

Response Form to the Consultation Paper

Alignment of MiFIR with the changes introduced by EMIR Refit



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex III. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **22 November 2019**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_AMER_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_AMER_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_AMER_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on Position limits and position management in commodities derivatives").



Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response 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 under the heading [Legal Notice](#).

Who should read this paper

This document is of interest mainly to financial and non-financial counterparties which are subject to the trading obligation under MiFIR and/or to the clearing obligation under EMIR.

General information about respondent

Name of the company / organisation	BVI Bundesverband Investment und Asset Management e.V.
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_AMER_1>

BVI¹ welcomes the opportunity to respond to the consultation on alignment of MiFIR with the changes introduced by EMIR Refit.

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 111 members manage assets more than 3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

<ESMA_COMMENT_AMER_1>

Questions

Q1 : Do you have any comment on the analysis of the amendments in relation to financial counterparties?

<ESMA_QUESTION_AMER_1>

We share ESMA analysis and fully support ESMA conclusions, in particular on the necessity of aligning the DTO under MiFIR with changes made under EMIR Refit to the CO.

In the context of the updated clearing obligation under EMIR Refit Small Financial Counterparties (e.g. UCITS/AIFs) are required by exceeding the clearing threshold for at least one class of OTC derivatives (e.g. FX) to comply with the clearing obligation for all classes of OTC derivatives, given the interconnectedness of financial counterparties and the possible systemic risk to the financial system that might arise if those OTC derivative contracts were not centrally cleared. However, some of the relevant clearing eligible asset classes are not subject to the EMIR clearing obligation. ESMA has not mandated such asset classes to the clearing obligation. Especially Foreign Exchange derivatives are not mandated for the clearing obligation (please consider ESMA website: <https://www.esma.europa.eu/regulation/post-trading/otc-derivatives-and-clearing-obligation>). Highly regulated investment funds (UCITS/AIFs) use in their investment portfolios Foreign Exchange to hedge their positions or for investment purposes.

We are of the opinion that as soon as a position calculation for one class of OTC derivatives exceeds the clearing threshold for currently not clearing eligible FX derivatives and which are below the calculation clearing thresholds for the ESMA mandated clearing products IRS and CDS investment funds should not be subject to DTO for interest and credit default swaps. The purpose of the EMIR revision is to exempt Small Financial Counterparties (e.g. UCITS/AIFs) with a small volume of OTC derivatives from the clearing obligation, as these do not represent a systemic risk. Connecting Small Financial Counterparties (e.g. UCITS/AIFs) via a clearing member to a CCP involves high costs. In this case we refer to the other ESMA consultation on the FRANDT principles. Therefore, some UCITS/AIFs are now subject to the clearing obligation as they are above the clearing threshold for FX but they do not have either any IRS or CDS in their portfolio for clearing or they have only a very limited volume of IRS&CDS for clearing which is significantly below the clearing threshold.

<ESMA_QUESTION_AMER_1>

Q2 Do you have any comment on the analysis of the amendments in relation to non-financial counterparties?

<ESMA_QUESTION_AMER_2>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_AMER_2>

Q3 : What is your view on the possible development of on-venue trading for contracts not cleared with a CCP? What are the challenges for the trading venues? What are the challenges for the counterparties exempted from the CO and subject to the DTO?

<ESMA_QUESTION_AMER_3>

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<ESMA_QUESTION_AMER_3>

Q4 : What is your view on the arguments exposed above, supporting the status quo i.e. a misalignment between the scope of counterparties subject to the CO and the DTO (G20 objectives, compliance with the DTO less burdensome than with the CO)? Can you identify other arguments?

<ESMA_QUESTION_AMER_4>
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<ESMA_QUESTION_AMER_4>

Q5 : What is your view on the arguments exposed above, supporting the alignment between the scope of counterparties subject to the CO and the DTO (initial policy intention, potential de-facto clearing obligation, limitation of operation burden)? Can you identify other arguments?

<ESMA_QUESTION_AMER_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_AMER_5>

Q6 : What is your view on ESMA's proposal to suggest an alignment in the scope of counterparties between the clearing and trading obligations?

<ESMA_QUESTION_AMER_6>
We agree with the alignment between the CO and DTO. In that perspective, we consider that the CO regime should drive the applicability of the DTO, the latter starting only once several trading venues and MTFs/OTFs offer an economically viable solution.
<ESMA_QUESTION_AMER_6>

Q7 : What is your view on the necessity to introduce a standalone suspension of the DTO in MiFIR? If you consider it is appropriate, do you have views on how it should be framed?

<ESMA_QUESTION_AMER_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_AMER_7>

Q8 : Have you identified other aspects of the DTO under MiFIR that should be aligned with amendments introduced by EMIR Refit? If so, please explain the amendments to MiFIR that could be introduced.

<ESMA_QUESTION_AMER_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_AMER_8>