



Frankfurt,  
19 January 2022

## **BVI<sup>1</sup>'s position on the ESMA Discussion Paper on the review of the clearing thresholds under EMIR**

We welcome ESMA's initiative to review the current population of counterparties and groups subject to the clearing obligation and the clearing thresholds after the entry into force of the EMIR Refit.

We strongly support within EMIR Refit the option to relieve Small Financial Counterparties (SFC) with a limited clearing volume from the clearing obligation by introducing a clearing threshold. We strongly confirm the evidence provided within the EMIR Refit process and in this discussion paper that for the smallest financial counterparties with a limited clearing volume such as many UCITS/AIFs it is economically unfeasible to fulfil the clearing obligation. Such UCITS/AIFs do not pose any important systemic risk for the financial system.

The vast majority of regulated (German) investment funds (UCITS/AIF) belong to the clearing category "Small Financial Counterparty". Only a few funds are above the EUR 8 billion thresholds calculated individually at fund level and are therefore classified within category (2). Our members with a limited volume of clearing activity face generally difficulties to find clearing members willing to set up legal and operational arrangements with SFC funds, accessing a CCP. The negotiation power of Small Financial Counterparties is limited when interacting with clearing members. Furthermore, many clearing members are less willing to offer client clearing services beyond their most important and biggest clients largely due to the stringent capital requirements applicable to them (e.g. BCBS Leverage Ratio). Most clearing members do generally not offer a cost-effective client clearing model which provide a viable solution to our small and medium-sized member firms. Due to the low number of transactions and the limited clearing volume executed by our small and medium sized members, using a clearing member will be disproportionately expensive as high basic fees are charged independently of the transaction fees.

We strongly suggest excluding currency derivatives from the calculation of the clearing threshold for Small Financial Counterparties (UCITS/AIF) as such entities do not represent any systemic risk to the financial system. The clearing of a very limited volume of clearing eligible IRS & CDSs (e.g. one CDS trade within the quarter) by the UCITS/AIFs are not proportionate given the high cost to maintain an access to the clearing broker and the CCP.

We would to make the following comments:

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<sup>1</sup> 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 116 members manage assets of some EUR 4 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 27%, 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](http://www.bvi.de/en).



**Q3. Please provide information and examples on how counterparties count fungible ETDs and OTC derivatives for the purpose of the calculation of the clearing thresholds?**

UK regulated markets offer for trading a broad range of exchange-traded derivatives (ETDs) that are widely used for risk- and hedge management purposes by market participants (e.g. UCITS/AIFs) in the EU. In many cases, UK regulated markets provide market users (e.g. German fund manager) with uniquely deep and liquid markets with global participation (and hence a wider number of potential counterparties) and there is currently no direct substitute for some UK ETDs on regulated markets in the EU or in other third countries.

Derivatives traded on non-equivalent third-country regulated markets are regarded as “OTC derivatives” under EMIR. In the absence of equivalence under EU EMIR Article 2a, ETDs traded on UK regulated markets will be considered as OTC derivatives for the purposes of determining whether Small Financial Counterparties have breached the clearing threshold to become financial counterparties. Adverse impacts of re-classification will have the effect that such transactions will be subject to the calculation of the clearing threshold under the EMIR for the first time. Small Financial Counterparties have then to aggregate their positions in UK ETDs when determining whether they are 'Small Financial Counterparties' that are exempted from the clearing obligation under EMIR REFIT.

A potentially widespread reclassification exercise under EU EMIR will cause significant confusion in the financial market. It will require costly and time-consuming updates to trading and other IT systems. This impact is exacerbated because these classifications apply at the level of all of the entities in a counterparty's corporate group.

Therefore, we are of the opinion that UK-ETDs should not be incorporated in the calculation of the clearing threshold positions for OTC derivatives within the EMIR framework. UK-ETDs will be automatically cleared and therefore collateralized due to their nature. Therefore, it would not be in line to reclassify such transaction which will then counted to the calculation of the clearing threshold.

**Q7. Considering the current coverage provided by the clearing thresholds in relation to credit derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

We suggest aligning the CDS clearing threshold (EUR 1 billion) to the interest rate derivative position (EUR 3 billion). EMIR Refit relieves Small Financial Counterparties (SFC) with a limited clearing volume from the clearing obligation by introducing a clearing threshold. In this context, we strongly confirm the evidence provided within the EMIR Refit process and in this discussion paper that for the smallest financial counterparties with a limited clearing volume such as many UCITS/AIFs it is economically unfeasible to fulfil the clearing obligation. Such UCITS/AIFs do not pose any important systemic risk for the financial system. The alignment of the CDS clearing threshold to the IRS clearing barrier would be in line with the EMIR Refit aim to release Small Financial Counterparties from the clearing obligation burden.



**Q11. Considering the current coverage provided by the clearing thresholds in relation to currency derivatives and the different type of counterparties (FCs and NFCs); is there any aspect or issue you consider ESMA should look into or pay attention to? Please, in your answer, provide as granular details and any relevant data to illustrate your response.**

In the context of the 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. currency derivatives) 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 also not mandated such asset classes to the DTO. Currency 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 use in their investment portfolios foreign exchanges to hedge their position or for investment purposes.

In the case of Small Financial Counterparties, as soon as a position calculation for one class of OTC derivatives exceeds the clearing threshold for currently not clearing eligible currency derivatives and which are below the calculation clearing thresholds for the ESMA mandated clearing products IRS/CDSs investment funds are subject to a clearing obligation for such products. However, some of our members are currently subject to the clearing obligation as they are above the clearing threshold for currency derivatives, but they do not have either any IRS and CDS in their portfolio for clearing or they have only a very limited volume of IRS & CDS for clearing (e.g. one trade within the quarter) which do not represent any risk to financial stability.

The purpose of the EMIR Refit 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 any systemic risk. Connecting Small Financial Counterparties via a clearing member to a CCP involves high costs without any additional value to the financial stability. In this case we refer to the ESMA consultation paper on the FRANDT principles<sup>2</sup>.

Therefore, we strongly suggest excluding currency derivatives from the calculation of the clearing threshold for Small Financial Counterparties (UCITS/AIF) as such entities do not represent any systemic risk to the financial system. The clearing of a very limited volume of clearing eligible IRS & CDSs (e.g. one CDS trade within the quarter) by the UCITS/AIFs are not proportionate given the high cost to maintain an access to the clearing broker and the CCP.

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<sup>2</sup> [https://www.esma.europa.eu/sites/default/files/library/esma70-151-2672\\_ta-frandt\\_art\\_43a.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-151-2672_ta-frandt_art_43a.pdf)