Please provide an indication, even a rough one, of compliance costs (in thousands of euros).

<ESMA\_QUESTION\_MIFID\_TO\_21>

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Draft RTS on the TO  | a. IT costs  | b. Training costs | c. Staff costs | d. Other costs (please identify) | Total costs ( if a., b, c or d. are not available separately  |
| One-off costs  | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| Recurring costs (on an annual basis} | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_21>

1. Taking into account the size of your firm, would you qualify overall compliance costs with the draft RTS as low, medium or high?

<ESMA\_QUESTION\_MIFID\_TO\_22>

|  |
| --- |
| Please enter here “Low”, “Medium” or “High”TYPE YOUR TEXT HERE |

<ESMA\_QUESTION\_MIFID\_TO\_22>

1. https://ec.europa.eu/info/law/derivatives-emir-regulation-eu-no-648-2012/upcoming\_en [↑](#footnote-ref-2)
2. Small building societies might only transact 3 to 5 swaps a year. [↑](#footnote-ref-3)
3. https://www.bsa.org.uk/BSA/files/39/390d78f0-8057-4747-9ffa-b0eef08e4b11.pdf [↑](#footnote-ref-4)