

ESMA Consultation Paper on Clearing Obligation under EMIR (no.1, ESMA/2014/799)

BVI¹ gladly takes the opportunity to present its views on the consultation on the clearing obligation under EMIR (no. 1).

We would like to make the following comments:

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

We agree with ESMA's proposal to group, to the extent possible, the analysis of the notified classes of OTC derivatives in a minimal set of consultation papers.

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

We agree with the proposed structure for the interest rate OTC derivative classes enabling counterparties (UCITS/AIFs) to identify the classes which are subject to the clearing obligation. We support ESMA's approach to use the prevailing market structure for interest rate OTC derivative classes applied by CCPs. The current market structure for interest rate swaps is also used by the confirmation platforms. The usage of the current market structure will guarantee that the introduction of a new contract within a class will be considered by all relevant market participants (UCITS/AIFs) in the same way, avoiding any misinterpretation and mishandling of those contracts.

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.

We have no comments.

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

BVI supports the proposal to establish a register on ESMA's website. The register will enable all market participants (e.g. investment fund management companies) to access all relevant data belonging to a class of OTC derivative contract which is subject to a clearing obligation in time. The research costs incurred by the market participants are reduced as they do not have to conduct own research for each authorized or registered CCP. We expect that CCPs and the counterparties are identified with the LEI (for details see www.lei.org).

¹ BVI represents the interests of the German investment fund and asset management industry. Its 82 members handle assets of more than EUR 2.2 trillion in both investment funds and mandates. BVI enforces improvements for fund-investors and promotes equal treatment for all investors in the financial markets. BVI's investor education programmes support students and citizens to improve their financial knowledge. BVI's members directly and indirectly manage the capital of 50 million private clients in 21 million households. (BVI's ID number in the EU register of interest representatives is 96816064173-47). For more information, please visit www.bvi.de.



In order to provide all market participants on time with the relevant information about the introduction/removal of a class or a contract within the class we recommend that ESMA could integrate in their operational set up of the public register the possibility to inform the market with so called “push notification” (e.g. via RSS-Feed).

We share ESMA’s views that either the removal of a class and the addition of a class to the public register need further clarification and should therefore be taken into consideration during the 2015 review of EMIR. In this context we would like to highlight the following points:

- **Addition of a class or contract within a class to the public register**

We agree with the statements made in paragraphs 61 (a) and (b) and 64 of the consultation paper. The introduction of a clearing obligation for a new contract within a class should be implemented with a phase-in approach which gives the market participants sufficient time to adapt to new legal and operational arrangements. In cases where the investment fund management companies have to establish new links with the clearing broker and the CCPs, the phase-in approach should be longer to take into account the establishment of these new clearing arrangements. In this context, ESMA should take into consideration that both the CCPs and the number of clearing members offering client clearing to the buy side is sufficient. The CCPs and the clearing members have to offer segregation models for assets and positions (“omnibus client segregation” and “individual client segregation”) which are in line with the segregation requirements applicable to contractual investment funds (Article (1) para (3) of Directive 2009/65/EC) and which meets the practical demands of the investment fund management companies. Otherwise, investment fund management companies are unable to set up the new clearing arrangements in time.

Therefore, we support ESMA’s proposal for the addition of a new class or contract within a class to conduct a new or modified consultation for regulatory technical standard (RTS). Only this approach will ensure legal certainty for all involved market participants.

- **Removal of a class from the public register**

ESMA should be able to remove quickly a clearing obligation due to unexpected market events especially in cases where the CCPs may impose extremely high margin requirements. In this context we would like to take the opportunity to reiterate that UCITS may have substantial difficulties to provide cash collateral in cases of centrally and bilaterally cleared OTC derivative transactions under EMIR. The ESMA Guidelines on ETFs and other UCITS issues (ESMA/2012/832EN)) restrict the re-use of cash obtained from UCITS repo transactions for such purpose.

We fear that paragraph 42 of ESMA’s Guidelines on ETFs and other UCITS issues hampers UCITS accessing CCP clearing. The mentioned guideline prohibits posting cash received in a repo transaction as collateral to a CCP respectively the clearing member. Since funds are restricted to borrows at 10% of the net asset value (NAV), it is obvious that UCITS will be hampered to use OTC derivatives subject to a clearing obligation. ESMA also needs to amend the Guidelines in order to allow the German investment fund industry to continue to participate in the derivative markets by allowing sufficient cash from repo transaction to fulfill the collateral requirement under the EMIR regime.



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.

Yes, we agree with the assessment.

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

We agree in general with the analyses. According to our observation, the client clearing offerings provided both on the level of the CCPs and of the clearing members are in principal sufficiently broad to support the introduction of the clearing obligation of the OTC interest rate classes as foreseen for regulated investment funds (UCITS/AIF) in the consultation paper. Furthermore, CCPs and clearing members offering client clearing arrangements should be capable to establish and to set up the new clearing links to the investment fund management companies in time. The buy side has to rely on the willingness and the capability of the clearing members and the CCPs to set up the clearing arrangements in time, particularly in the case where only one CCP or a small number of clearing members offering client clearing models.

Please see also our answer to questions 8.

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.

We agree with the assessment.

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.

We strongly agree with ESMA's proposal that the date of the application for Category 2 (e.g. UCITS/AIF) should be set at eighteen months from the entry into force of the RTS on the clearing obligation. As stated in our answer to question 4, regulated investment funds need sufficient time to set up new legal and operational arrangements with the clearing members and the CCPs. For example, the assessment and the implementation of the segregation requirements for regulated investment funds takes additional time for the investment fund management companies as they have to analyze the complex and different clearing framework agreements by the CCPs knowing if the agreements comply with the European investment fund law. The terms "individual client segregation" and "omnibus client segregation" are not clearly defined which leads to the consequence that each CCP develop, interpret and offer its own segregation model to the financial industry.

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 agree with ESMA's proposal that only contracts entered into during Period B should be subject to frontloading under some conditions. However, ESMA should develop a balanced approach considering an efficient phase-in phase for Category 2 (UCITS/AAIF) and a practical implementation time for the



frontloading requirement. Furthermore, we expect that contracts concluded and terminated between on or after the publication in the Official Journal of the RTS and the date on which the clearing obligation takes effect (the date of application) do not need to be frontloaded in a CCP due to that fact they do not create any counterparty or systemic risk.

Question 10: Do you have any comment on the analysis on the Equity OTC derivative classes presented in Section 6?

Question 11: Do you have any comment on the analysis on the OTC Interest rate future and options derivative classes presented in Section 7?

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

Question 13: Please indicate your comments on the Impact Assessment.

We have no comments.