



**EACH response to the ESMA consultation
paper on 'Clearing obligation for
financial counterparties with a limited
volume of activity'**

September 2016

EACH response – ESMA consultation paper on ‘Clearing obligation for financial counterparties with a limited volume of activity’ – September 2016

1. Introduction.....	3
2. Response to specific questions.....	3

1. Introduction

The European Association of CCP Clearing Houses (EACH) represents the interests of Central Counterparty Clearing Houses (CCPs) in Europe since 1992. EACH currently has 20 members from 15 different European countries and is registered in the European Union Transparency Register with number 36897011311-96.

2. Response to specific questions

Q5: Do you agree with the proposal to keep the definitions of the categories of counterparties as they currently are and to postpone the date of application of the clearing obligation for Category 3? If not, which alternative would achieve a better outcome?

We understand that ESMA’s proposal to modify the phase-in period applicable to Category 3 is based on these firms representing only a very small amount of activity and risk in the market and the delay of their clearing mandate not having a material impact on the overall systemic risk in the OTC markets.

We also note that Article 2(3) of RTS 2015/2205 permits the application of the EUR 8 billion threshold at individual fund, rather than at group level. This would allow, as defined in Article 2(3), those market participants that may split their business into several undertakings to fall under category 3, while at an aggregate group level such firms would represent a greater amount of activity and risk in the market.

We would therefore propose that the modification of the phase-in period applicable to Category 3 not be extended to undertakings that are part of a group with at least one undertaking that surpasses the thresholds (is in Category 2).

Q6: Do you agree with the proposal to modify the phase-in period applicable to Category 3, by adding two years to the current compliance deadlines?

In general, we agree with ESMA’s analysis of the difficulties that smaller firms may have in accessing clearing services. We share ESMA’s concerns that capital requirements and pending regulations may reduce the appetite of clearing members to provide clearing services to clients within the timeframe originally planned. However, the following points should be taken under consideration:

- EU commitment to the G20 mandate - As a result of the recent financial crisis, on 25th September 2009, the G20 Leaders agreed on a set of measures to improve the functioning of the OTC derivatives markets by increasing their transparency, mitigating systemic risk, and improving protection against market abuse. One of the measures

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agreed was trading, clearing and reporting of standardised OTC derivative contracts by the end of 2012.

We appreciate that, in implementing these measures, ESMA is considering the ultimate impact on smaller participants. We agree with ESMA’s conclusion that these firms represent only a very small amount of activity and risk in the market and the delay of their clearing mandate will not have a material impact on the overall systemic risk in the OTC of the markets. Further, we agree with ESMA’s finding that these firms face significant hurdles in securing access to cleared markets and therefore may be unable to meet the clearing obligation as currently defined.

Since the EU is already some way behind the internationally agreed timeframe for implementation of its OTC reforms, we would have some reservations about ESMA’s proposal for a delay, as we believe it would serve to take the EU further out of line with the international commitments. As an alternative, rather than delaying the EU’s conformance with its international commitments, we encourage that where ESMA has identified hurdles that are caused by other elements of the regulatory framework, including capital charges, ESMA leads other European authorities to seek removal of the hurdles themselves.

- **Timing** - In finalising the length of time for implementation, we would encourage ESMA to consider the potential for inconsistencies, as with the current proposal, the implementation of the clearing obligation for Category 3 would occur after the implementation of the clearing obligation for Category 4. Category 4 is supposedly a category of non-financial counterparties, even less sophisticated and less accustomed to clearing and Category 4 counterparties have even more limited experience and operational capacity with central clearing than the other categories. Hence, we recommend ESMA to ensure that the implementation date of the clearing obligation for Category 3 takes place before the date of implementation of Category 4. For example, under the G4 interest rate swap clearing obligation¹, Category 4 compliance date is planned for 21st of December 2018. The revised compliance date for Category 3 could be 21st of June 2018. We believe this approach should enable progress on clearing access for financial counterparties with a limited volume activity, while preserving liquidity in the markets and the benefits of a gradual phase-in.

¹ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_314_R_0003&from=EN