ISDA® Safe, Efficient Markets

ISDA RESPONSE TO ESMA'S DISCUSSION PAPER ON THE TRADING OBLIGATION FOR DERIVATIVES UNDER MIFIR 0F SEPTEMBER 20, 2016

Introduction

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. ISDA's work in three key areas – reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure – shows the strong commitment of the Association toward its primary goals of building robust, stable financial markets and a strong financial regulatory framework.

ISDA welcomes its continued engagement with ESMA on MiFID II and MiFIR. Our response to this discussion paper, and to all consultations on MiFID, reflects the composition of our members and therefore focuses on the operation of the derivatives market in the EU and globally. We hope that ESMA will continue its dialogue with ISDA and the industry as it develops its draft technical advice.

Executive summary

ISDA welcomes the opportunity to provide comments to ESMA on its discussion paper regarding the trading obligation for derivatives under MiFIR (ESMA/2016/1389) and would summarise the responses as follows:

I. **Level of granularity for the purposes of the trading obligation**
We believe that the TO should include much greater granularity. This would ensure that firms have a clear and defined product list and would avoid confusion as to whether a product is in scope. This would also serve to closely align the TO with the US regime, which we consider to be of fundamental importance.

II. Assessment of liquidity in fixed-float IRS
In general, we agree that single currency fixed-float IRS are commonly traded derivatives. However, the results of ESMA's assessment of the data set in the discussion paper do not entirely reflect firms' assessments of liquidity in fixed-float IRS. Our response to Q.21 provides further detail around where firms' assessments differ from ESMA's. We believe that the assessments made by ESMA are a consequence of the post-trade allocation data that it used. In our view, such data does not provide a true reflection of the market and we have therefore made clear that firms and ISDA would be open to discussing ways in which to assist ESMA with the collection of data.

We have also proposed that three tenor points in a currency should be deemed liquid before the currency becomes subject to the TO. We believe that this would ensure competition in the market and also ensure that the amount and type of third party buying and selling interests that will be available for interaction on the trading venue is not reduced.

III. Date from which the TO will take effect

We propose a relatively short phase in for the TO in order for firms to address operational issues arising from it, such as developing a systematic framework for ensuring that products required to be traded on venues are indeed traded on registered OTFs/MTFs/RMs. In addition, we strongly believe that firms should have the ability to connect to venues and carry out the necessary testing of controls in order to ensure that trades that were previously not traded on venue will be traded on venue. We would welcome any confirmation regarding firms' ability to do this.

IV. Packed orders

Regarding packaged orders, provided that ESMA agrees with our proposal that three tenor points in a currency should be deemed liquid before a currency becomes subject to the TO, we recommend that only packages where all components are subject to the mandatory clearing obligation under EMIR and are listed on at least one trading venue, and where at least one of those components forming the package is subject to the TO (e.g. curves, flies with benchmark swaps), should be subject to the TO. In the case of a package order containing only interest rate derivative components, we believe that only a package order that contains no more than three components should be subject to the TO. No other packages should be subject to the TO.

Q1. Do you agree that the level of granularity for the purpose of the trading obligation should apply at the same level as the one used for calibrating the transparency regime of non-equity instruments? If not, which level of granularity for the TO would you recommend and why? Would that differ by asset class and type of instrument?

No, ISDA do not agree that the level of granularity used in the transparency regime should be the same as the granularity used in the TO. Instead, we believe that the TO should include much greater granularity, this is because:

(1) from an implementation perspective, it is helpful for firms to have a clear and defined product list in order to avoid confusion as to whether a product is in scope;

(2) there may be some bespoke contract terms (e.g. certain day count fractions) which are not listed by trading venues, or which rarely trade on venues;

(3) and this would serve to better align the TO with the US regime.

As currently drafted, certain combinations of terms that are not widely available would be made subject to the TO (e.g. derivatives with variable notional and zero coupon swaps). We believe that the US MAT regime strikes the correct balance in terms of level of detail required in order to identify the most liquid sub-set of products. Therefore, we believe that it would be appropriate to include a greater level of granularity in order to harmonise the TO, to the greatest possible extent, with the US MAT regime. We would propose achieving this by applying the specifications set out in the table on pages 11 and 12 of the Discussion Paper. This approach would also be consistent with the political commitment made by the EC and the CFTC in July 2013, in their agreement on a "Common Path

Forward on Derivatives". This included a commitment to "working collaboratively to share ideas and ensure harmonization to the maximum extent possible". In our view, this harmonisation commitment and effort should also apply at the level of the TO implementing rules being developed by ESMA.

Q2. Do you agree that all derivatives currently subject to or considered for the CO are admitted to trading or traded on at least one trading venue? If not, please explain which classes of derivatives are not available for trading on at least one trading venue.

No, ISDA believe that the classes of derivatives subject to the clearing obligation are not sufficiently granular and consequently, it is not clear that all derivatives currently subject to or considered for the CO are admitted to trading or traded on at least one trading venue. For example, we believe that this would be the case for amortised swaps/variable notionals. We also understand that ESMA has not considered OTFs at this stage and that references to 'trading venues' are to regulated markets and MTFs only.

Q3. How should ESMA determine the total number of market participants trading in a class of derivatives? Do you consider it appropriate to carry out this assessment with TR data or would you recommend other data sources?

ISDA do not believe that it is appropriate to use TR data to carry out the assessment of the total number of market participants. Our concern is that using post-trade allocation data will provide an inaccurate indication of the number of market participants that are trading in a class of derivatives. For example, a trade undertaken by an asset manager may be allocated post trade between several sub funds. In this scenario, the TR data would indicate that multiple trades have occurred involving several market participants, rather than one trade involving one participant. We believe that identifying that there is only one market participant in this scenario would give a more accurate understanding as to the amount of third party buying and selling interest, as the scenario described would involve only one entity being responsible for making the investment decisions. We believe that data gathered by trading venues may be of assistance to ESMA. However, we are aware of the limits of such a dataset. For example, it will represents only a subset of market participants, as only the larger market participants will already be connected to venues at this time.

Q4. In your view, what should be the minimum total number of market participants to consider the following classes of derivatives as sufficiently liquid for the purpose of the trading obligation? i) OTC interest rate derivatives denominated in EUR, USD, GBP and JPY; ii) OTC interest rate derivatives denominated in NOK, PLN and SEK; iii) Credit default swaps (CDS) indices? Should you consider that this assessment should be done on a more granular level, please provide your views on the relevant subsets of derivatives specified in 1.-3.

ISDA do not offer a view on the appropriate minimum total number of market participants. However, we would note that in order to be considered sufficiently liquid for the purposes of the TO, we believe that there should be sufficient volume of trading in a class of derivatives, as well as a minimum total number of market participants.

Q5. Do you agree with this approach? Do you consider alternative ways to identify the number of trading venues admitting to trading or trading a class of derivatives as more appropriate?

No, ISDA believe it is important to clarify that an increase in the number of trading venues that offer trading in a class of derivatives does not necessarily correspond to an increase in the liquidity of that class of derivatives. Subject to the classes of derivatives being sufficiently granular (as discussed in our response to Q.2), we contend that a class of derivatives should be actually traded and that trading should take place on two different and independent trading venues. This would provide choice to users and ensure competition among venues (please see our response to Q.6 which sets out further reasoning on this point).

Q6. On how many trading venues should a derivative or a class of derivatives be traded in order to be considered subject to the TO?

ISDA believe that, subject to the classes of derivatives being sufficiently granular, a class of derivatives should be actually traded on two different and independent trading venues.

This would:

> (i) guard against any anti-competitive behaviour that might otherwise develop from introducing the TO where one class of derivatives is only admitted to trading or traded on one trading venue;
>
> (ii) and prevent risk from being concentrated within a single trading venue. In addition, we would query whether a single trading venue would have the operational scalability to trade the sudden substantial additional volumes of derivatives that would become subject to the TO, given that these derivatives would previously have normally been traded OTC.

Q7. What would be in your view the most efficient approach to assess the total number of market makers for a class of derivatives? Where necessary, please distinguish between: i) The phase prior to the application of MiFID II (i.e. before January 2018); ii) The phase after the application of MiFID II (i.e. after January 2018).

We do not offer a response to this question.

Q8. How many market makers and other market participants under a binding written agreement or an obligation to provide liquidity should be in place for a derivative or a class of derivatives to be considered subject to the TO?

We do not offer a response to this question.

Q9. Do you agree with the proposed approach or do you consider an alternative approach as more appropriate?

No, ISDA believe it is important to note that any assessment that is based on post-allocation data is unlikely to provide an accurate representation of the number of market participants.

Q10. Do you agree that the criterion of average size of spreads, in particular in case of absence of information on spreads, should receive a lower weighting than the other liquidity criteria? If not, please specify your reasons.

Yes, ISDA agrees that the criterion of average size of spreads, particularly in the absence of information on spreads, should receive a lower weighting than the other liquidity criteria. As has been noted in responses to previous ESMA Discussion Papers, it is our view that where spreads are to be used, it should be clear that these are generated from actual transactions or executable quotes.

Q11. Which sources do you recommend for obtaining information on the average size of spreads by asset class?

ISDA do not recommend any sources for obtaining information on the average size of spreads by asset class.

Q12. What do you consider as an appropriate proxy in case of lack of information on actual spreads?

ISDA do not believe that there are any appropriate proxies in the event that there is a lack of information on actual spreads.

Q13. Do you agree with the suggested approach? If not, what approach would you recommend?

While ISDA supports the principle of ensuring that the introduction of the trading obligation does not unintentionally restrict non-financial end users in their trading opportunities necessary for their commercial activity, we are doubtful as to how effectively this assessment could be carried out given the volume of data involved. We do not propose an alternative approach.

Q14. Do you agree that trades above the post-trade large in scale threshold should not be subject to the TO? If not, what approach would you suggest? Should transactions above the post-trade LIS threshold meet further conditions in order to be exempted from the TO?

ISDA would strongly support any approach that most closely aligns the TO with the US regime. We would urge ESMA to have primary regard to US alignment when developing its consultation paper and any technical standards that are deemed appropriate. Our members have not unanimously agreed which approach would best achieve such alignment, however, a majority agree with ESMA's conclusion that trades above the post-trade LIS threshold should not be subject to the TO.

Q15. How highly should ESMA prioritise the alignment of the TO with transparency? What would be the main consequences for the market if some instruments are covered by transparency and not by the TO or vice versa? If the two are not fully aligned, would a broader scope for the TO or for transparency be preferable, and why? In case of a broader or narrower scope for the TO (compared with transparency), how should the two liquidity thresholds relate to each other?

While ISDA recognises the importance of ensuring that the liquidity test in the transparency regime and the liquidity test in the TO regime are calibrated correctly, we do not believe that this would be best achieved by aligning the two regimes. Consequently, we do not regard alignment of the TO and the transparency regime to be a high priority when calibrating the liquidity test under the TO.

We understand why ESMA has, via Recital 7 of RTS2 (and paragraph 38 on page 214 of the December 2014 Consultation Paper), taken steps to clarify that it was not the intention of MiFIR to permit a transparency waiver for any derivative not subject to the TO, since this would result in waivers for many liquid but non-clearable derivatives.

However, we disagree with ESMA's understanding of Article 9(1)(c) MiFIR, set out at paragraph 107 of the Discussion Paper. In our view, Article 9(1)(c) MiFIR clearly allows for the waiving of transparency obligations for all derivatives for which there is not a liquid market per RTS 2, irrespective of whether the derivative has been assessed for the TO. It is not restricted to a subset of derivatives that is subject to the CO but for which the TO does not apply. Therefore, any approach that ESMA takes must ensure that instruments deemed illiquid per RTS2 still benefit from a waiver whether or not they are subject to the clearing obligation. ISDA's previous comments in respect of the calibration of the non-equities transparency regime give detail as to the likely negative consequences of requiring real-time transparency for illiquid instruments.

We therefore consider that, if ESMA wishes to completely bifurcate the two "parts" of MiFIR Article 9(1)(c) (as it appears to do in paragraph 107 on page 38 of the Discussion Paper) into: (i) all derivatives subject to the clearing obligation, for which a waiver is available if they are not subject to the trading obligation; and (ii) "all other instruments" including "all other derivatives" not subject to the clearing obligation, ESMA must ensure that it does not cause outcomes that could conflict with the general intention of 9(1)(c), taken as a whole, to ensure availability of waivers for any illiquid instrument, whilst providing transparency for liquid instruments.

Moreover, it would produce an odd outcome if a waiver could be granted in respect of derivatives subject to the CO but not subject to the TO, as this could potentially carve out some liquid derivatives whilst comparatively less liquid, non-mandatorily clearable derivatives, that had been assessed as liquid under RTS2 would not benefit from a waiver.

However, the proposals raised in paragraph 109 do not appear to satisfactorily address the issue and would instead result in ESMA compromising its standards.

We believe that ESMA should calibrate the TO and liquidity for transparency effectively so that the waiver is not required for the trading obligation. We therefore believe that ESMA should calibrate liquidity for transparency purposes precisely and effectively (as it has already attempted to do via its extensive efforts to refine RTS2) so that the 9(1)(c) waiver is not required for any derivatives deemed liquid under RTS2 but insufficiently liquid to be subject to the trading obligation. In order for ESMA to do this we recommend that ESMA uses its rights under 9(2) to ensure NCAs:

> (a) allow the second part of 9(1)(c) waiver for any illiquid derivative whether or not subject to the clearing obligation; and
>
> (b) further subdivide the application of the first part of 9(1)(c) into:
>
>> (i) liquid derivatives subject to the clearing obligation but not the TO. ESMA should not need to permit NCAs to grant the waiver for this set; and
>>
>> (ii) Illiquid derivatives subject to the clearing obligation but not the TO. ESMA should ensure NCAs are able to grant the waiver for this set.

We also consider that this approach will help to harmonise the pre-trade transparency requirements between Systematic Internalisers and trading venues, since SIs are unable to waive any pre-trade transparency obligation for instruments subject to the EMIR clearing obligation that are deemed liquid under RTS2 but which are not subject to the clearing obligation (as a consequence of MiFIR Article 18(2) not making any exception for liquid derivatives not subject to the trading obligation, but 9(1)(c) potentially allowing trading venues to waive transparency for such instruments).

Q16. Do you agree with the proposed methodology to eliminate duplicated trades or would you recommend another approach? Do you agree with selecting Option 2?

We do not offer a response to this question.

Q17. Do you agree with the approach taken with regard to calculating tenors?

ISDA believe that the appropriate methodology to calculating tenors should be to measure the time between the effective date and the maturity date, rather than the time between the date that the trade is concluded and the maturity date. We note that 'trade start date' is a specification currently included under the US MAT regime. Consequently, by aligning the TO with the US MAT regime (as we propose in our response to Q.1) this would ensure that tenor would be measured with reference to the effective date and the maturity date.

However, it will be important to ensure that any eventual specification of derivatives subject to the trading obligation also differentiates between spot starting swaps and forward starting swaps. A forward starting swap has different liquidity characteristics from a spot starting swap and they should be assessed separately. The US determinations of made available to trade (MAT) include details of the "trade start type" and are currently limited to spot starting transactions.

Q18. Do you agree with the reasons mentioned above or is there another explanation for the significant number of trades outside of benchmark dates?

Although we do not agree that there are a 'significant' number of trades outside of benchmark dates, we do believe that there are other explanations for such trading. For example, during the time period of the assessment (01/07/2015 – 31/12/2015) firms may have been preparing for the advent of clearing. Consequently, if a different time period had been analysed, a less significant volume of trading outside of the benchmark dates may have been observed. These trades may also be IMM and MAC swaps, which would show as being outside a benchmark date as they are forward started. We also understand that ESMA has calculated the tenors on the basis of the difference between the execution date and the maturity date, rather than between the effective date and maturity date. This could also explain why there are swaps a couple of days either side of the benchmark dates.

Q19. Does this result reflect your assessment of liquidity in fixed-float IRS? If not, please explain on which subclasses you disagree and why.

In general, ISDA agree that single currency fixed-float IRS are commonly traded derivatives. However, the results of the assessment of the data set in the discussion paper do not entirely reflect firms' assessments of liquidity in fixed-float IRS. We believe that this is a consequence of the post-trade allocation data used by ESMA which, in our view, does not provide a true reflection of the market. In particular, we would question ESMA's assessment of liquidity with regards to:

(1) SEK 10Y – this has one of the lowest levels of trades per day (11.88), a low average notional per day in EUR (228,150,447) and a relatively low number of distinct counterparties (65), when compared with other currencies;

(2) EUR 7Y, 8Y and 9Y – we believe that much of the activity, particularly in relation to the 8Y and 9Y tenors, could result from those tenors forming part of a package (as opposed to own right substantial trading); and

(3) JPY 5Y, 7Y, 10Y and 20Y – we note that these tenors each contain relatively low numbers of distinct counterparties (29, 28, 42 and 36 respectively).

In addition, we have some more-general queries regarding ESMA's methodology and analysis. In particular, we query whether:

- certain figures listed in the 'Days traded' column are accurate, as it appears that a number of currencies/tenors were traded on more than 130 days; and

- the reference to 'distinct counterparties' is to counterparties acting as investment advisor (pre-allocation to the sub-funds) or beneficial owner (post-allocation to the sub-funds)? As indicated in our response to Q.3, this figure may provide an inaccurate indication of the number of market participants if it were to include asset managers for example.

In light of the shortcomings of the current data set that we have identified, we are wary of finalising a liquidity test that is based on an analysis of such data. We would advocate for harmonisation of the liquidity test with the US MAT assessment to the extent possible and would welcome the opportunity to review an appropriate set of data to see if there is a case for including additional benchmark/tenors that are subject to US MAT (to the extent justifiable under a suitable liquidity test). Firms and ISDA would be open to discussing ways in which to assist ESMA with the collection of such data.

As a general point, we propose that three tenor points in a currency should be deemed liquid before the currency becomes subject to the TO. Otherwise, competition in the market may be restricted and the amount and type of third party buying and selling interests that will be available for interaction on the trading venue may also reduce. Smaller firms may consider that the trading volume associated with trading on venue just one benchmark tenor will not justify the operational and infrastructure costs associated with connecting to the venue (e.g. the fees for trading on a venue, costs of connecting with trading venue API, testing with the venue, etc.). However these costs would become more justifiable if a wider set of products is traded on that same venue.

Q20. What thresholds would you propose as the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

We do not offer a response to this question.

Q21. What further specifications (e.g. payment frequency, reset frequency, day count convention, trade start type) would you consider necessary for specifying the trading obligation for fixed-float IRS? How would you determine these additional specifications?

As stated in our response to Q.1, ISDA believe that the same level of granularity should apply to the TO as to the US MAT regime. For this reason, we would suggest additionally including all US MAT regime specifications that are not otherwise currently included in ESMA's proposal.

Q22. Does this result reflect your assessment of liquidity in OIS? If not, please explain on which subclasses you disagree and why.

Yes, this broadly reflects ISDA understanding. However, as indicated in our response to Q.19, we propose that three tenor points in a currency should be deemed liquid before the currency becomes subject to the TO.

Q23. What thresholds would you propose for the liquidity criteria? What minimum number of counterparties would you consider appropriate for introducing the TO?

We do not offer a response to this question.

Q24. What further specifications (e.g. payment frequency, reset frequency, day count convention, trade start type) would you consider necessary for specifying the trading obligation for OIS? How would you determine these additional specifications?

As stated in our response to Q.1, ISDA believe that the same level of granularity should apply to the TO as to the US MAT regime. For this reason, we would suggest additionally including all US MAT regime specifications that are not otherwise currently included in ESMA's proposal.

Q25. Do you agree that due to the specificities of the FRA-market, FRAs should not be considered for the TO? Do you agree that the majority of FRAs transactions serve post-trade risk reduction purposes rather than actual trades.

Yes, for the reasons that ESMA outlines, ISDA agree that FRAs should not be considered for the TO.

Q26. In case you consider FRAs should be considered for the TO, which FRA sub-classes are in your view sufficiently liquid and based on which criteria? How should a TO for FRAs best be expressed? Should it be based on the first (effective date) or the second period (reference date)? Apart from the tenor, which elements do you consider necessary for specifying the TO for FRAs and why?

ISDA do not consider that FRAs should be considered for the TO.

Q27. Would you consider the two index CDS as sufficiently liquid for being covered by the TO?

Yes, this conclusion is consistent with the analysis set out in the ISDA response to ESMA's 22 May 2014 MiFID II/MiFIR Discussion Paper. However, our analysis also indicates that only the on-the-run series should be identified as sufficiently liquid, as an index becomes illiquid as soon as it is off-the-run.

Q28. Do you agree that the TO for CDS should cover the on-the-run series as well as the first thirty working days of the most recent off-the run-series? If not, please explain why and propose an alternative approach.

No, ISDA would argue that the first off the run series is not sufficiently liquid and therefore should not be subject to the TO. This view is supported by the analysis set out in our response to ESMA's 22 May 2014 MiFIDII/MiFIR Discussion Paper, which clearly shows that only the on-the-run series should be identified as sufficiently liquid, as an index becomes illiquid as soon as it is off-the-run. However, should ESMA require off the run series' to be subject to the TO, we would propose that the whole of the most recent off the run series should be subject to the TO. Otherwise, setting an arbitrary limit at 30 days would likely influence/distort trading practices.

Q29. Apart from the tenor, which elements do you consider indispensable for specifying the TO for CDSs and why?

ISDA considers that the reference index, settlement currency and series are indispensable for specifying the TO for CDSs.

Q30. Do you agree with the proposed application dates? If not, please provide an alternative and explain your reasoning.

No, as further detailed in our response to Q.31, ISDA believe that it would be appropriate to phase-in the application of the TO for different categories of counterparties. This would provide counterparties that will be subject to the TO with additional time in which to address operational issues.

Q31. Do you consider necessary to provide for an additional phase-in for the TO for operational purposed and to avoid bottlenecks? If yes, please provide a proposal on the appropriate length of such a phase-in for the different categories of counterparties and explain your reasoning.

Yes, ISDA are in favour of a relatively short phase in for the TO in order for firms to address operational issues. Consequently, we would propose the following dates:

OTC derivatives class	Category of counterparty			
	Category 1	Category 2	Category 3*	Category 4
IRD (EUR, GBP, JPY, USD)	21 January 2018	21 February 2018	21 March 2018	21 December 2018
IRD (NOK, PLN, SEK)	21 January 2018	21 February 2018	21 March 2018	21 August 2019
Credit derivatives	21 January 2018	21 February 2018	21 March 2018	21 May 2019

* We note that ESMA has recently published its final report on the clearing obligation for financial counterparties with a limited volume of activity, in which ESMA proposes that the above clearing obligation deadlines for Category 3 counterparties be delayed until 21 June 2019. Should ESMA's draft RTS be adopted, we would maintain that the TO should be subject to phase in. By way of explanation for this proposed delay, firms will need to implement a systematic framework to ensure products required to be traded on venues are actually traded on registered OTFs/MTFs/RMs. If the RTS is not published until Q4 2017 this will cause challenges because:

(i) technology resources will need to be prioritised at firms in order to build the systematic controls and carry out testing of these controls – this will occur at the same time as firms are preparing for the broader scope of MiFID II obligations and will also occur close to a holiday period, where technical freezes are common;

(ii) firms may not know the full scope of available trading venues at this time; and

(iii) many firms will need to wait until the final product set before deciding whether they should connect to trading venues. This connectivity setup to a trading venue will take time. As part of their operational processes, we strongly believe that firms should have the ability to connect to venues and carry out the necessary testing of controls in order to ensure that trades that were previously not traded on venue will be traded on venue. We would expect venues to provide such testing environments, but we are not aware of any confirmation regarding this point.

Q32. Which types of package transactions are carried out comprising components of classes of derivatives that are assessed for the purpose of the TO, i.e. IRD and/or CDS? Please describe the package and its components as well as your view on the liquidity of those packages.

ISDA believe it is essential that ESMA clearly defines the different types of packaged transactions that would be subject to the TO. Any ambiguity will create substantial difficulties for the industry with regards to implementation given the complexity that can surround packaged transactions. Furthermore, subjecting package types that cannot actually be traded on a single trading venue as a contingent package will force market participants to execute the components separately, subjecting them to additional execution costs and risks, and cause them to lose the benefits arising from executing the components collectively as a package that are available to market participants today.

Provided that ESMA agrees with our proposal that three tenor points in a currency should be deemed liquid before a currency becomes subject to the TO, we recommend that only packages where all components are subject to the mandatory clearing obligation under EMIR and are listed on at least one trading venue, and where at least one of those components forming the package is subject to the TO (e.g. curves, flies with benchmark swaps), should be subject to the TO. In the case of a package order containing only interest rate derivative components, only a package order that contains no more than three components should be subject to the TO. No other packages should be subject to the TO.

We are supportive of alignment with the US regime. We therefore contend that any package that currently benefits from an exemption under the CFTC rules should not be subject to the TO. We believe that the fact that these products were exempted under another regime demonstrates the difficulty that subjecting such products to a trading obligation presented to the markets. For example, CFTC no-action relief provides relief in respect of package trades in the US where the market not been able to accommodate the trading of these packages on SEF. As MiFIR does not provide a framework for no-action relief, mandating on-venue trading in these package types would restrict market participants.

Q33. Are there packages that only comprise components of classes of derivatives that are assessed for the purpose of the TO? Do you consider those package transactions to be standardised and sufficiently liquid?

Yes, there are some packaged transactions that only comprise components of classes of derivatives that are assessed for the purpose of the TO. For example an IR curve or fly trade with only benchmark tenors: e.g. 2s5s10s EUR IRS butterfly trade.

Q34. Do you agree that package transactions that are comprised only of components subject to the TO should also be covered by the TO or should the TO only apply to categories of package transactions that are considered liquid? If not, please explain.

As indicated in our response to Q.32, provided that ESMA agrees with our proposal that three tenor points in a currency should be deemed liquid before a currency becomes subject to the TO, ISDA recommend that only packages where all components are subject to the mandatory clearing obligation under EMIR and are listed on at least one trading venue, and where at least one of those components forming the package is subject to the TO (e.g. curves, flies with benchmark swaps), should be subject to the TO. In the case of a package order containing only interest rate derivative components, only a package order that contains no more than three components should be subject to the TO. No other packages should be subject to the TO.

Q35. How should the TO apply for package transactions that include some components subject to the TO, whereas other components are not subject to the TO?

As indicated in our response to Q.32, provided that ESMA agrees with our proposal that three tenor points in a currency should be deemed liquid before a currency becomes subject to the TO, ISDA recommend that only packages where all components are subject to the mandatory clearing obligation under EMIR and are listed on at least one trading venue, and where at least one of those components forming the package is subject to the TO (e.g. curves, flies with benchmark swaps), should be subject to the TO. In the case of a package order containing only interest rate derivative components, only a package order that contains no more than three components should be subject to the TO. No other packages should be subject to the TO.