

BVI¹ position on the ESMA Consultation Paper on alignment of MiFIR with the changes introduced by EMIR Refit

We welcome the opportunity to respond to the consultation on alignment of MiFIR with the changes introduced by EMIR Refit. We would to make the following comments:

Q1. Do you have any comment on the analysis of the amendments in relation to financial counterparties?

We share ESMA analysis and fully support ESMA conclusions, in particular on the necessity of aligning the DTO under MiFIR with changes made under EMIR Refit to the CO.

In the context of the updated clearing obligation under EMIR Refit Small Financial Counterparties (e.g. UCITS/AIFs) 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, 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 not mandated such asset classes to the clearing obligation. Especially Foreign Exchange 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 (UCITS/AIFs) use in their investment portfolios Foreign Exchange to hedge their positions or for investment purposes.

We are of the opinion that as soon as a position calculation for one class of OTC derivatives exceeds the clearing threshold for currently not clearing eligible FX derivatives and which are below the calculation clearing thresholds for the ESMA mandated clearing products IRS and CDS investment funds should not be subject to DTO for interest and credit default swaps. The purpose of the EMIR revision 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 a systemic risk. Connecting Small Financial Counterparties (e.g. UCITS/AIFs) via a clearing member to a CCP involves high costs. In this case we refer to the other ESMA consultation on the FRANDT principles. Therefore, some UCITS/AIFs are now subject to the clearing obligation as they are above the clearing threshold for FX but they do not have either any IRS or CDS in their portfolio for clearing or they have only a very limited volume of IRS&CDS for clearing which is significantly below the clearing threshold.

¹ BVI represents the interests of the German fund industry at national and international level. The association promotes sensible regulation of the fund business as well as fair competition vis-à-vis policy makers and regulators. Asset Managers act as trustees in the sole interest of the investor and are subject to strict regulation. Funds match funding investors and the capital demands of companies and governments, thus fulfilling an important macro-economic function. BVI's 111 members manage assets more than 3 trillion euros for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 22%, Germany represents the largest fund market in the EU. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.



Q6. 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 trading venues and MTFs/OTFs offer an economically viable solution.