



**Response to the Discussion Paper on the Clearing Obligation under EMIR
Amsterdam, 12 September 2013**

A. Respondent

Name: DACSI (trade association ¹)

Country: Netherlands

Category:

Category	Please select
Audit/Legal/Individual	
Banking sector	x
Central Counterparty	
Commodity trading	
Government, Regulatory and Enforcement	
Insurance and Pension	
Investment Services	
Non-financial counterparty subject to EMIR	
Regulated markets/Exchanges/Trading Systems	
Other Financial service providers	

B. Introduction – General comments

DACSI recommends a direct link with MiFIR/D II, where in the case that derivatives are mandatorily listed/executed on a Regulated Market, MTF or OTF under MiFID II, these derivatives are also obliged to be cleared under the EMIR obligation.

In practice it could be the case that the same derivatives class should be cleared under the DFA obligation and the EMIR obligation. In practice it is also possible that under the DFA and EMIR obligation different CCP's be authorized by the NCA to clear this derivatives class. It should be made very clear by ESMA for European counterparties which Regulation should be followed in this circumstances.

Liquidity is a very important issue to detect a derivatives class for the clearing obligation. In the case that the clearing obligation for a certain class would be terminated for reasons of low liquidity, it is of utmost importance that care is taken of the open interest in the relevant derivatives class. The risk issue still exists, and for the valuation it will be preferable to continue the clearing obligation; if it is not continued, the remaining transactions

¹ See also www.dacsi.nl

would be handled as OTC derivatives. With regard to posterior exclusion we advise ESMA only to terminate a derivatives class if there is no open interest on CCP level.

For all derivatives classes and underlying series we call ESMA to include in the characteristics an additional mandatory field if the class or underlying series are listed on an exchange (Regulated Market, MTF or OTF (SEF)) All derivatives classes and underlying series which are currently cleared by a CCP (and with an open interest) should be in general the best candidates for the clearing obligation.

C. Comments on the discussion paper and answers to questions

Comments on paragraphs 1 to 6:

With regard to paragraph 2: what is the actual (indicative) timeline for NCA's authorisation of CCPs?

1. Procedure for the determination of the classes to be subject to the clearing obligation

Comments on paragraphs 7 to 17:

The authorisation period for the Clearing Obligation is too long. In particular, if a class of OTC derivatives is mandatorily executed on a Regulated Market, MTF or OTF under MiFID/R II, this class is also mandatorily cleared by a CCP (as of the first executing day on an Exchange). The authorisation period should never impede the introduction of trading.

2. CCP-cleared classes of OTC derivatives

Comments on paragraphs 18 to 30:

Table 1 gives an overview of the asset classes cleared in Europe. The table includes two recognised CCPs outside the Union (USA). It is possible that the same classes of (OTC) derivatives have a clearing obligation under Dodd Frank Act (USA) and EMIR (Europe). In this case is there a choice for a European Counterparty to clear its trades/transactions with an authorised USA CCP or with an authorised European CCP?

2.1 Credit derivatives

Question 1 (Series for Index CDS):

Please indicate your preference between the options presented. Do you believe that the possibility for a new series to exhibit low liquidity is a risk worth being considered when defining the classes of Index CDS? Under Option C, which criteria do you believe are relevant and how should they be calibrated?

Answer 1:

We support option A because of its operational flexibility.

Yes, potentially low liquidity is an issue for the clearing obligation, but for risk reasons it should always be included. In cases of low liquidity in new series there is always a valuation problem, no matter whether it is cleared or not. In these circumstances the risk issue should be the driver to include the new series in the class, with a central role for the CCP. No clearing means a fragmentation for these series and each counterparty should find a risk solution for this series, which will burden the counterparties.

Question 2 (Index CDS):

Do you consider that the main characteristics of Index CDS are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

Answer 2:

No, we consider that an additional variable is necessary: a mandatory field indicating whether the series are listed on a Regulated Market, MTF or OTF (SEF) (this is a general requirement for all derivatives classes).

Question 3 (Index CDS):

Do you have preliminary views on the specific items within those classes which would be the best candidates for the clearing obligation, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

Answer 3:

Risk should be the driver and not the liquidity of a class/series. All series of a class with an open interest should be a candidate for the clearing obligation.

Question 4 (Single name CDS):

Please indicate your preference between the options presented. In relation to Option B, which geographical zones would you define, i.e. how could the currencies be grouped in geographical zones? What is the standard market practise in this respect?

Answer 4:

We prefer Option A because of its operational flexibility.

Question 5 (Single name CDS):

Please indicate your preference between the options presented. Under Option C, which criteria do you believe are relevant and how should they be calibrated?

Answer 5:

We prefer option A because of its operational flexibility.

Question 6 (Single name CDS):

Do you consider that the main characteristics of Single Name CDS are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

Answer 6:

No, we consider that an additional variable is necessary: a mandatory field indicating whether the series are listed on a Regulated Market, MTF or OTF (SEF) (this is a general requirement for all derivatives classes).

Question 7 (Single name CDS):

Do you have preliminary views on the specific items within those classes which would be the best candidates for the clearing obligation, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

Answer 7:

Risk should be the driver and not the liquidity of a class/series. All series of a class with an open interest should be a candidate for the clearing obligation.

2.2 Interest rate derivatives

Question 8 (Interest rate derivatives):

Do you consider that the main characteristics of the interest rate derivatives are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

Answer 8:

No, we consider that an additional variable is necessary: a mandatory field indicating whether the series are listed on a Regulated Market, MTF or OTF (SEF) (this is a general requirement for all derivatives classes).

Question 9 (Interest rate derivatives):

Do you have preliminary views on the specific items within those classes which would be the best candidates for the clearing obligation, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

Answer 9:

Risk should be the driver and not the liquidity of a class/series. All series of a class with an open interest should be a candidate for the clearing obligation.

2.3. Equity derivatives

Question 10 (Equity derivatives):

Please indicate your preference between the options presented. Under Option D, which criteria do you believe are relevant and how should they be calibrated?

Answer 10:

We prefer option A because of its operational flexibility.

Question 11 (Equity derivatives):

Please indicate your preference between the options presented.

In relation to Option B, which geographical zones would you define, i.e. how could the currencies be grouped in geographical zones? What is the standard market practise in this respect?

Answer 11:

We prefer option A because of its operational flexibility.

Question 12 (Equity derivatives):

Do you consider that the main characteristics of Equity OTC derivatives are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

Answer 12:

No, we consider that an additional variable is necessary: a mandatory field indicating whether the series are listed on a Regulated Market, MTF or OTF (SEF) (this is a general requirement for all derivatives classes).

Question 13 (Equity derivatives):

Do you have preliminary views on the specific items within those classes which would be the best candidates for the clearing obligation, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

Answer 13:

Risk should be the driver and not the liquidity of a class/series. All series of a class with an open interest should be a candidate for the clearing obligation.

2.4. Foreign Exchange derivatives

Question 14 (FX derivatives):

Do you consider that the main characteristics of the FX derivatives are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

Answer 14:

No, we consider that an additional variable is necessary: a mandatory field indicating whether the series are listed on a Regulated Market, MTF or OTF (SEF) (this is a general requirement for all derivatives classes).

Question 15 (FX derivatives):

Do you have preliminary views on the specific items of the presented class which would be the best candidates for the clearing obligation, in view of the criteria to be assessed by ESMA, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

Answer 15:

Risk should be the driver and not the liquidity of a class/series. All series of a class with an open interest should be a candidate for the clearing obligation.

2.5. Commodity derivatives

Question 16 (Commodity derivatives):

What is in your view the best approach to specify the underlying assets within each OTC Commodity class?

Answer 16:

The best approach is following the ISDA taxonomy.

Question 17 (Commodity derivatives):

Do you consider that the main characteristics of the Commodity derivatives are adequately captured by the proposed structure? Are there any other variables which you consider as relevant in the context of the clearing obligation?

Answer 17:

No, we consider that an additional variable is necessary: a mandatory field indicating whether the series are listed on a Regulated Market, MTF or OTF (SEF) (this is a general requirement for all derivatives classes).

Question 18 (Commodity derivatives):

Do you have preliminary views on the specific items within those classes which would be the best candidates for the clearing obligation, taking into consideration the overarching aim of reducing systemic risk and the criteria defined in Article 5(4) of EMIR?

Answer 18:

Risk should be the driver and not the liquidity of a class/series. All series of a class with an open interest should be a candidate for the clearing obligation.

3. Preliminary analysis of the readiness of asset classes vis-à-vis the clearing obligation

Comments on paragraphs 85 to 105:

With regard to paragraph 88: two other criteria should be included in the suitability for the clearing obligation:

- Mitigation of risk
- Fostering a level playing field.

Question 19 (readiness of the classes):

Do you agree with this analysis?

Answer 19:

Yes.

4. Determination of the phase in, and the categories of counterparties to which the CO would apply

4.1. Dates, phase in, categories of counterparties

Question 21 (dates, phase in):

What would you consider to be a reasonable delay to allow CCPs which clear the same asset class or a similar Class+ to clear a new Class+?

Answer 21:

12-18 months, enabling all parties in the chains – including end users and clearing members - to amend their procedures and documentation.

Comments on paragraphs 116 to 119:

Questions referring to these paragraphs are related to organisation and operations of CCPs; DACSI considers these questions as most relevant for CCPs.

Question 25 (categories of counterparties):

Please indicate your preference between the options presented. Would you rather use an option that is not detailed here? Under Options B and C, do you agree to base the clearing access approach on the asset class to which the counterparties have access? What should be the date on which clearing access/threshold calculation should be assessed?

Answer 25:

We prefer option A, categories of counterparties defined in EMIR, which is clear for us. Any other category (option B or C) will have an impact on the scope of EMIR and subsequently EMIR would have to be amended with new counterparty classes and its role in the (OTC) derivatives trade/transaction and clearing process.

Question 26 (categories of counterparties):

What would in your view be the appropriate timeframe for counterparties with / without access to clearing in the relevant asset class?

Answer 26:

For derivatives classes currently cleared by a CCP the timeframe will be shorter than for derivatives classes which are currently not cleared; for derivatives classes not cleared the timeframe should be much longer (12-18 months).

Question 27 (categories of counterparties):

Do you agree that a key factor to take into account when defining the phase in for the counterparties to comply with the clearing obligation will be the number of clearing members offering client clearing services? Is the client clearing capacity of the CCP also a relevant factor? What could be the other criteria?

Answer 27:

Financial Counterparties (FC) have a choice to become a direct Clearing Member or to make use of the clearing services of a Financial Institution (i.e. a Bank) offering clearing services in its role of (General) Clearing Member.

Non Financial Counterparties (NFC) do not have this choice and will be completely dependent if a General Clearing Member wants to offer its clearing services on request of the NFC.

The concentration of clearing services on the level of General Clearing Members and/or CCPs is an issue regarding the capacity of these institutions to service the relevant counterparties, but more important is the risk issue for the General Clearing Member (concentration issue).

4.2. Minimum remaining maturity of the OTC derivative contracts referred to in EMIR Article 4(1)(b)(ii)

Question 28 (remaining maturity):

What are your views regarding the calibration of the remaining maturity of the contracts to be subject to the CO? What criteria should ESMA take into account when defining it?

Answer 28:

The bottom-up method for the clearing obligation will limit this problem. For the frontloading only contracts with a maturity > 1 year should be loaded within 6 months after the announcement date of the Clearing obligation for the relevant derivatives class.

5. The clearing obligation in specific cases

5.1. Contracts concluded with Covered Bond issuers

Question 29 (covered bonds):

Are there other specific features of the contracts concluded with covered bond issuers or with cover pools for covered bonds, to be considered by ESMA in the context of the clearing obligation?

Answer 29

The covered bond itself is a transferable security and not in the scope of EMIR. The cover of the bond is a (legal) transaction to reduce or eliminate the risk for the covered bond holder in case of a default of the covered bond issuer. In general this is one (legal) package typical for this issued covered bond. If the “cover” is a derivatives trade/transaction, this transaction will be in the scope of EMIR; if these derivative is part of an EMIR defined derivative class and this class will be cleared under the conditions of EMIR, there is no problem to clear this trade/transaction. If the construction is an “exotic” one and the cover is an “exotic” derivatives trade/transaction as well, this transaction/trade should be fully qualified as an OTC deal without a clearing obligation.

Question 30 (covered bonds):

What would be the legal or technical challenge faced by covered bonds issuers and CCPs, if a clearing obligation was imposed on some of the OTC derivative contracts included in the cover pools of covered bonds?

Answer 30

If the covered bonds issuer is the counterparty (FC or NFC (+)) in the OTC derivatives trade/transaction, the covered bond issuer should comply with the EMIR requirements.

Question 32 (covered bonds):

Would an appropriate phase-in for these counterparties alleviate these challenges? If so, how?

Answer 32

See Answer 30.

5.2. Foreign exchange OTC derivatives

Question 33 (FX derivatives):

Within the foreign exchange asset class, for which type of contracts do you consider that settlement risk is the predominant risk, and what criteria or characteristics should be used by ESMA to identify those contracts?

Answer 33:

For contracts which are multi listed and/or multi cleared in different time zones with different settlement cycles there could be an additional settlement risk, a global standard for the period of a settlement cycle should be helpful and is advisable.

5.3. Interaction of portfolio compression and the clearing obligation

Question 34 (Portfolio compression):

Are there ways in which the imposition of the clearing obligation in the EU could hamper the effectiveness of compression services? If so, please provide evidence of the potential impact. Are there ways in which exclusions to the clearing obligation could be defined which alleviate the problem without creating opportunities for avoidance?

Answer 34:

Based on the information/presentations regarding the CCP service offering under EMIR the answer is: no.

5.4. How to withdraw a clearing obligation on a class or subset of it?

Question 35 (Modification of a Class+):

For which reason (other than the fact that a CCP does not clear it any longer) do you believe that the clearing obligation of a class - or subset of it - would need to be removed? Please focus on the risks which could stem from a clearing obligation on contracts which would no longer be appropriate for mandatory clearing and provide concrete examples.

Answer 35:

As a principle, posterior exclusion or removal from the clearing obligation for a class or a subset of it should be avoided as much as possible. Since risk considerations are dominant over liquidity, Removal of the clearing obligation should only be allowed if there are no outstanding positions (open interest) in the class (or subset).

Question 36 (Modification of a Class+):

In case a clearing obligation would need to be reviewed, how crucial would be the time needed to dis-apply the clearing obligation?

Answer 36:

See Answer 35.