



European Securities and
Markets Authority

Reply form for the Consultation Paper On the Clearing Obligation under EMIR (no. 3)



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Clearing Obligation under EMIR (no. 3), published on the ESMA website.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that 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.

Responses must reach us by **6 November 2014**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.

Instructions

Please note that, in order to facilitate the analysis of the responses, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type < ESMA_CA3_QUESTION_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. 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.

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 under the heading ‘Disclaimer’.



General information about respondent

| | |
|--------------------------------------|--|
| Are you representing an association? | Jérôme Le Page, representing the European Federation of Energy Traders |
| Activity: | Energy trading |
| Country/Region | Europe |



Introduction

Please make your introductory comments below:

<ESMA_CO3_COMMENT_1>
TYPE YOUR TEXT HERE
<ESMA_CO3_COMMENT_1>

1. The clearing obligation procedure

Q1: Do you have any comment on the clearing obligation procedure described in Section 1?

<ESMA_CO3_QUESTION_1>
TYPE YOUR TEXT HERE
<ESMA_CO3_QUESTION_1>

2. Structure of the non-deliverable forward derivatives classes

Q2: Do you consider that the proposed structure for the FX NDF classes enables counterparties to identify which contracts are subject to the clearing obligation?

<ESMA_CO3_QUESTION_2>

TYPE YOUR TEXT HERE

<ESMA_CO3_QUESTION_2>

3. Determination of the classes of OTC derivatives to be subject to the clearing obligation

Q3: In view of the criteria set in Article 5(4) of EMIR, do you consider that the determination of this class addresses appropriately the objective of reduction of the systemic risk associated to NDF derivatives?

<ESMA_CO3_QUESTION_3>

TYPE YOUR TEXT HERE

<ESMA_CO3_QUESTION_3>

Q4: For the currency pairs proposed for the clearing obligation on the NDF class, do you consider there are risks to include longer maturities, up to the 2 year tenor?

<ESMA_CO3_QUESTION_4>

TYPE YOUR TEXT HERE

<ESMA_CO3_QUESTION_4>

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

Q5: Do you have any comment on the analysis presented in Section Error! Reference source not found.?

<ESMA_CO3_QUESTION_5>
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<ESMA_CO3_QUESTION_5>

Q6: Do you agree with the proposal to keep the same definition of the categories of counterparties for the NDF classes than for the credit and the interest rate classes? Please explain why and possible alternatives.

<ESMA_CO3_QUESTION_6>

Similar to the initial draft RTS on the clearing obligation for IRS and CDS, the carve-out introduced by ESMA in Category 4 (ex-Category 3) according to which NFC+ that are Clearing Members of a CCP fall into category 1 (Clearing Members) and hence benefit from a phase-in period limited to six months appears to contradict the 7 February 2013 agreement between Internal Market Commissioner Barnier and the European Parliament. This agreement does not make a distinction whether NFC+ are Clearing Members or not. NFC+ which are Clearing Members of a specific CCP may only clear one determined derivative or one determined type of derivatives within one asset class, while trading other derivatives in the same asset class OTC. It can't be inferred from these circumstances that this NFC+ is already experienced with clearing and should therefore irreversibly fall into Category 1 and widely clear all its eligible OTC derivatives: this experience is limited to the particular derivative and the specific CCP and can't justify this NFC+ to be assimilated to a sophisticated clearing member. We therefore believe that the longer phase-in period remains valid at large, even for those NFCs which are a Clearing Member of a specific CCP.

See question 7 for more detail.

Further, with regard to the suggested Category 2, the threshold calculation method does not seem appropriate. As it is currently formulated, it seems to be a measure tailored to the financial sector, with disproportionate consequences for the industry. Indeed, requiring financial firms which are part of an industrial group to take into account derivative transactions entered into by other entities of the same group which are NFC- would eventually be another constrain on risk management activities undertaken by such NFC- (by almost forcing them to clear). It would also put an unnecessary pressure on relevant non-bank actors to review heavy and complex internal processes within a short timeframe. For these reasons, we suggest to refine the scope of the threshold calculation methodology by either specifying that only the activities of financial firms that are part of the same group (thus excluding NFCs from the calculation), or alternatively only "risk increasing" transactions of NFC- part of the group, should be taken into account,.

<ESMA_CO3_QUESTION_6>

Q7: Do you consider that the proposed dates of application ensure a smooth implementation of the clearing obligation? Please explain why and possible alternatives.

<ESMA_CO3_QUESTION_7>

EFET welcomes ESMA's pragmatic approach as regards the dates of application of the clearing obligation to the four categories of counterparties determined by ESMA and eligible to clear their FX NDF OTC derivatives in accordance with Art. 3 of EMIR. EFET notably welcomes the 33-

month phase-in period granted to NFC+, in accordance with the agreement between Internal Market Commissioner Barnier and the European Parliament on 7 February 2013.

Provided that the reduction of the phase in period remains negligible and does not exceed three months, EFET agrees, as an exception, to the shortening of the original three-year phase-in period for NFC+ as mentioned in Section 121 of the Consultation Paper for the specific case of NDFs. However, we do not support a general shortening of the phase in periods for all “subsequent RTS” as suggested by ESMA, especially considering that the RTS for OTC commodity and equity derivatives will be published at a later stage, shortening even more the phase-in period for NFC+ primarily needing to clear these types of OTC derivatives. ESMA seems to consider that while establishing clearing arrangements for IRS and CDS, NFC+ can simultaneously establish clearing arrangements for NDFs and that there should thus be no timing issue. EFET does not dispute this fact but wishes to underline that the focus should not be on the mere negotiation of the clearing arrangements but on the necessary internal set up for clearing (IT processes and systems need to be upgraded or changed, internal workflows and controls need to be modified, additional workforce might be needed) and especially the financial costs of clearing which NFC+ will have to bear (including the costs of collateral). These considerations should justify a full phase-in period of three years being generally granted to NFC+ falling into Category 4.

However, the new version of the proposed classification of counterparties does not solve the issue highlighted in our previous responses on the clearing obligation for IRS and CDS. Indeed, the carve-out introduced by ESMA in Category 4 (NFC+) according to which NFC+ that are Clearing Members of a CCP fall into Category 1 (Clearing Members) and hence benefit from a phase-in period limited to six months appears to contradict the above-mentioned agreement between Commissioner Barnier and the European Parliament. The agreement does not make a distinction whether NFC+ are Clearing Members or not. NFC which are a Clearing Member of a specific CCP may only have a limited experience with that specific CCP, but not necessarily with all other relevant CCPs. Hence, the argument of the limited experience of NFCs with CCPs justifying a longer phase-in period remains valid at large, even for those NFCs which are a Clearing Member of a specific CCP.

As an example many energy market participant firms are clearing members of the Nasdaq OMX (NOMX) clearing house for power derivatives. The NOMX market is essential for participation in certain power markets, in many cases there are no alternatives. Non-clearing membership of NOMX is not available. Accordingly, many energy market participant non-financial counterparties are clearing members of NOMX for what is in many cases a very limited segment of their overall business, i.e. power derivatives, yet they do not have any clearing arrangements in place for the remaining vast majority of their business. Existing clearing membership of NOMX provides no practical preparation for clearing other commodities which participants may also be trading and which form the overwhelming majority of their remaining business and for which they very much need to take advantage of the “Phase-In” offered by Commissioner Barnier.

We do not believe that the argument that a very limited number or no NFC would in the end fall into Category 1 given the notifications received by ESMA under Art. 10(1)(b) of EMIR and the information received from CCPs on their Clearing Members is a valid basis for a rule of law. We welcome ESMA’s recognition of the specific case of energy derivatives in the explanatory document for the final RTS on the clearing obligation for IRS (paragraphs 111 and 112), and its commitment to further analyse the specific case of NFC+ that are commodity clearing members by necessity in the context of a consultation paper on the clearing obligation for the commodity

asset class. This would however necessarily mean that the classification for clearing members should be done per asset class. We observe that ESMA has left this door open, as expressed in paragraph 91 of the explanatory document for the final RTS on the clearing obligation for IRS. While we appreciate the openness of ESMA on this question, we remain of the view that a full exclusion of NFC+ from Category 1 should be enacted, in line with the agreement between Commissaire Barnier and the European Parliament.

Therefore, we recommend the amendment of paragraph 105 of the consultation document (deletion of the reference to "Category 1" in the fourth bullet point) and of Article 2 of the draft Regulatory Technical Standards (deletion of the reference to "Category 1" in Article 2(1)(d)).

<ESMA_CO3_QUESTION_7>

5. Remaining maturity and frontloading

Q8: Do you have comments on the minimum remaining maturities for NDF?

<ESMA_CO3_QUESTION_8>

EFET welcomes and supports ESMA's conclusion set out in points 124 to 126 of the Consultation Paper regarding the frontloading requirement in relation to non-financial counterparties. EFET agrees that following Article 10(1)(b) of EMIR the clearing obligation is only applicable to NFC+ for contracts entered into or novated on or after the date on which such counterparty became subject to the clearing obligation. Frontloading is therefore not applicable to contracts to which at least one of the counterparties is an NFC+. We note that the carve-out initially included in Article 3(4) of the draft RTS on the clearing obligation for IRS and CDS has been removed in the final RTS on the clearing obligation for IRS and in the present draft RTS on the clearing obligation for NDF. Instead, the recitals have been amended. We agree with this approach and the clear formulation of recital 23 of the draft RTS on the clearing obligation for NRF.

EFET further agrees with the views taken by ESMA regarding the definition and determination of the "minimum remaining maturity" (including the subdivision into Period A and Period B) for the frontloaded contracts, which are aligned with the principles expressed by the EU Commission in its letter to ESMA dated 8 July 2014 (response to ESMA's letter of 8 May 2014).

<ESMA_CO3_QUESTION_8>

Annex I - Draft Regulatory Technical Standards on the Clearing Obligation

Q9: Please indicate your comments on the draft RTS other than those already made in the previous questions.

<ESMA_CO3_QUESTION_9>
TYPE YOUR TEXT HERE
<ESMA_CO3_QUESTION_9>

Annex II – Impact assessment

Q10: Please indicate your comments on the Impact Assessment.

<ESMA_CO3_QUESTION_10>
TYPE YOUR TEXT HERE
<ESMA_CO3_QUESTION_10>