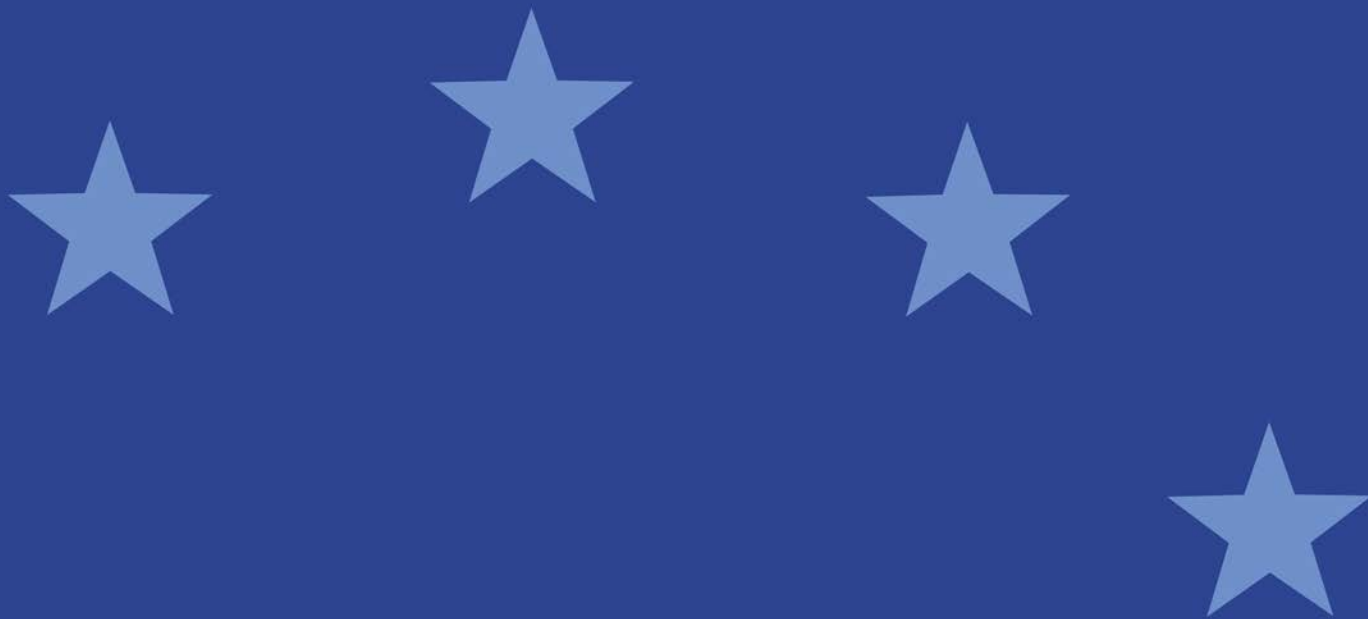


## **Reply form for the Discussion Paper on the re- view of the clearing thresholds under EMIR**



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Discussion Paper on the review of the clearing thresholds 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\_DP\_EMIR\_CTs> - 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;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

### **Naming protocol**

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

ESMA\_DP\_EMIR\_CTs\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_DP\_EMIR\_CTs\_ESMA\_REPLYFORM

### **Deadline**

Responses must reach us by **19 January 2021**.

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	BVI
Activity	Investment Services
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Germany

## Introduction

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

<ESMA\_COMMENT\_DP\_EMIR\_CTs>

We welcome ESMA's initiative to review the current population of counterparties and groups subject to the clearing obligation and the clearing thresholds after the entry into force of the EMIR Refit.

We strongly support within EMIR Refit the option to relieve Small Financial Counterparties (SFC) with a limited clearing volume from the clearing obligation by introducing a clearing threshold. We strongly confirm the evidence provided within the EMIR Refit process and in this discussion paper that for the smallest financial counterparties with a limited clearing volume such as many UCITS/AIFs it is economically unfeasible to fulfil the clearing obligation. Such UCITS/AIFs do not pose any important systemic risk for the financial system.

The vast majority of regulated (German) investment funds (UCITS/AIF) belong to the clearing category "Small Financial Counterparty". Only a few funds are above the EUR 8 billion thresholds calculated individually at fund level and are therefore classified within category (2). Our members with a limited volume of clearing activity face generally difficulties to find clearing members willing to set up legal and operational arrangements with SFC funds, accessing a CCP. The negotiation power of Small Financial Counterparties is limited when interacting with clearing members. Furthermore, many clearing members are less willing to offer client clearing services beyond their most important and biggest clients largely due to the stringent capital requirements applicable to them (e.g. BCBS Leverage Ratio). Most clearing members do generally not offer a cost-effective client clearing model which provide a viable solution to our small and medium-sized member firms. Due to the low number of transactions and the limited clearing volume executed by our small and medium sized members, using a clearing member will be disproportionately expensive as high basic fees are charged independently of the transaction fees

We strongly suggest excluding currency derivatives from the calculation of the clearing threshold for Small Financial Counterparties (UCITS/AIF) as such entities do not represent any systemic risk to the financial system. The clearing of a very limited volume of clearing eligible IRS & CDSs (e.g. one CDS trade within the quarter) by the UCITS/AIFs are not proportionate given the high cost to maintain an access to the clearing broker and the CCP.

<ESMA\_COMMENT\_DP\_EMIR\_CTs>

**Q1. Please explain if you see a need for further clarification on how to identify OTC contracts for the purpose of the calculation of the positions to be compared to the clearing thresholds.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_1>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_1>

**Q2. Please explain if you see a need for further clarification to identify OTC contracts that can be considered as reducing risks directly relating to commercial activity or treasury financing activity. And please mention any additional aspects to be further considered with regards to the hedging exemption.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_2>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_2>

**Q3. Please provide information and examples on how counterparties count fungible ETDs and OTC derivatives for the purpose of the calculation of the clearing thresholds?**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_3>

UK regulated markets offer for trading a broad range of exchange-traded derivatives (ETDs) that are widely used for risk- and hedge management purposes by market participants (e.g. UCITS/AIFs) in the EU. In many cases, UK regulated markets provide market users (e.g. German fund manager) with uniquely deep and liquid markets with global participation (and hence a wider number of potential counterparties) and there is currently no direct substitute for some UK ETDs on regulated markets in the EU or in other third countries.

Derivatives traded on non-equivalent third-country regulated markets are regarded as "OTC derivatives" under EMIR. In the absence of equivalence under EU EMIR Article 2a, ETDs traded on UK regulated markets will be considered as OTC derivatives for the purposes of determining whether Small Financial Counterparties have breached the clearing threshold to become financial counterparties. Adverse impacts of re-classification will have the effect that such transactions will be subject to the calculation of the clearing threshold under the EMIR for the first time. Small Financial Counterparties have then to aggregate their positions in UK ETDs when determining whether they are 'Small Financial Counterparties' that are exempted from the clearing obligation under EMIR REFIT.

A potentially widespread reclassification exercise under EU EMIR will cause significant confusion in the financial market. It will require costly and time-consuming updates to trading and other IT systems. This impact is exacerbated because these classifications apply at the level of all of the entities in a counterparty's corporate group.

Therefore, we are of the opinion that UK-ETDs should not be incorporated in the calculation of the clearing threshold positions for OTC derivatives within the EMIR framework. UK-ETDs will be automatically cleared and therefore collateralized due to their nature. Therefore, it would not be in line to reclassify such transaction which will then counted to the calculation of the clearing threshold.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_3>

**Q4. Please provide data and arguments to illustrate the potential impact of the lack of an equivalence decision under Article 2a of EMIR and what could be done to alleviate your concerns (besides an equivalence decision)? Please specify the kind of transactions and activities that would be affected and the purpose of those, and whether there are alternatives.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_4>

Please see our answer to question 3.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_4>

**Q5. Please describe the scenarios when transactions do not qualify as hedging transactions.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_5>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_5>

**Q6. Please describe your views on how the EMIR framework works (also compared to other regimes) for the purpose of the clearing thresholds and the requirements triggered by those? Please provide examples and supporting data.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_6>

Please see our answer to question 11.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_6>

**Q7. Considering the current coverage provided by the clearing thresholds in relation to credit derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_7>

We suggest aligning the CDS clearing threshold (EUR 1 billion) to the interest rate derivative position (EUR 3 billion). EMIR Refit relieves Small Financial Counterparties (SFC) with a limited clearing volume from the clearing obligation by introducing a clearing threshold. In this context, we strongly confirm the evidence provided within the EMIR Refit process and in this discussion paper that for the smallest financial counterparties with a limited clearing volume such as many UCITS/AIFs it is economically unfeasible to fulfil the clearing obligation. Such UCITS/AIFs do not pose any important systemic risk for the financial system. The alignment of the CDS clearing threshold to the IRS clearing barrier would be in line with the EMIR Refit aim to release Small Financial Counterparties from the clearing obligation burden.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_7>

**Q8. Considering the current coverage provided by the clearing thresholds in relation to interest rate derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_8>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_8>

**Q9. Considering the current coverage provided by the clearing thresholds in relation to commodity derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_9>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_9>

**Q10. Considering the current coverage provided by the clearing thresholds in relation to equity derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_10>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_10>

**Q11. Considering the current coverage provided by the clearing thresholds in relation to currency derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_11>

In the context of the clearing obligation under EMIR Refit Small Financial Counterparties (e.g. UCITS/AIF) are required by exceeding the clearing threshold for at least one class of OTC derivatives (e.g. currency derivatives) 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 also not mandated such asset classes to the DTO. Currency 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 use in their investment portfolios foreign exchanges to hedge their position or for investment purposes.

In the case of Small Financial Counterparties, as soon as a position calculation for one class of OTC derivatives exceeds the clearing threshold for currently not clearing eligible currency derivatives and which are below the calculation clearing thresholds for the ESMA mandated clearing products IRS/CDSs investment funds are subject to a clearing obligation for such products. However, some of our members are currently subject to the clearing obligation as they are above the clearing threshold for currency derivatives, but they do not have either any IRS and CDS in their portfolio for clearing or they have only a very limited

volume of IRS & CDS for clearing (e.g. one trade within the quarter) which do not represent any risk to financial stability.

The purpose of the EMIR Refit 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 any systemic risk. Connecting Small Financial Counterparties via a clearing member to a CCP involves high costs without any additional value to the financial stability. In this case we refer to the ESMA consultation paper on the FRANDT principles<sup>1</sup>.

**Therefore, we strongly suggest excluding currency derivatives from the calculation of the clearing threshold for Small Financial Counterparties (UCITS/AIF) as such entities do not represent any systemic risk to the financial system.** The clearing of a very limited volume of clearing eligible IRS & CDSs (e.g. one CDS trade within the quarter) by the UCITS/AIFs are not proportionate given the high cost to maintain an access to the clearing broker and the CCP.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_11>

**Q12. Beyond the different treatments between FCs and NFCs in the calculation, are there differences between the different types of counterparties that might justify a different calibration of the actual clearing thresholds? In addition, please consider if a different calibration of the current clearing thresholds by type of counterparty should apply in the same manner to all asset classes. Please provide any supporting data that might help illustrate your response.**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_12>

Please see our answer to questions11.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_12>

**Q13. Looking at the simulations presented in the paper and at the impact they would have, do you have any views on the sensitivities of the thresholds?**

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_13>

We have no comments.

<ESMA\_QUESTION\_DP\_EMIR\_CTs\_13>

---

<sup>1</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-151-2672\\_ta-frandt\\_art\\_43a.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-151-2672_ta-frandt_art_43a.pdf)