ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

**AMAFI / 19-108**
**20 November 2019**

# ESMA CONSULTATION PAPER

# ALIGNMENT OF MIFIR WITH THE CHANGES INTRODUCED BY EMIR REFIT

## AMAFI contribution

**Association française des marchés financiers (AMAFI)** is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities.

AMAFI welcomes ESMA's consultation paper on the alignment of MiFIR with the changes introduced by EMIR Refit. The amendments to EMIR brought an important distinction between small and other Financial counterparties and, with respect to Non-financial counterparties limits the clearing obligation to OTC derivatives pertaining only to any class of OTC derivatives subject to the clearing obligation, acknowledging the low level of systemic risk presented by small Financial and Non-financial counterparties and the necessity to exclude them from the clearing obligation with regard to derivative contracts. This Consultation paper acknowledges the linkage between the clearing obligation and the derivatives trading obligation. AMAFI believes that this linkage is apparent in the intention of the legislators and strongly supports the alignment of the MiFIR provisions relating to the Derivatives trading obligation with the new provisions introduced by EMIR Refit regarding the scope of the clearing obligation.

## AMAFI'S RESPONSE

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

AMAFI agrees with ESMA's legal interpretation about the amendments in relation to financial counterparties regarding their impact on the MiFIR DTO. The cross-reference in MiFIR to the definition of "financial counterparties" in Article 2(8) of EMIR does not make room for the new distinction between FC+ and FC- as introduced by the amendments to EMIR. This means that all the financial counterparties are subject to the DTO, including small financial counterparties, regardless of their exemption from the CO.

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

AMAFI agrees with ESMA's legal interpretation about the amendments in relation to non-financial counterparties regarding their impact on the MiFIR DTO. The cross-reference in MiFIR to "non-financial counterparties that meet the conditions referred to in Article 10(1)(b) [of EMIR]" points to the wrong provision in the new version of EMIR and should be adjusted in order to limit the DTO to OTC derivatives contracts pertaining only to any class of OTC derivatives subject to the clearing obligation. Therefore, the scope of NFCs subject to the DTO is misaligned with EMIR and
should be corrected.

AMAFI ■ 13, rue Auber ■ 75009 Paris ■ France
Phone : +33 1 53 83 00 70 ■ http://www.amafi.fr ■ E-mail : info@amafi.fr

**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?**

AMAFI believes that the main obstacle to the development of on-venue trading of contracts not cleared with a CCP is the pricing issue. As a matter of fact, the pricing of derivatives contracts depends partly on collateral arrangements. The clearing of contracts allows the centralization and standardization of collateral arrangements, while those arrangements are bilateral in the case of non-cleared contracts. This makes it difficult for trading venues to price non-cleared contracts.

This practical difficulty implies that the application of the DTO to small financial counterparties (FC-) and NFC- would force them back into the scope of the CO. Such a consequence would place unnecessary burden on these counterparties, considering that the regulation in place states that the clearing obligation is not proportionate for counterparties who represent such a low level of systemic risk.

**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 commitments, compliance with DTO less burdensome than with the CO)? Can you identify other arguments?**

AMAFI believes that the misalignment between the scope of counterparties subject to the CO and the DTO is incoherent with the intention of the legislator to align the scopes of the two obligations notably:

- As pointed out in Point 30, Article 28(2) of MiFIR states that 'third-country institutions or other third-country entities that *would be subject to the clearing obligation* if they were established in the Union' are also subject to the trading obligation.
- Article 2 of Commission Delegated Regulation (EU) 2017/2417 sets the date at which the Derivatives trading obligation takes effect following the date established in article 3 of Commission Delegated Regulation (EU) 2015/2205, which indicates the dates from which the clearing obligation takes effect.
- At last, Recital 5 of the Commission Delegated Regulation (EU) 2015/2205 establishes a clear link between the two obligations, by posing the application of the clearing obligation as a condition for the application of the trading obligation:

*'Commission Delegated Regulation (EU) 2015/2205 [(3)] (interest rate OTC derivatives) and Commission Delegated Regulation (EU) 2016/592 [(4)] (credit OTC derivatives) identify four categories of counterparty to which the clearing obligation applies. In order to accommodate the specific needs of each category of counterparty, a phased-in application of that clearing obligation has also been laid down in those Delegated Regulations. 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.'*

**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?**

AMAFI agrees with the arguments supporting the alignment between the scope of counterparties subject to the CO and the DTO. As stated in response to Q 3, AMAFI believes that the application of the DTO to small financial counterparties and NFC- would force them back into the scope of the clearing obligation because of practical pricing difficulties in the absence of standardized and centralized collateral arrangements. This would force little entities to clear their transactions, adding an unnecessary burden given their very low level of systemic risk.

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

AMAFI supports ESMA's proposal to suggest an alignment in the scope of counterparties between the clearing and trading obligation. AMAFI believes that this alignment could be made through modifications in **Article 28(1)**, notably:

| Current | Amendment suggestion |
|---|---|
| Financial counterparties as defined in Article 2(8) of Regulation (EU) No 648/2012 and non-financial counterparties that meet the conditions referred to in Article 10(1)(b) thereof shall conclude transactions which are neither intragroup transactions as defined in Article 3 of that Regulation nor transactions covered by the transitional provisions in Article 89 of that Regulation with other such financial counterparties or other such non-financial counterparties that meet the conditions referred to in Article 10(1)(b) of Regulation (EU) No 648/2012 in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 32 and listed in the register referred to in Article 34 only on | Financial counterparties as defined in Article 2(8) ~~as defined in Article 2(8)~~ **that meet the conditions set out in the second subparagraph of Article 4a(1)** of Regulation (EU) No 648/2012 and non-financial counterparties that meet the conditions referred to in ~~Article 10(1)(b)~~ **the second subparagraph of Article 10(1)** thereof shall conclude transactions that are subject to the clearing obligation referred to in Article 4 which are neither intragroup transactions as defined in Article 3 of that Regulation nor transactions covered by the transitional provisions in Article 89 of that Regulation with other such financial counterparties that meet the conditions set out in the second subparagraph of Article 4a (1) or other such non-financial counterparties that meet the conditions referred to in the second subparagraph of Article 10(1) of Regulation (EU) No 648/2012 in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation in accordance with the procedure set out in Article 32 and listed in the register referred to in Article 34 only on |

In order to avoid any future misalignment in the context of changes to either counterparties or product scope as regards the CO, we also support the inclusion of a general principle reaffirming that submission of a transaction to CO is a precondition to be subject to DTO.

In case of CO suspension, it would also ensure the suspension of the DTO.

**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?**

AMAFI agrees with the idea of ESMA having a standalone power to suspend the DTO, regardless of the CO being suspended or not. The link established between the CO and the DTO does not mean that the DTO can be suspended only when the CO is suspended. The application of the DTO follows different criteria. AMAFI does not have any views on the modalities of a standalone power to suspend the DTO that would be given to ESMA.
However, the suspension of the CO should automatically suspend the DTO. To this aim the inclusion of the principle referred to in Q6 will ensure this alignment.

**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**

AMAFI has no additional input.