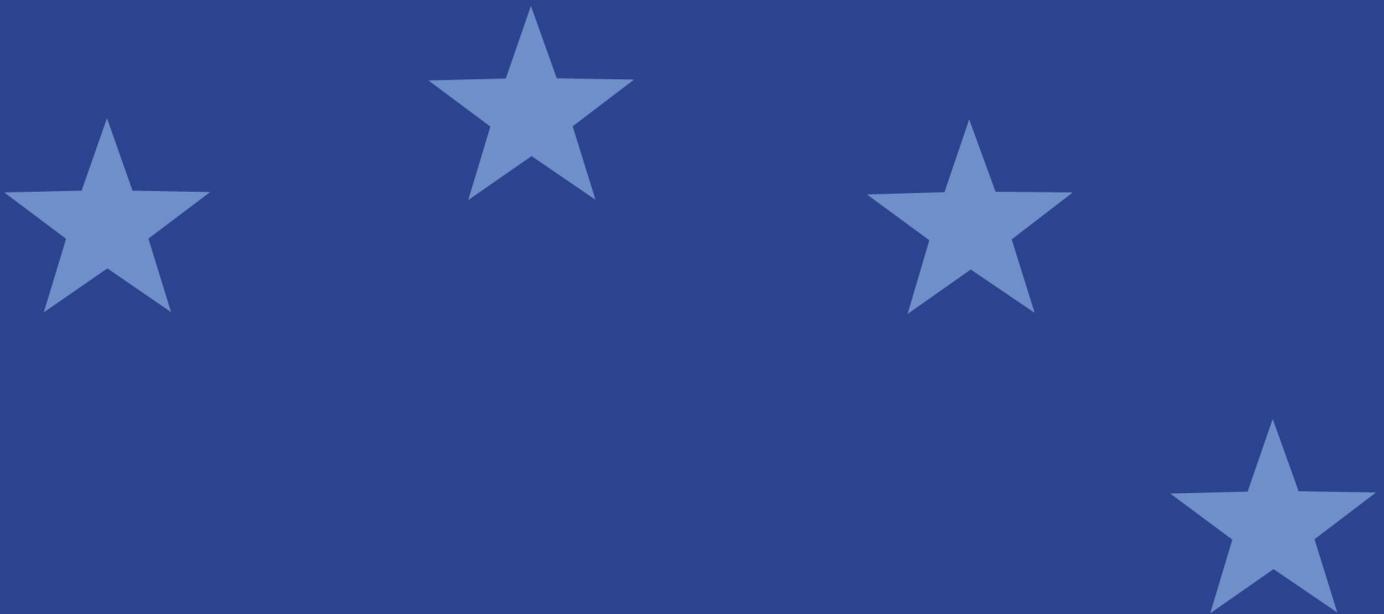




European Securities and  
Markets Authority

## **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	Jérôme Le Page
Are you representing an association?	European Federation of Energy Traders
Activity	Energy trading
Country/Region	Europe



## Introduction

**Please make your introductory comments below:**

<ESMA\_COMMENT\_1>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<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>  
EFET welcomes ESMA's pragmatic approach as regards the dates of application of the clearing obligation to the three categories of counterparties determined by ESMA and eligible to clear their Interest Rate derivatives in accordance with Art. 3 of EMIR. EFET notably welcomes the three-year phase-in period granted to NFC+, in accordance with the agreement between Internal Market Commissioner Barnier and the European Parliament on 7 February 2013.



However, the carve-out introduced by ESMA in Category 3 (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. Therefore, we recommend the deletion of paragraphs 197 to 200 of the consultation document. Article 2 of the draft Regulatory Technical Standards should be modified accordingly (deletion of the reference to “Category 1” in Article 2(1)(c)).

<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>

EFET welcomes and supports ESMA's conclusion set out in points 239 to 242 of the Consultation Paper regarding the frontloading requirement in relation to non-financial counterparties. EFET agrees that following Art. 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+.

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).

However in an effort of clarification and to avoid any misunderstandings, EFET would propose to redraft Art. 4(3) of the draft RTS as follows:

*"Article 4(1)(b)(ii) of Regulation (EU) 648/2012 shall not apply to those OTC derivative contracts listed in Annex 1 where at least one of the counterparties is a non-financial counterparty meeting the conditions referred to in Article 10(1)(b) of Regulation (EU) 648/2012."*

<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>

TYPE YOUR TEXT HERE

<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>



TYPE YOUR TEXT HERE  
<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>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_12>

### **Annex III - Impact assessment**

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

<ESMA\_QUESTION\_13>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_13>