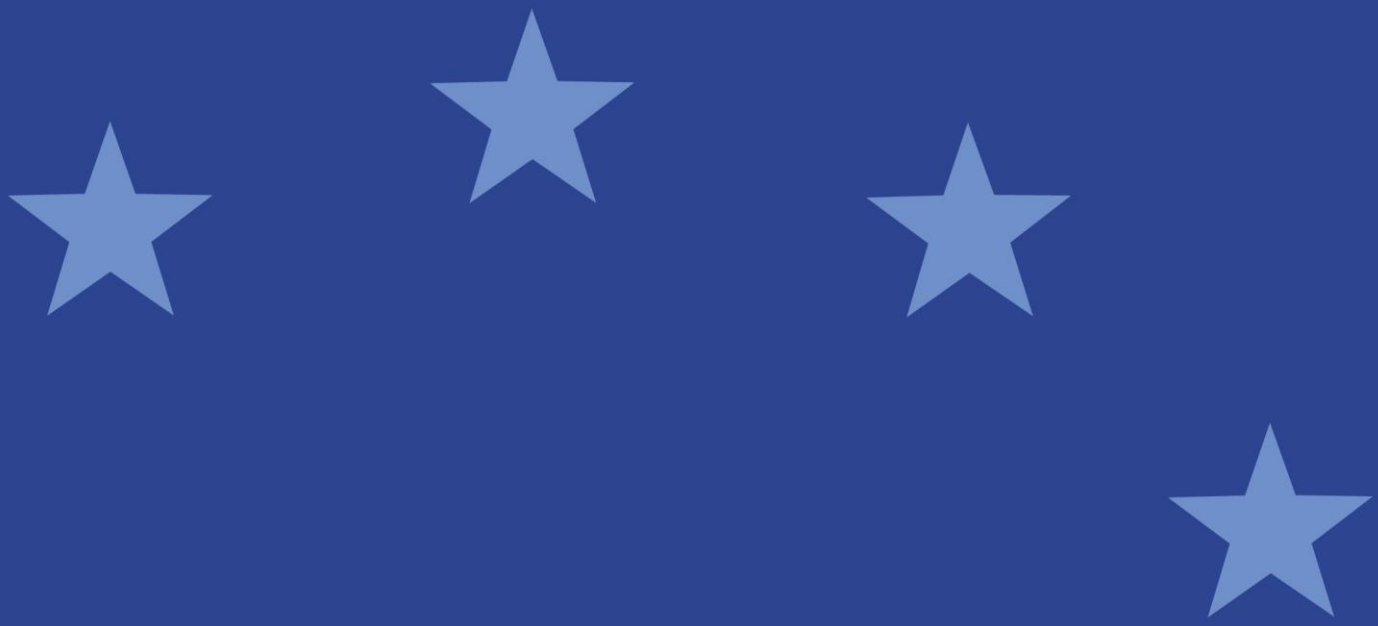
esma European Securities and Markets Authority

Consultation Paper

Alignment of MiFIR with the changes introduced by EMIR Refit



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Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. 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'.

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 publicly 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.

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Acronyms and definitions used

CDR on the DTO	Commission Delegated Regulation (EU) 2017/2417 of 17 November 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives
CO	Clearing Obligation
CP	Consultation Paper
DTO	Derivatives Trading Obligation
EC	European Commission
EMIR	European Market Infrastructures Regulation Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
EMIR Refit	Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories
EU	European Union
ESMA	European Securities and Markets Authority
FC	Financial Counterparty
MiFID II	Markets in Financial Instruments Directive (recast) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
MiFIR	Markets in Financial Instruments Regulation Regulation 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
MTF	Multilateral Trading Facility
NCA	National Competent Authority
NFC	Non-Financial Counterparty
OTC	Over-the-counter
OTF	Organised Trading Facility
Q&A	Question and answer
RTS	Regulatory Technical Standard

1 Executive Summary

Reasons for publication

Under EMIR Refit, the Commission shall prepare a report assessing the necessity and appropriateness of aligning the trading obligation for derivatives under MiFIR with changes made under EMIR Refit to the clearing obligation for derivatives. This concerns, in particular, the scope of the entities that are subject to the clearing obligation. That report shall be submitted to the European Parliament and to the Council, together with any appropriate proposals, by 18 December 2020, on the basis of a report by ESMA to be submitted to the Commission by 18 May 2020. This consultation paper is seeking stakeholders view on the assessment and the proposals that ESMA intends to make in the context of that report.

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Section 2 explains the background to this report. Section 3 describes the amendments made under EMIR Refit that have an impact on the application of the derivatives trading obligation under MiFIR, for financial counterparties and for non-financial counterparties. Section 4 recalls the short-term solution adopted by ESMA to address the misalignment of the scope of entities subject to the clearing and the trading obligations on a temporary basis. Section 5 assesses the merits and drawbacks of aligning the scope of counterparties subject to the clearing and the trading obligations. Section 6 examines other changes to MiFIR that could be proposed in the context of the changes introduced by EMIR Refit, in particular, a possible stand-alone suspension mechanism for the derivatives trading obligation. Annex I contains the list of questions and Annex II provides the mandate.

Next Steps

ESMA will develop the final report taking into consideration the feedback received to this consultation paper. ESMA intends to submit the final report to the Commission in early 2020.

2 Introduction

1. The European Market Infrastructure Regulation (EMIR) and the Markets in Financial Instruments Directive/Regulation (MiFIDII/MiFIR) form part of the European regulatory response to the financial crisis. Within the EU, EMIR and MiFIR fulfil the G20 commitments on improving the safety and transparency of over-the-counter (OTC) derivatives market as agreed in Pittsburgh in September 2009.

2. In particular, the clearing obligation (CO) under EMIR, and the derivatives trading obligation (DTO) under MiFIR, address the Pittsburgh's engagement that all standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms and cleared through central counterparties.

3. EMIR has recently been amended via a new regulation referred to as "EMIR Refit"[1], which intends to simplify certain provisions, and adopt a more proportionate approach thereto. This is in line with the Commission's Regulatory Fitness and Performance programme, one intention being that Union policies achieve their objectives more efficiently, by reducing regulatory and administrative burdens where possible.

4. The changes introduced by EMIR Refit concern inter-alia the scope of counterparties subject to the CO: EMIR Refit introduces an exemption from the CO for small financial counterparties and modifies the mechanism to determine the obligations of non-financial counterparties above the clearing threshold (NFC+).

5. EMIR Refit was not accompanied by direct amendments to MiFIR, which currently leads to a misalignment between the scope of counterparties subject to the CO and to the DTO. However, in light of the close interconnection between those two obligations, EMIR Refit requires the European Commission (EC) to prepare a report assessing "the necessity and appropriateness of aligning the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/834 to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation." (Article 1(24)(c) and (d) of Refit, which amends Article 85 of EMIR).

6. The EC's report shall be submitted to the European Parliament and to the Council by 18 December 2020, on the basis of an ESMA report to be submitted to the EC by 18 May 2020.

7. This consultation paper (CP) is seeking stakeholders views on the necessity and appropriateness of aligning the DTO under MiFIR with changes made under EMIR Refit to the CO, in particular to the scope of the entities that are subject to the CO.

[1] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories

3 Amendments under EMIR Refit that have an impact on the MiFIR DTO

3.1 Amendments in relation to Financial Counterparties

8. One of the crucial changes introduced by EMIR Refit is the distinction between two types of financial counterparties (FC): those who may pose an important systemic risk to the financial system (thereafter FC+), and the others (FC-). The distinction between the two is made by reference to their volume of activity in OTC derivatives, compared to thresholds defined in the law. EMIR Refit acknowledges, in Recital 7, that the volume of activity in OTC derivatives markets of FCs- is too low for central clearing to be economically viable.

9. As a result, since the entry into force of EMIR Refit, the CO only applies to FCs+, i.e. financial counterparties that either (1) exceed any of the clearing thresholds specified pursuant to point (b) of Article 10(4) of EMIR; or (2) decide not to calculate whether they exceed those thresholds.

10. Such a change has been introduced in EMIR via a new Article 4a, which defines how FCs should determine whether they are subject to the CO, and what their obligations are. In addition, in Article 4 of EMIR (which specifies the transactions subject to the CO) the reference to FC has been modified from “financial counterparties” to “financial counterparties that meet the conditions set out in the second subparagraph of Article 4a(1)”.

11. Under MiFIR, the scope of the DTO for FCs is defined with a cross-reference to the definition of FC in EMIR (i.e. “financial counterparties as defined in Article 2(8) of [EMIR]”).

12. Given that EMIR Refit does not amend MiFIR, the scope of FCs subject to the DTO and the CO is currently not aligned. In practice, this means that small financial counterparties are exempted from the CO while still being subject to the DTO.

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

3.2 Amendments in relation to Non-Financial Counterparties

13. Under the former version of EMIR, non-financial counterparties (NFC) were subject to the CO, in all asset classes, when their volume of OTC activity exceeded *any* of the clearing thresholds (which are defined per asset class). EMIR Refit amends that mechanism, to take into account the fact that NFCs are less interconnected than FCs, and that they are often predominantly active in only one class of OTC derivatives.

14. The activity of NFCs poses less systemic risk to the financial system than the activity of FCs, in the sense that the risk that they may pose tends to be concentrated in the asset class in which they are mainly active.

15. As a result, since the entry into force of EMIR Refit, NFCs calculating their positions are subject to the CO only in the asset classes in respect of which the result of the calculation exceeds the clearing thresholds.

16. In practice, in Article 4 of EMIR, which defines the conditions on the counterparties for a contract to be subject to the CO, the references to NFC have been modified (by Refit) from "a non-financial counterparty that meets the conditions referred to in Article 10(1)(b)" to "a non-financial counterparty that meets the conditions set out in the second subparagraph of Article 10(1)".

17. Under MiFIR, the scope of the DTO for NFCs is defined with a cross-reference to the NFCs+ in EMIR (i.e. "non-financial counterparties that meet the conditions referred to in Article 10(1)(b) [of EMIR]").

18. The issue is that Article 10(1)(b) of EMIR does not have the same meaning in the old and the new version of EMIR, and therefore the references in MiFIR to "non-financial counterparties that meet the conditions referred to in Article 10(1)(b) [of EMIR]" no longer point to the correct provisions under the revised version of EMIR.

19. The new concept introduced by Refit, according to which NFCs become subject to the CO only for those classes where they exceed the clearing thresholds (or in case they choose not to make the calculation, for all asset classes), is introduced in the second subparagraph of Article 10(1) and in Article 10(1)(c), but not in Article 10(1)(b).

20. The scope of NFCs subject to the DTO since the entry into force of EMIR Refit therefore appears to be misaligned with EMIR and should be corrected to ensure the same treatment for the purposes of the CO and the DTO.

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

4 Interim solution – ESMA Public Statement

21. In the period preceding the entry into force of EMIR Refit, stakeholders have urged ESMA to analyse the issue of the misalignment of the scope of counterparties between the EMIR CO, and the MiFIR DTO, and the possible implementation challenges that this misalignment creates for counterparties exempted from the CO.

22. Those challenges are expected to be analysed in the EC report to the European Parliament and to the Council, on the basis of ESMA's report which is the subject of this CP. However, there remains a relatively long period of uncertainty between the entry into force of Refit, and the outcome of the above-mentioned report. Such outcome could either be a proposal to change MiFIR to reflect the amendments introduced in EMIR Refit (which would inevitably be a process taking a significant amount of time), or a confirmation that such changes are not deemed necessary or appropriate.

23. To address the situation in a consistent manner in the Union in this interim period, ESMA published on 12 July 2019 a statement[2] on MiFIR implementation considerations regarding the DTO following the entry into force of EMIR Refit.

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

25. Additionally, for FCs in Category 3 which are subject to the CO, the date of application of the DTO 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 FCs to ESMA and NCAs as required under EMIR Refit, rather than 21 June 2019.

5 Assessment of the necessity and appropriateness to align the scope of counterparties

26. To recall, ESMA's mandate for the report due to the EC is to assess "the necessity and appropriateness of aligning the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/834 to the clearing obligation for derivatives, **in particular to the scope of the entities that are subject to the clearing obligation**." This section focuses on the latter point only, i.e. the alignment of the scope of counterparties.

27. The immediate impact of aligning the scope of counterparties subject to the CO and the DTO would be to limit the volume of trading that is executed on trading venues. Exempted counterparties would have no legal obligation to trade on venue and instead are likely to continue trading those derivatives OTC. Such outcome would appear at odds with the G20 commitment to increase the level of standardized OTC derivative contracts traded on exchanges or electronic trading platforms.

28. As a result, the possible extension to the DTO of the exemptions from the CO that have been introduced under EMIR Refit should be examined carefully.

<u>The policy intention before EMIR Refit</u>

29. Before EMIR Refit, the legal framework pointed at a policy intention to align the scope of counterparties subject to the CO and the DTO. The use of cross-references between EMIR and MiFIR initially ensured a perfect alignment between the counterparties subject to both obligations.

30. Furthermore, Article 28(2) of MiFIR defines how the DTO applies when EU counterparties enter into transactions with third-country firms. Those third-country firms are referred to as "third-country financial institutions or other third-country entities that would be subject to

[2] Public Statement "MiFIR implementation considerations regarding the trading obligation following the entry into force of EMIR Refit", ESMA70-156-1436, 12 July 2019

the clearing obligation if they were established in the Union." This further demonstrates the linkages between the CO and the DTO.

31. In addition, the framework of the CO and the DTO was construed according to a time sequence where first, counterparties became subject to the CO for a specific set of instruments, and then to the DTO for the same or a potentially more granular set of instruments.

32. Finally, the implementation dates of the DTO have been chosen to ensure that counterparties become subject to the DTO no sooner than when they become subject to the CO.

33. ESMA has not identified specific new circumstances or market developments which would justify a deviation from this initial construction, i.e. the introduction of differences in the scope of counterparties.

34. In particular, ESMA does not see any logical explanation why all the construction of the two obligations envisage that the CO apply first and can apply to a broader set of instruments, but it cannot apply to certain counterparties while the DTO would apply to those counterparties. ESMA does also not see any logic on why third country counterparties would not be subject to the DTO if they are not subject to the CO, while certain EU counterparties would.

The current market functioning could create a de facto CO for exempted counterparties

35. Article 29 of MiFIR requires that derivatives concluded on a regulated market are cleared by a CCP, but this provision does not apply to the other types of trading venues where derivatives are traded, i.e. multilateral trading facilities (MTFs) and organised trading facilities (OTFs). In the EU, derivatives subject to the DTO currently only appear to be available on MTFs and OTFs[3], and not on regulated markets.

36. However, some of the MTFs and OTFs which offer trading of derivatives subject to the DTO may require all counterparties (including those exempted from the CO) to centrally clear those contracts. As a result, a standalone DTO (without a CO) could lead certain counterparties to a forced CO if they transact through these MTFs or OTFs. And if there is an alternative MTF or OTF that does offer trading for some of these contracts as non-cleared, then the DTO without the CO could limit the number of TVs certain counterparties could trade on.

37. It is also unclear what the objective of forcing the execution of a contract on a trading venue is while allowing for the contract not to be cleared by a CCP.

38. Should MTFs and OTFs find it impossible to accommodate different post-trade mechanisms for exempted counterparties, the existence of a standalone DTO could create, in practice, a quasi-obligation to clear for counterparties exempted therefrom under EMIR Refit. Even though incentives to centrally clear on a voluntary basis can be viewed as a

[3] Table 2.1 of the Public Register for the derivatives trading obligation under MiFIR (ESMA70-156-300) lists all the EU venues where the derivatives subject to the DTO are available for trading. No regulated market features on that list.

positive development in terms of overall reduction of systemic risks, this in effect would contradict the very objective of EMIR Refit, which is to exempt from the CO counterparties those that do not pose a high systemic risk to the system.

Suspension of the CO leading to a suspension of the DTO

39. In addition, Recital 14 of EMIR Refit explains why the suspension of the CO could also trigger (subject to specific conditions) the suspension of the DTO, i.e. “The suspension of the clearing obligation might prevent counterparties from being able to comply with the trading obligation.” This Recital tends to already introduce the idea that the absence of a CO might create operational issues for counterparties to comply with the DTO. Since this concept of a temporary suspension of the CO having an impact on the DTO is already embedded in EMIR it is difficult to see why in the absence of a CO in the first place the DTO should nevertheless apply.

40. This argument is however nuanced by the fact that the suspension of the CO does not automatically trigger the suspension of the DTO. Instead, there are additional conditions for such dual-suspensions, namely that the suspension of the CO is considered by ESMA to be a material change in the criteria for the DTO to take effect. To recall, those criteria are (1) the existence of at least one trading venue offering the class of derivatives for trading; and (2) the existence of sufficient third-party buying and selling interest so that the derivatives are considered sufficiently liquid to trade only on eligible venues (Article 32(2) of MiFIR).

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?

One argument underpinning the limitation of the scope of the CO is also valid for the DTO

41. As explained in the recitals of EMIR Refit, the limitation of the scope of counterparties subject to the CO is justified by two main arguments: (1) the systemic risk (or absence thereof) that certain counterparties pose in the financial system; and (2) the general policy intention to simplify certain provisions, and to adopt a more proportionate approach thereto by reducing the administrative and regulatory burden where possible.

42. The argument on systemic risk is of less relevance in the context of the DTO, as the reduction of systemic risk is not the overarching principle guiding the application of the DTO (as opposed to the CO).

43. However, the objective of reducing the administrative and regulatory burden for counterparties could be considered as valid both for the DTO and the CO. This should however be nuanced by the fact that the administrative burden of setting up clearing arrangements to meet the CO is certainly higher than that of setting up access with a trading venue to meet the DTO.

44. The underlying assumption that formed the basis of the EMIR Refit proposal in relation to the exemption from the CO was that such exempted counterparties, although numerous in terms of head-count, only account for a small share of the total volume traded.

45. In this respect, reference can be made e.g. to ESMA's CP on the CO for FCs with a limited volume of activity[4]. Based on trade repository data, this report showed that in the interest rate derivative asset class, less than 500 counterparties (out of 6,000+) represented 99.4% of the activity. Similarly, in the credit derivative asset class, less than 400 counterparties (out of 2,000+) represented 98.6% of the activity.

46. This could support the argument that an exemption from the DTO, for counterparties exempted from the CO, should have a limited impact on the volumes traded on venues, while alleviating the burden for a large number of counterparties.

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?

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?

47. In view of the arguments developed above, ESMA's initial proposal would be to formulate a recommendation to the European Commission to align the scope of counterparties subject to the clearing and the trading obligation.

48. The objective should be that only financial counterparties subject to the clearing obligation, are also subject to the trading obligation. In relation to non-financial counterparties, the objective would be the same, i.e. non-financial counterparties should be subject to the trading obligation (1) in all asset classes if they choose not to calculate the thresholds; or (2) in the asset classes in respect of which the clearing thresholds are exceeded (i.e. the asset class in respect of which they are also subject to the clearing obligation).

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?

6 Assessment of the necessity and appropriateness to amend other aspects of MiFIR

49. ESMA's mandate in relation to the report to be submitted to the EC is not limited to the alignment of the scope of counterparties between the EMIR CO and the MiFIR DTO. It may cover other amendments introduced via EMIR Refit that have an impact on the MiFIR DTO. This section focuses on those possible other aspects.

[4] ESMA/2016/1125 published on 13 July 2016, Section 3

50. Another significant change introduced by EMIR Refit relates to a new mechanism to suspend the CO (Article 6a of the revised version of EMIR). As explained in Recital (13) of EMIR Refit, it should be possible to temporarily suspend the CO in certain exceptional situations (e.g. the criteria on the basis of which specific classes of OTC derivatives have been made subject to the CO are no longer met, a CCP ceases to offer a clearing service for specific classes of OTC derivatives or for a specific type of counterparty, or it is considered necessary to avoid a serious threat to financial stability in the Union.)

51. EMIR Refit further explains in Recital (14) that the MiFIR DTO is triggered when a class of derivatives is declared subject to the CO, and that suspension of the CO might prevent counterparties from being able to comply with the DTO. As a consequence, where the suspension of the CO has been requested, and where it is considered to be a material change in the criteria for the DTO to take effect, it should be possible for ESMA to propose the concurrent suspension of the DTO on the basis of EMIR, instead of MiFIR.

52. Under this mechanism, the suspensions of the DTO and the CO would function in parallel: they can be requested at the same time, become effective at the same time and be extended at the same time, for the same period. However, EMIR Refit does not introduce a standalone mechanism to suspend the DTO, without suspending the CO.

53. ESMA considers that there may be situations where the criteria on the basis of which specific classes of OTC derivatives have been made subject to the DTO are no longer met, while at the same time the criteria on the basis of which those classes have been made subject to the CO are still met. This follows the logic underpinning the articulation between the CO and the DTO i.e. only a subset of OTC derivative subject to the CO meet the relevant criteria to become eligible to the DTO.

54. For example, it is possible that a specific class of derivatives subject to the DTO is no longer offered for trading on any EU trading venue, hence forcing EU counterparties to comply with the DTO via trading venues established in equivalent third countries following an equivalence decision of the EC. Moreover, there could be a significant drop in the liquidity of derivatives traded on EU trading venues which may warrant a suspension of the DTO. Both situations could result in market disruptions.

55. This argument would therefore support amending MiFIR by creating a similar possibility to suspend the DTO on a standalone basis, without impacting the CO on the same classes of derivatives.

56. However, MiFIR already introduces a mechanism in Article 32(5) according to which ESMA may submit to the EC draft regulatory technical standards (RTS) to amend, suspend or revoke existing RTS, whenever there is a material change in one of the two criteria set out in Article 32(2) i.e. (1) the existence of at least one trading venue offering the derivatives for trading; and (2) the existence of sufficient third-party buying and selling interest so that the derivatives are considered sufficiently liquid to trade only on eligible venues.

57. However, that mechanism does not address the same situation as the suspension of the DTO/CO in at least two ways: (1) amending existing RTS is a lengthy exercise which is unlikely to be effective in case the DTO needs to be suspended swiftly; and (2) such amendments of existing RTS is triggered by only two specific conditions, which might not

be sufficiently flexible to address unforeseeable market developments that would require a 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?

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.

7 Annexes

7.1 Annex 1 - Summary of questions

7.2 Annex 2 - Commission mandate

Article 85(3a) of EMIR as amended by EMIR Refit:

‘3a. By 18 May 2020, ESMA shall submit a report to the Commission. That report shall assess:

(c) the alignment of the trading obligation for derivatives under Regulation (EU) No 600/2014 with changes made under Regulation (EU) 2019/834 to the clearing obligation for derivatives, in particular to the scope of the entities that are subject to the clearing obligation;