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ESMA CONSULTATION ON THE TRADING OBLIGATION FOR DERIVATIVES UNDER MiFIR

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AMAFI and FBF's contribution

Introduction

Association française des marchés financiers (AMAFI) is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.

The French Banking Federation (FBF) represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorized as banks and doing business in France, i.e. more than 450 commercial, cooperative and mutual banks. FBF member banks have more than 40,000 permanent branches in France. They employ 400,000 people in France and around the world, and service 60 million customers.

AMAFI and FBF welcome the opportunity to comment on ESMA's consultation paper (CP) regarding the trading obligation (TO) for derivatives under MIFIR. Before responding to the specific questions of ESMA's consultation document, we would like to point out the following general comments.

<u>On the draft technical standards</u>

AMAFI and FBF agree with the draft technical standards (Annex IV of the CP) which broadly reflects our analysis on how the TO should apply within the EU.

That being said, AMAFI and FBF consider **that the date of entry into force should be delayed for at least three months**. Indeed it would be concretely impossible for the industry to be compliant with the trading obligation by 3 January 2018 considering that:

- The final standard will be available very late in the process.
- Most of the trading venues that will offer trading for derivatives eligible for the TO will not be authorised before the end of 2017; once authorised the trading venues have to perform tests (connectivity and functional tests) with their market participants which implies incompressible timeframe.

Moreover, the TO in the EU should be put in place only after third-country trading venues are recognised as equivalent by the European Commission. Indeed if third-country trading venues (especially Swap Execution Facilities) are not granted the equivalence by 3 January 2018, investment firms belonging to EMIR categories 1 (clearing members) and 2 would not be authorized to trade on non-EU venues for vanilla swaps (denominated in USD, EUR and GBP) and CDS indices and would be in an impossible position.

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On the TO for large in scale (LIS) transactions

AMAFI and FBF believe that transactions above the LIS threshold should not be included in the TO, mainly in order to align the EU regime with the US block trade regime. We believe this is consistent with the spirit of this regulation as article 32 in MiFIR is drafted in a manner that would foster a differentiated regime based on the size of transactions (for example "*ESMA shall determine whether the class of derivatives or relevant subset thereof is only sufficiently liquid in transactions below a certain size*").

Nevertheless, we consider that ESMA should clearly confirm that transactions that are carried out off venue according to pre-trade transparency waivers but reported onto a venue in coherence with the given venue rules meet the TO test (are considered as executed on venue). This is in line with ESMA Guidelines on Transaction Reporting (*ESMA/2016/1452*) which state that « *For the purpose of Field 36, a transaction should be considered to be executed on a Trading Venue* […] *when* […] *the buying and selling interest of two parties is not brought together by the Trading Venue either on a discretionary or non-discretionary basis, but the transaction is nonetheless subject to the rules of that Trading Venue and is executed in compliance with those rules.* »

On packages

ESMA states that it does not have empowerment to address packages in relation to the trading obligation and that further clarification will be provided through Q&A.

In our view, when at least one component of the package is not subject to the TO, none of them should be. Moreover, if all components are subject to the TO, it should be necessary to assess whether the TO should apply (case-by-case assessment) by appraising if the package is "liquid as a whole".

In our response to the Consultation on Draft Regulatory Technical Standard on package orders for which there is a liquid market in January 2017, we have provided ESMA with the following criteria in order to assess a liquid package:

- to put in place a phase in period where, at the beginning, only package orders without any illiquid component would be deemed as having a liquid market as a whole and/or;
- to establish that only package orders with no more than one illiquid component could be considered as liquid as a whole and/or;
- to use additional quantitative criteria (e.g. number of transactions) when assessing the liquidity of package orders with at least one illiquid component.

In any case, should a package transaction with an illiquid component be found "liquid as a whole", a deep analysis of the actual liquidity of this package should be carried out by ESMA prior to releasing this finding.

Besides this specific topic, we suggest ESMA to consider the following additional criteria which we see as critical and that should be taken into consideration cumulatively:

- All components in the package should be OTC derivatives (options excluded). Packages with at least one non-derivative leg (such as a corporate bond) should not be considered as standard and liquid.
- All components in the package should be denominated in the same currency (EUR, USD or GBP).

- The maximum number of components in the packages should be limited to three, as a package with more components would not be standard but bespoke and not frequently traded.

- Packages in cross-asset classes should not be considered as standardized and liquid as a whole. In fact, even if the individual components are admitted to trade on a trading venue, such packages are often bespoke and traded only OTC and do not fulfill the requirements of being "standardized and frequently traded". A cross asset class regime would probably also need to be quite complex taking into account that the components will have different pricing models and regimes for calculating SSTI, liquidity, SI thresholds etc.

As professional associations, AMAFI and FBF are not in the position to respond to CBA questions (see section II.).

Questions

Question 1: Do you agree with ESMA's assessment and proposed way forward for the criteria assessing the number and types of active market participants? If not, please explain your position and how you would integrate these elements into the liquidity test.

AMAFI and FBF broadly agree with ESMA's assessment which takes into account some of the comments provided by market participants in their response to the Discussion Paper (DP) in November 2016.

Nevertheless AMAFI and FBF regrets that ESMA does not want to take into consideration an additional liquidity test at the trading venue level considering that one of the outcome of MiFIR could be to have a lot of derivatives with a "trading on a trading venue" status without any actual trades on venues.

Therefore it is all the most important that ESMA relies on actual trading venues activities to perform the liquidity test.

Question 2: Do you agree with the revised proposal not to exempt post-trade LIS transactions? If not, please explain and present your proposal.

AMAFI and FBF believe that transactions above the LIS threshold should not be included in the TO, mainly in order to align the EU regime with the US block trade regime. We believe this is consistent with the spirit of this regulation as article 32 in MiFIR is drafted in a manner that would foster a differentiated regime based on the size of transactions (for example "*ESMA shall determine whether the class of derivatives or relevant subset thereof is only sufficiently liquid in transactions below a certain size*").

Nevertheless, we consider that ESMA should clearly confirm that transactions that are carried out off venue according to pre-trade transparency waivers but reported onto a venue in coherence with the given venue rules meet the TO test (are considered as executed on venue). This is in line with ESMA Guidelines on Transaction Reporting (*ESMA/2016/1452*) which state that « *For the purpose of Field 36, a transaction should be considered to be executed on a Trading Venue* […] *when* […] *the buying and selling interest of two parties is not brought together by the Trading Venue either on a discretionary or non-discretionary basis, but the transaction is nonetheless subject to the rules of that Trading Venue and is executed in compliance with those rules.* »

Question 3: Do you agree with this proposal? If not, please explain why and provide an alternative proposal for ESMA to populate and maintain the register.

AMAFI and FBF agree with ESMA' proposal.

Question 4: Do you agree with this proposal? Would you add other parameters e.g. day count convention of the floating leg, notional type (constant vs. variable), fixed rate type (MAC vs. MAC)? If yes, please explain why and provide the parameters.

AMAFI and FBF agree with ESMA' proposal.

Question 5: For each Case, specify if you agree with the proposal of qualifying the sub-classes as liquid for the purpose of the trading obligation and if not, please explain why and provide an alternative proposal

AMAFI and FBF agree with ESMA' proposal.

Question 6: Would you also consider any of these possible sub-classes as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?

AMAFI and FBF agree with ESMA' proposal.

Question 7: For each Case, specify if you agree with the proposal of qualifying the sub-classes as liquid for the purpose of the trading obligation and if not, please explain why and provide an alternative proposal.

AMAFI and FBF agree with ESMA' proposal.

Question 8: Would you also consider any of these possible sub-classes as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?

AMAFI and FBF agree with ESMA' proposal.

Question 9: For each case, specify if you agree with the proposal of qualifying the sub-classes as liquid for the purpose of the trading obligation and if not, please explain why and provide an alternative proposal.

AMAFI and FBF agree with ESMA' proposal.

Question 10: Would you also consider the possible sub-classes here below as liquid? Which other combinations of fixed leg payment frequency and floating leg reset frequency specifically would you consider to be sufficiently liquid?

AMAFI and FBF do not have any comment.

Question 11: Do you agree with this proposal? If not, please explain why and provide an alternative proposal.

AMAFI and FBF support the proposal that only three benchmark tenor must qualify as liquid.

Question 12: Do you agree with this proposal? If not, please explain why and provide an alternative proposal.

AMAFI and FBF agree with ESMA' proposal.

Question 13: Do you agree to the proposed timeline? If not, please explain why and present your proposal.

No. AMAFI and FBF consider **that the date of entry into force should be delayed for at least three months**. Indeed it would be concretely impossible for the industry to be compliant with the trading obligation by 3 January 2018 considering that:

- The final standard will be available very late in the process.
- Most of the trading venues that will offer trading for derivatives eligible for the TO will not be authorised before the end of 2017; once authorised the trading venues have to perform tests (connectivity and functional tests) with their market participants which implies incompressible timeframe.
- Moreover, the TO in the EU should be put in place only after third-country trading venues are recognised as equivalent by the European Commission. Indeed if third-country trading venues (especially Swap Execution Facilities) are not granted the equivalence by 3 January 2018, investment firms belonging to EMIR categories 1 (clearing members) and 2 would not be authorized to trade on non-EU venues for vanilla swaps (denominated in USD, EUR and GBP) and CDS indices and would be in an impossible position.