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| **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](http://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](http://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](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/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**

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| --- | --- |
| Name of the company / organisation | Deutsche Börse AG (DBAG) |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | Germany |

**Introduction**

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

<ESMA\_COMMENT\_AMER\_1>

**DBAG has welcomed the introduction of the trading obligation for OTC derivatives under MiFIR as one of the key cornerstones of the G20 reforms in the aftermath of the financial crisis** and supports ESMA in its efforts to further specify the conditions and procedures for making the trading obligation provisions applicable. As such, we understand ESMA’s interest to ensure a consistent regulatory framework across regulatory files.

We also acknowledge the target of EMIR REFIT to relief smaller market participants from unnecessary burden and understand the introduction of small financial counterparties (FC-) as part of this attempt. **The overarching rationale when granting exemptions should always be to strike the balance between thoroughly implementing G20 objectives and justified proportionality to cater for the needs of smaller counterparties.**

**Any recommendation to the European Commission to align the trading obligation for OTC derivatives under MiFIR with the recent changes to the counterparties in scope of the clearing obligation under EMIR Refit should not be rushed – but rather based on evidence.** The proposals to remove counterparties from the trading obligation on the basis of this alignment has the air of a cascade of rolling back regulatory reform. Firstly, to assuage this concern, the European Commission should clarify whether a reduction in transparency and competition on the trading layer was included in the EMIR REFIT assessment.

Secondly, in order to achieve an optimal outcome for the market and legislative intentions, we believe **any exemption from key rules agreed by the G20 with a view to making our markets more stable and resilient should be based on a thorough impact assessment conducted by ESMA** in order to avoid that any unintended side effects will override the common goal of avoiding unnecessary regulatory burden in particular for smaller market participants.

Having that said, we want to make the following remarks on the consulted subject:

* **It seems questionable whether exempting FC- will eventually serve to the advantage of these market participants** as they will most likely remain strongly bilaterally exposed to a potential default of large market participants and overall will increase their dependence on these. While the exemption from both clearing and trading obligations may appear as an initial cost relief for some, these firms might become undercollateralized, exposed to the default of systemic banks and lose the benefits of increased transparency.
* Most of the financial counterparties who would fall in the FC- category are usually not direct trading members on regulated markets, but **exempting them will most likely increase barriers for these smaller market participants** to become trading members (if they want to).
* It is further worth noting in this context the review clause of EMIR REFIT includes the option for ESMA to assess the effectiveness of the threshold calculation for defining FC-. We believe that **the threshold calculation for FC- in EMIR REFIT is not fully clear and leaves doubt whether truly only the targeted group of small financial counterparties will end up in this category**. **We are in particular concerned that the entity level calculation for funds of the new threshold (instead of group level) will lead to these entities falling out from the clearing trading obligation. This could have serious negative implications for the overall systemic risk and broader financial stability, not only via the bilateral market dimension but also because any clearing ecosystem needs a healthy balance between “fixed payers” and “fixed receivers”.** Funds (including pension funds) in particular, play a vital role in this context, as those are the key entities seeking long-dated exposures. Taking this market segment out of the equation would lead to a systemic build of up risk by resulting in a systematic imbalance. In this context, we also note that the EU is lacking behind if benchmarked at global level, as other jurisdictions have included such entities in the clearing ecosystem for a long time already.
* Though we believe it is important to ensure regulatory consistency across files, we take the view that the definition of FC- in EMIR REFIT does not appear to be flawless. **Therefore, we oppose to agree a continuation of these flaws by linking the MiFIR trading obligation to FC-. In the broader context it should also be noted, that the EU should avoid any further reduction of transparency and “lit trading”, as it runs counter to the G20 Pittsburgh agreement. Also here it should be noted that the EU lacks behind if benchmarked at global level, as other jurisdictions see significantly more “lit trading” via regulated markets, a core element to guaranteeing financial stability and integrity.**

**As such, any fair economic and financial calculation of providing “relief” to smaller market participants (“industry cost”) should also always contain an assessment on potential costs incurred for society (“socialised costs”) due to defaults caused by overly complex bilateral market structures, intransparency, undercollateralisation and inappropriate risk management. The lessons from the crisis should not be forgotten.**

We would highly appreciate if these points would be taken into consideration by an appropriate impact assessment to allow for a well-informed advice to be taken. Otherwise, the EU may run the risk of potentially scaling back well-intended rules in the context of financial stability and integrity, which have only been agreed a short time ago.

In the meantime, ESMA’s statement from 2 July 2019 on MiFIR implementation by national competent authorities (NCAs) could continue to apply. NCAs could continue to not prioritize their supervisory actions in relation to the derivatives trading obligation towards the counterparties exempted from the clearing obligation.

As previously stated in our response to the consultation paper on the trading obligation for derivatives under MiFIR from 19 June 2017, we are generally cautious to exempt specific segments from the OTC derivatives market from the trading obligation.

<ESMA\_COMMENT\_AMER\_1>

**Questions**

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

<ESMA\_QUESTION\_AMER\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_AMER\_1>

1. 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>

1. : 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>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_AMER\_3>

1. : 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>

Please refer to our general comments in the introductory remarks.

<ESMA\_QUESTION\_AMER\_4>

1. : 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>

Please refer to our general comments in the introductory remarks.

<ESMA\_QUESTION\_AMER\_5>

1. : 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>

Please refer to our general comments in the introductory remarks.

<ESMA\_QUESTION\_AMER\_6>

1. : 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>

1. : 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>

Please refer to our general comments in the introductory remarks.

<ESMA\_QUESTION\_AMER\_8>