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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 | Irish Funds Industry Association |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Ireland |

**Introduction**

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

<ESMA\_COMMENT\_AMER\_1>

The Irish Funds Industry Association (Irish Funds) welcomes the opportunity to respond to ESMA’s consultation paper on the Alignment of MiFIR with changes introduced by EMIR Refit. Irish Funds is the representative body for the international investment fund community in Ireland. Irish Funds has a broad membership encompassing firms across all parts of the funds industry and, through its extensive working group structure, is active on all significant technical topics relating to funds. Through its representation and participation on government and industry committees/working groups and the development of guidance and policy papers, Irish Funds, working collaboratively with industry, has contributed to the regulatory and legislative framework and defined market practice. The collaboration across our member companies ensures that a wide range of industry perspectives and insights are represented in the formulation of those policy and guidance papers and in its responses to this consultation paper. Given Irish Funds’ membership base, these responses do not address questions specific to the position of non-financial counterparties or trading venues.

<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>

Irish Funds agrees with ESMA’s interpretation that, before EMIR Refit, the legal framework indicated a policy intention to align the scope of counterparties subject to the Clearing Obligation (CO) and the Derivatives Trading Obligation (DTO). Irish Funds considers this interpretation to be supported by:

* Article 2 of Commission Delegated Regulation (EU) 2017/2417 of 17 November 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives (the “**MiFIR RTS**”) which links, with respect to a category of counterparty referred to in Article 3 of:
	+ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation; or
	+ Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation,

the effective date of the DTO with the effective date of the CO for that category of counterparty;

* Recital 5 of the MiFIR RTS, which states “… Given the link between the clearing obligation and the trading obligation, the trading obligation for each category of counterparty should only take effect once the clearing obligation for that category has already taken effect.”; and
* Article 28(2) of MiFIR (as referenced at paragraph 30 of the Consultation Paper).

<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>

Not applicable. See introductory comments.

<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>

The development of on-venue trading for uncleared derivatives contracts does not affect the fact that the imposition of a requirement to trade on such a venue should only be imposed where, as noted by the G20 agreement, such a requirement is “appropriate”[[1]](#footnote-2). Irish Funds is of the view that the EU’s pre-EMIR Refit implementation of the G20 agreement indicates an acceptance by EU legislators and regulators that alignment of the counterparties subject to the CO and DTO is required to meet that test of appropriateness.

Irish Funds expresses no view on the challenges for trading venues (see the introductory comments to these responses).

As regards counterparties exempted from the CO and subjected to the DTO, Irish Funds shares the concern raised by ESMA, at paragraphs 35 to 38 of the Consultation Paper, that the application of a stand-alone DTO to small Financial Counterparties (FCs) that are exempt from the CO could, given current market functioning, result in the application of a “de facto” CO for those small FCs. Irish Funds considers that such a result would be a disproportionate response to the limited systemic risk posed by such small FCs and runs counter to the approach taken by the EU legislators and regulators prior to EMIR Refit (see its response to Question 1). Irish Funds is also concerned that imposing a stand-alone DTO would impose, on small FCs, administrative burdens and costs that are disproportionate to the (low) level of systemic risk posed by such small FCs. (Irish Funds expresses no view on the position regarding NFCs; see the introductory comments to these responses.)

<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>

As indicated above, Irish Funds advocates alignment of the scope of counterparties subject to the DTO with those subject to the CO. As regards the arguments against such alignment, it does not consider the argument that compliance with the DTO is less burdensome than compliance with the CO to be persuasive. As indicated in its response to Question 3, Irish Funds shares ESMA’s concern that requiring small FCs to comply with the DTO will de facto bring them into scope for the CO and so they will in fact be subject to the burdens and costs associated with CO compliance. Irish Funds has not identified any other arguments in favour of misalignment.

<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>

Irish Funds agrees with ESMA’s arguments supporting alignment of the scope of counterparties subject to the DTO with those subject to the CO and strongly advocates for such alignment. Irish Funds is also of the view that maintaining the current misalignment could, particularly given the increased administrative costs and burdens associated with the DTO and potential de facto CO for small FCs (see our response to question 3 above), discourage small FCs from transacting derivatives that are in scope for the DTO even for purposes of risk management, thereby increasing risk levels within the financial system.

<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>

Irish Funds supports ESMA’s proposal to suggest an alignment in the scope of counterparties subject to the DTO with those subject to the CO and strongly advocates for such alignment.

<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>

Whereas Irish Funds supports ESMA’s proposal to introduce a standalone power to suspend the DTO in MiFIR for the reasons set out in the Consultation Paper, it is also of the view that the parameters within which such a power may be exercised should, as is the case with the CO, be clearly prescribed.

<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>

Irish Funds notes that the focus of the Consultation Paper is on misalignment between the categories of counterparty subject to the CO and DTO, which reflects Irish Funds’ current concerns. However, Irish Funds is aware of suggestions that a misalignment may also arise in respect of an individual transaction in circumstances where that transaction is subject to the DTO and would, save for the application of a derogation from the CO specific to a category of transactions to which it belongs, be subject to the CO. Irish Funds has not yet identified any existing such misalignments of specific relevance to its members but suggests that, in order to future-proof the alignment of the application of transactions subject to the DTO with those subject to the CO (for the avoidance of doubt; Irish Funds does not suggest that the scope of the DTO should be expanded to encompass all transactions subject to the CO but, instead, that no transaction should be subject to the DTO unless it is also subject to the CO), consideration might be given to whether alignment can be achieved at the level both of counterparty (as proposed by ESMA) and individual transaction (on the basis outlined above).

<ESMA\_QUESTION\_AMER\_8>

1. See G20 Leaders Statement: The Pittsburgh Summit, at section 13: “…*Improving over-the-counter derivatives markets*: All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the FSB and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse. …” [↑](#footnote-ref-2)