

**EFAMA reply to the ESMA Consultation Paper on
the Alignment of MiFIR with the changes introduced by EMIR Refit**

EFAMA¹ welcomes ESMA's analysis and fully supports ESMA's conclusions on the necessity of aligning the DTO under MiFIR with changes to the CO made under EMIR Refit.

We consider however that, thanks to the successful implementation of the EMIR clearing obligation and the risk mitigations techniques, the DTO could be removed entirely.

Should ESMA decide to maintain the DTO, we would recommend to:

- Suppress the DTO for SFC and NFC, to ensure alignment with EMIR Refit; and
- Suspend automatically the DTO when the CO is suspended.

¹ EFAMA is the voice of the European investment management industry, representing 28 member associations and 60 corporate members and 23 associate members. At end 2018, total net assets of European investment funds reached EUR 15.2 trillion. These assets were managed by almost 62,000 investment funds, of which more than 33,000 were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org

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

EFAMA shares ESMA's analysis and fully supports ESMA's conclusions on the necessity of aligning the DTO under MiFIR with changes to the CO made under EMIR Refit.

We also consider that, thanks to the successful implementation of EMIR clearing obligation and the risk mitigations techniques, the DTO could be removed entirely as:

- DTO is creating undue complexity as CCPs are the counterparties to each party in a clearable derivatives transaction, ensuring execution of the transaction in a systemic risk-free OTC derivatives market;
- Imposing a Trading Obligation on transactions that are centrally cleared would potentially lead CCPs to become venues or members of a venue, with all the additional capital requirements that would supersede the ones requested from CCPs; and
- in the context of the updated 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. FX) to comply with the clearing obligation for all classes of OTC derivatives. 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 DTO, especially Foreign Exchange derivatives are not mandated for the clearing obligation. Highly regulated investment funds use Foreign Exchange derivatives in their investment portfolios to hedge their position or for investment purposes.

Should the DTO be nevertheless applied, FC- should be exempted from the DTO, in application of EMIR Refit.

Lastly, we would recommend that ESMA use identical terminology across legislations to identify counterparties, especially Financial Counterparties ("FC") and small financial counterparties. The notions of FC+ and FC- proposed by ESMA could create confusion as they are not currently defined in any text. Therefore, we recommend adding the definition of a FC in the MiFID definitions to create a cross reference.

Q 2: Do you have any comment on the analysis of the amendments in relation to non-financial counterparties?

We agree with ESMA's analysis in relation to non-financial counterparties.

Q 3: 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?

As referred to in this consultation, we welcome the ESMA statement dated 12 July 2019 on the interim period regarding the DTO following the entry into force of EMIR Refit. In that perspective,

we would suggest including the elements referred in the points 24 and 25 of the consultation paper in the ESMA Q&A on EMIR.

Regarding the application of the DTO, we consider that the extension of the CO as modified by EMIR Refit should be automatically applicable to the DTO. This would support legal consistency and would be consistent with G20 requirement as the FSB recognizes the relevance to have a different treatment for counterparties representing a lower systemic risk. This approach would also respect the principle of proportionality in implementing the legislation.

As mentioned in our reply to question 4, we also consider that, should CO lead to DTO, CCPs would have to either become trading venues or members of venues. We do not believe that this is in line with the objectives neither of EMIR nor of MiFIR. We would here again challenge the consistency of imposing DTO and would recommend authorities to abolish this obligation during the revision of MiFIR.

In addition, we note that the current market infrastructure does not allow counterparties to electronically trade in a bilateral fashion. Trading venues would have to adapt themselves to offer such a bilateral form of trading. Counterparties such as FCs would therefore be obliged to centrally clear when electronically trading while benefitting from a clearing exemption. This creates an operational burden and imposes extra-costs as well as being in contradiction with the aim of EMIR Refit which was to reduce it.

Q 4: 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?

We would encourage ESMA to remove the DTO before it becomes enforceable. We consider that maintaining a misalignment would be contradictory with the goal of EMIR Refit of more proportionate, less burdensome regulation.

As mentioned above, Market infrastructures do not provide a proper set-up to bilaterally trade on electronic platform and therefore we are not in favor of keeping a misalignment between the scope of counterparties subject to CO and DTO. Huge efforts have been undertaken by asset managers to onboard small financial counterparties for clearing. But the process to comply with this obligation was very heavy compared to the systemic risk represented by those counterparties. This has been recognized and lead to the exemption of clearing obligation for small financial counterparties under EMIR Refit. If such misalignment between MiFIR DTO and EMIR Refit CO is maintained, exempted counterparties from CO under EMIR Refit will de facto be subject to clearing through MiFIR DTO undermining all advancements brought by EMIR Refit.

Q 5: 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?

See also our replies to questions 4 and 5 above.

We are in favour of such alignment to allow the market to adapt itself to the DTO, should ESMA decide to neither propose to suppress the DTO nor to reduce its application to FC+.

Q 6: What is your view on ESMA's proposal to suggest an alignment in the scope of counterparties between the clearing and trading obligations?

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 venues offer an economically viable solution.

We also consider that the suppression of DTO should trigger the revision of the TO in its entirety (including for Share Trading Obligation (STO)), at least for NFCs and SFCs.

As the products subject to the DTO are the same as some of the products subject to the CO, the DTO shall automatically be suspended when the CO is. Nevertheless, it is also coherent to create a standalone DTO suspension to align it with what is applicable to CO, e.g. in case of the disappearance of an electronic platform.

Q 7: 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?

We support the introduction of standalone DTO suspension provisions in MiFIR as consistent with and contributing to the goal of EMIR Refit of more proportionate, less burdensome regulation.

We also consider that the suspension of the CO should automatically trigger the DTO. The sole communication of the suspension of the CCP or the CM should suspend the CO and the DTO without further trigger or reporting.

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

The suspension mechanism should be automatic to ensure legal consistency. Relying on RTS adoption would be too slow.

We have not identified other aspects of the DTO that need to be modified. Nevertheless we regret that the opportunity of EMIR Refit was not used to align the EMIR reporting obligation with the MiFIR reporting obligation to make it single-sided as well.

Q 8: 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.

No.

We would however recommend here again to review and hopefully abolish TOs, at least for qualifying SFCs and NFCs.

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