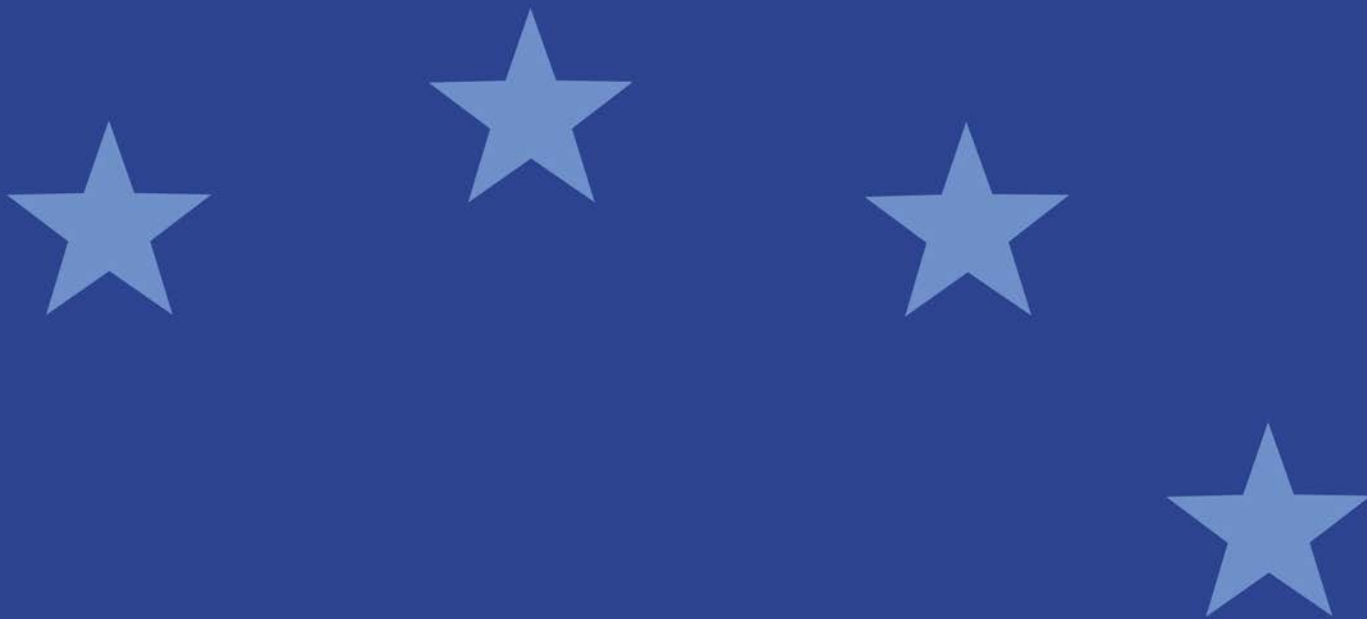


## **Reply form for the Consultation Paper on the trading obligation for derivatives under MiFIR**



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on the trading obligation for derivatives under MiFIR, published on the ESMA website.

### **Instructions**

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA\_QUESTION\_MIFID\_TO\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider.

### **Naming protocol**

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA\_MiFID\_TO\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_MiFID\_TO\_ESMA\_REPLYFORM or

ESMA\_MiFID\_TO\_ESMA\_ANNEX1

### **Deadline**

Responses must reach us by **31 July 2017**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input/Consultations'.



### ***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that 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 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 headings 'Legal notice' and 'Data protection'.



### General information about respondent

Name of the company / organisation	German Insurance Association (GDV)
Activity	Insurance and Pension
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

## Introduction

**Please make your introductory comments below, if any:**

<ESMA\_COMMENT\_MIFID\_TO\_0>

The German insurance industry welcomes the opportunity to respond to ESMA's consultation paper on introducing a trading obligation for derivatives under MiFIR. We understand that introducing trading obligations for derivatives is an indispensable duty according to G20 agreements that might develop positive effects for certain markets and major derivative traders and dealers. We believe that the corresponding legislation should

- take the **principle of proportionality** carefully into account (please see our comments in the introduction below)

and

- grant **sufficient phase-in** periods (please see our comments in Q 13).

### 1. Principle of proportionality

Insurers do not trade and deal derivatives as core business. They are not allowed to do this according to Article 132 (4) of the Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance ("Solvency II"). For European insurers, the use of derivatives is limited to achieve a reduction of risks or the facilitation of an efficient portfolio management. The trading and dealing of financial derivatives without this intentions described in Article 132 (4) Solvency II is therefore not permissible. German insurers predominately use financial derivatives to carefully hedge parts of their restricted assets "Sicherungsvermoegen", which cover the insurance companies' liabilities against their insurance clients. These hedging strategies - and the corresponding acquisition of financial derivatives on the buy-side - are important instruments of the insurers' asset liability management.

Since the stepwise introduction of EMIR and EMIR-related legislation, small insurance companies in particular have had to reduce the use of important hedging tools, because they cannot stem the administrative, operational and financial burdens anymore. Small insurance companies sustain a relevant competitive disadvantage if they cannot hedge their portfolios at reasonable costs against future risks anymore. But also even medium and bigger-sized insurers need to find alternative solutions, in order to avoid the burdens of EMIR and EMIR-related legislation.

We believe EMIR and EMIR-related legislation should consider these facts in order to comply with the principle of proportionality.

### 2. Analysis of clearing obligations with regards to insurers

#### a. Category 3-insurers

Before 21 June 2019

Category 3-insurers would not be subject to the trading obligation before 21 June 2019, as they will not be subject to EMIR's clearing obligation before that date according to the Commission's Delegated Regulation (EU) 2017/751 of 16 March 2017 amending Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives.

After 21 June 2019

Category 3-insurers might become subject to the trading obligation after 21 June 2019,

- if they acquire derivatives above the clearing threshold as proposed by the Commission's proposal of 4<sup>th</sup> May 2017 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, the

registration and supervision of trade repositories and the requirements for trade repositories (“EMIR review”) or

- the respective proposal of the Commission’s EMIR review will not be endorsed.

As an intermediate result, at least some category 3-insurers will be subject to the trading obligation according to ESMA’s current proposal.

- b. Category 2-insurers  
Category 2-insurers will soon be subject to all clearing obligations (9 August 2017).
- c. Category 1-insurers  
According to our knowledge, there is not one category 1-insurer in Germany.

### 3. Conclusion and proposal

The current proposal might not be proportional in the light of the fact, that the overall volume of the derivative business carried out by category 3-insurers does not seem relevant to the stability of the markets and in particular small and medium-sized insurers are already affected seriously by the burdens of EMIR and EMIR-related regulation. Also for category 2-insurers the burdens are getting out of proportion.

ESMA is analysing correctly, that even financial counterparties not currently trading derivatives on trading venues, “**will incur direct additional cost as IT connectivity costs, membership**” (page 66 of the consultation paper). It is also correct, that “**For firms that trade those derivatives infrequently, those costs could be significant**” and “**that firms might consider switching to alternative instruments or amending their business model**” (also page 66 of the consultation paper). - As explained above, category 3-insurers and even category 2-insurers are forced to look for cost proportional alternatives in order to best manage their assets in favour of the persons insured.

**With regard to the trading obligation, we therefore propose,**

**to exclude all category 3-insurance companies and to introduce a new threshold for category 2, in order to exempt financial counterparties not dealing the respective derivatives frequently, so that category 2 is subdivided into two groups. The current calibration of category 2 counterparties seems too strict with regard to the trading obligation and treats two very different groups equally: On the one hand, credit institutions, frequently dealing the respective derivatives as their core business and insurers on the other hand, not dealing frequently the respective derivatives but using it as an important and restricted asset management tool.**

<ESMA\_COMMENT\_MIFID\_TO\_0>



**Q1. 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.**

<ESMA\_QUESTION\_MIFID\_TO\_1>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_1>

**Q2. Do you agree with the revised proposal not to exempt post-trade LIS transactions? If not, please explain and present your proposal.**

<ESMA\_QUESTION\_MIFID\_TO\_2>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_2>

**Q3. Do you agree with this proposal? If not, please explain why and provide an alternative proposal for ESMA to populate and maintain the register.**

<ESMA\_QUESTION\_MIFID\_TO\_3>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_3>

**Q4. 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.**

<ESMA\_QUESTION\_MIFID\_TO\_4>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_4>

**Q5. 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**

<ESMA\_QUESTION\_MIFID\_TO\_5>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_5>

**Q6. 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?**

<ESMA\_QUESTION\_MIFID\_TO\_6>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_6>



**Q7. 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.**

<ESMA\_QUESTION\_MIFID\_TO\_7>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_7>

**Q8. 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?**

<ESMA\_QUESTION\_MIFID\_TO\_8>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_8>

**Q9. 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.**

<ESMA\_QUESTION\_MIFID\_TO\_9>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_9>

**Q10. 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?**

<ESMA\_QUESTION\_MIFID\_TO\_10>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_10>

**Q11. Do you agree with this proposal? If not, please explain why and provide an alternative proposal.**

<ESMA\_QUESTION\_MIFID\_TO\_11>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_11>

**Q12. Do you agree with this proposal? If not, please explain why and provide an alternative proposal**

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



**Q13. Do you agree to the proposed timeline? If not, please explain why and present your proposal.**

<ESMA\_QUESTION\_MIFID\_TO\_13>

According to ESMA's current proposal, first trading obligations for certain interest rate swaps and CDS should become effective as of 3 January 2018. This **timeline is much too short** in the light of the following uncertainties:

- a. Assessment by an entity whether it is impacted  
Insurers need to assess how and whether they are impacted. But it is not yet clear, if interest rate swaps with add-ons will be subject to the trading obligation. A reliable decision whether the own assets are affected by the trading obligation is not yet possible.
- b. Strategy  
From a strategic point of view, insurers must analyse carefully if it is profitable for them avoiding trading obligations by acquiring products with different maturities or not.
- c. Technical Infrastructure and connectivity  
Insurers are usually not connected to trading venues and must therefore in a first step adapt and implement the technical infrastructure required for the connection to a trading venue. In this respect, bottleneck effects must be expected, as several market participants in the same situation will ask for on-boarding in a short period of time. The costs of on-boarding and connectivity are not yet known.
- d. Contractual management  
Trading venues might need to adapt their contractual documentation to the new regulatory requirements. The legal examination and work will need time. And it will also need time to explain and to agree upon these contracts and to develop a common market understanding of standards.
- e. Adaptation of internal processes  
The scope of process-related adaptations (interfaces to internal systems, transition to CCPs etc.) is not yet clear, which makes it difficult, to further describe and estimate the workload, that must be expected.

We do not agree with ESMA's assumption that "EU market participants have been aware that the TO has been coming for quite a long period of time since [...] 2014" (page 47, no. 159 of the consultation paper). **It is not decisive whether market participants - and in particular buy-side - know about a certain regulatory plan in advance. They need the precise legal text and wording as well as the legal certainty which is - and only then - available, as soon as the new law was published in the Official European Journal.** In the current market situation with a remarkable regulatory workload, market participants cannot afford to implement processes precautionary "on stock" and running the risk of expensive and burdensome last minute adjustments. Such actions would also contradict to some extend fiduciary duties of insurers.

The market has just seen the short-term introduction of EMIR's bilateral margining obligations right after the publication of the respective regulatory technical standard in the Official European Journal. In practice, the counterparties had severe problems to implement the agreements and processes short-term, even if these obligations had been consulted for almost four years.

**With regard to the phase-in period, we therefore propose,**

**to grant sufficient time after the publication of the regulatory technical standard in the Official European Journal, i.e. at least 9 months.**

<ESMA\_QUESTION\_MIFID\_TO\_13>

## CBA QUESTIONS

**Q14. This first question aims at identifying the category of firm/entity you belong to. Please provide the total notional amount traded in derivatives (trading venues + OTC) in 2016 in thousands euros and the related total number of trades in the relevant boxes**

<ESMA\_QUESTION\_MIFID\_TO\_14>

Category	Number of employees	Total Notional traded 2016 (in thousands euros)	Total number of trades 2016
<b>EMIR Category 1</b>	[1-50]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[51-250]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[251-1000]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	>1000	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>EMIR Category 2</b>	[1-50]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[51-250]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[251-1000]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	>1000	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>EMIR Category 3</b>	[1-50]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[51-250]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[251-1000]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
		TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
<b>EMIR Category 4</b>	[1-50]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[51-250]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[251-1000]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE



		HERE	HERE
	>1000	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
Trading Venue	[1-50]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[51-250]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	[251-1000]	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
	>1000	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_14>

**Q15. Based on the draft RTS, which percentage of your derivative trading (notional amount and number of trades) do you expect to be captured by the TO? Please provide the data for derivatives globally, and then for interest rate derivatives and for credit default swaps, using 2016 trading data?**

<ESMA\_QUESTION\_MIFID\_TO\_15>

% of trading captured by the TO	Year 2016
% of total notional amount traded in derivatives captured by the TO	TYPE YOUR TEXT HERE
% of total number of transaction in derivatives captured by the TO	TYPE YOUR TEXT HERE
% of total notional amount traded in interest rate derivatives captured by the TO	TYPE YOUR TEXT HERE
% of total number of transactions in interest rate derivatives captured by the TO	TYPE YOUR TEXT HERE
% of total notional amount traded in credit default swaps captured by the TO	TYPE YOUR TEXT HERE
% of total number of transactions in credit default swaps captured by the TO	TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_15>

CBA Questions 16 and 17 are to be answered by investment firms and significant non-financial counter-parties

**Q16. Out of the trading activity expected to be captured by the TO, as identified under Q2, which % is already traded on an EU regulated market, an EU Multilateral Trad-**



ing Facility (MTF), a US Swap Execution Facility (SEF) or another third-country trading venue?

<ESMA\_QUESTION\_MIFID\_TO\_16>

Trading activity expected to be captured by the TO	Traded on a regulated market	Traded on an EU MTF	Traded on a US SEF	Traded on another 3 <sup>rd</sup> country venue
% of total trading volume captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
% of total number of transactions captured by the TO already traded on an EU trading venue, a US SEF or another third-country venue	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_16>

**Q17. Compliance with the TO may require some further trading arrangements. Which of the following statement would you consider relevant regarding the steps you might be taking to that end? Please add any comment as appropriate.**

<ESMA\_QUESTION\_MIFID\_TO\_17>

Arrangements contemplated to comply with the TO	Yes	No	Comments
1. Current membership/Direct Electronic Access (DEA) arrangements are sufficient to comply with the TO	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
2. I intend to become a member/ participant/client of one (or multiple) EU trading venues for the first time	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
3. I intend to become a member/participant/client of additional EU trading venues	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
4. I intend to seek access to EU trading venues through Direct Electronic Access (DEA)	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
5. I intend to combine membership (2.or 3) with DEA (4.)	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
6. I am considering other arrangements; Please explain those arrangements in the Com-	TYPE YOUR	TYPE YOUR	TYPE YOUR TEXT HERE



ments section	TEXT HERE	TEXT HERE	
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<ESMA\_QUESTION\_MIFID\_TO\_17>

**CBA Question 18 is to be answered by trading venues**

**Q18. Question 5: Which of the derivatives subject to the TO, based on the draft RTS, are currently available for trading on your trading venue? Do you consider extending trading on your venue to other derivatives subject to the TO?**

<ESMA\_QUESTION\_MIFID\_TO\_18>

Derivatives potentially subject to the TO currently available for trading on your venue	Derivatives potentially subject to the TO that may become available for trading on your venue
TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_18>

**CBA Questions 19 to 22 are to be answered by all respondents**

**Q19. Based on the draft RTS, which impacts do you expect from the TO in the short and medium term? Please elaborate as appropriate under Positive or Negative impact.**

<ESMA\_QUESTION\_MIFID\_TO\_19>

TO Impact	Positive Impact	Negative impact
Impact on your business model/ organisation/ client relationship	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
Impact on your revenues	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
Impact on market structure (e.g. principal vs. agency trading etc).	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
Impact on market liquidity and execution costs.	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
Other impacts. Please elaborate	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_19>

**Q20. Is there any specific provision in the draft RTS that you would expect to be a source of significant cost? If so, please elaborate.**

<ESMA\_QUESTION\_MIFID\_TO\_20>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_MIFID\_TO\_20>

**Q21. Please provide an indication, even a rough one, of compliance costs (in thousands of euros).**

<ESMA\_QUESTION\_MIFID\_TO\_21>

Draft RTS on the TO	a. IT costs	b. Training costs	c. Staff costs	d. Other costs (please identify)	Total costs ( if a., b, c or d. are not available separately)
One-off costs	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE
Recurring costs (on an annual basis}	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE	TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIFID\_TO\_21>

**Q22. Taking into account the size of your firm, would you qualify overall compliance costs with the draft RTS as low, medium or high?**

<ESMA\_QUESTION\_MIFID\_TO\_22>

Please enter here "Low", "Medium" or "High" TYPE YOUR TEXT HERE
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<ESMA\_QUESTION\_MIFID\_TO\_22>