



European Securities and
Markets Authority

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	Association of the Luxembourg Fund Industry (ALFI)
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Luxembourg

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_AMER_1>

The **Association of the Luxembourg Fund Industry (ALFI)** represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg-domiciled investment funds, asset management companies and a wide range of businesses that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, law firms, consultants, tax advisory firms, auditors and accountants as well as specialist IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg-domiciled investment funds are distributed in more than 70 countries around the world.

We thank the ESMA for the opportunity to participate in this consultation.

<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>

Mid-June 2019, ESMA updated last week the Public Register for the Trading Obligation for derivatives under MIFIR¹.

Since EMIR enforcement ESMA gradually increased the scope of both the OTC derivatives clearing obligation (CO) and trading obligation (TO), and so far TO calendar has always been aligned to the CO calendar (i.e. TO not to start before the CO). As ESMA has not updated the Table 5 (Dates from which the TO takes effect) to maintain consistency between TO and EMIR-Refit revised CO calendar, the industry might fall under the on-venue trading obligation [starting June 21st](#), so ahead of the CO for the bulk of Category 3 which benefits from the SFC clearing exemption.

Our understanding was that the update of Table 5 to reflect the clearing exemptions (e.g. for SFCs) might have been forgotten.

On 12 July, ALFI publically welcomed the statement² published the same day by ESMA, which proposed a short-term solution to address the misalignment of the scope of entities subject to the clearing and the trading obligations on a temporary basis.

ESMA's statement addresses two areas:

- Clearing and trading obligations for small financial counterparties and non-financial counterparties; and,
- Date of application of the trading obligation for financial counterparties (FC) which are in Category 3 and subject to the CO.

The statement advises National Competent Authorities (NCAs) not to prioritise their supervisory actions in relation to the TO towards counterparties exempted from the CO following the entry into force of EMIR Refit.

Additionally, for financial counterparties (FC) in Category 3 which are subject to the CO, the date of application of the TO should be the same as the new date of application of the CO as amended by EMIR Refit. This date of application should hence be four months following the notification from FC to ESMA and NCA as required under EMIR Refit, rather than 21 June 2019.

<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>

In the spirit of our response to question 1, we agree with the statement in §20 according to which the misalignment should be corrected.

<ESMA_QUESTION_AMER_2>

¹ https://www.esma.europa.eu/sites/default/files/library/public_register_for_the_trading_obligation.pdf

² <https://www.esma.europa.eu/press-news/esma-news/esma-addresses-derivatives-trading-obligation-concerns-following-entry-force>

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>

We consider that the amendment of the CO under EMIR Refit, should be automatically reflected in the MiFIR DTO, for consistency purposes. The introduction of the SFC category should not modify the perfect alignment explained in §29. This scenario would support legal consistency and would not be against G20 requirement as FSB recognizes the relevance to have a different treatment for less risky counterparties.

We tend to disagree with the provisions of §27. The ultimate goal of the commitment of G20 to increase the level of cleared OTC derivatives is to reduce the systemic risk. This goal is, however, not jeopardized by the SFC CO exemption. CO should be applied when relevant, but we consider that DTO should be suppressed for SFCs whose inherent characteristics justifies such exemption³. In addition, entities may opt-in for central clearing on a voluntary basis.

The scenario described in §36 would lead to the undesirable situation where two classes of MTF/OTF would arise: with the clearing and without the clearing. This would create a very unclear situation with the market being forced to determine the “market best practices” (i.e. with or without clearing).

As regards the cross referencing between EMIR and MiFIR, we do not believe on the benefits nor on the practicality of DTO especially for investment funds generally not subject to MiFIR obligations. We consider that they duplicate the role of the CCPs or transform them into trading venues and increase artificially transaction costs without reduction of risk, for the counterparties who make the choice of assessing their amount of OTC derivatives vis-à-vis the clearing thresholds.

<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>

We confirm our disagreement with this misalignment.

The alignment should be obtained by suppressing the DTO, at the very least for SFCs.

<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>

³ SFC definition in EMIR Refit : Certain financial counterparties have volume of activity in OTC derivatives that is too low to represent systemic risk, and this volume is too low for central clearing to be economically viable.



See above. In addition, the pedagogical argument is important in order not to create unjustified exceptions and to be able to simply explain clearly the CO and DTO in light of the numerous issues observed in the MiFIR and EMIR implementation.

<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 support the alignment between the CO and DTO. In that perspective, we consider that the CO regime should drive the applicability of the DTO.

The suppression of DTO should trigger the revision of the TO, at least for SFCs.

<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>

It is a minimum to suspend the DTO if the CO is suspended.

In addition, should a FC become SFC or an NFC+ falling below a clearing threshold, both CO and DTO should *be* suspended.

<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>

No

<ESMA_QUESTION_AMER_8>