

## **BVI<sup>1</sup> position on the ESMA Consultation on draft technical standards to further detail the new EMIR clearing thresholds regime**

We generally welcome ESMA's consultation on draft technical standards to review the new EMIR clearing threshold regime. As several times in our positions to the EMIR clearing threshold regime repeated, we strongly support within the EMIR Refit regulation introduced in 2019 the option to relieve Small Financial Counterparties (SFC) with a limited clearing volume from the clearing obligation by introducing a carefully calibrated clearing threshold. We strongly confirm the evidence provided within the EMIR Refit process and in the ESMA 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). Some of our biggest members with a large exposure in ETDs and OTC derivative products are already connected via a clearing broker to an EU-CCP or Third country CCP and clear OTC eligible products in line with the EMIR clearing obligation. Furthermore, they could also clear on a voluntary basis OTC derivative instrument which are currently not mandated according to the clearing obligation.

However, 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. In this context we strongly support ESMA's reference in para 31 within EMIR 3.0 (Recital 9) that the *"review and recalibration of the clearing threshold (CT) is not expected to lead to substantial changes in order to ensure that the current coverage of the clearing obligation is not affected by the new methodology"*. The EU legislator would like to ensure that the introduced clearing scope coverage in 2019 should be maintained with EMIR 3.0 and should not be broadened. However, we strongly fear that ESMA's proposal to introduce new thresholds for the *"uncleared"* OTC position will further extend the clearing obligation to our small and mid-sized members with a very limited volume of clearing activity. Therefore, we strongly disagree with ESMA's proposal to introduce a new threshold for the uncleared position.

Furthermore, ESMA's macro data analyse approach considers only the group level structure (please see chapter 2.2.3) and does not take into consideration how the suggested thresholds affect the (German) Buy-Side. Investment fund management companies calculate their clearing thresholds based on each investment fund and not on the management level. By relying on notional traded volumes aggregated at the financial counterparty (FC) group level, ESMA's approach fails to capture the specific impact on our smaller members whose derivatives activity is closer to the threshold and who are therefore especially affected by any changes made to the levels at which these are set. As mentioned above, the

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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 EUR 4.5 trillion for retail investors, insurance companies, pension and retirement schemes, banks, churches and foundations. With a share of 26%, 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).



introduction of EMIR Refit provides generally proportionality and appropriateness of clearing regulatory requirements, especially for our smaller members.

We would like to make the following specific comments:

**Q1:** Do you agree that the aggregate thresholds should only be set for those asset classes subject to the CO i.e. IRDs and credit derivatives? If not, please elaborate.

We agree with the proposal.

**Q2:** Do you agree with ESMA's proposal to maintain the aggregate thresholds at the current level i.e. 3 billion EUR for IRDs and 1 billion EUR for credit derivatives? If not, please elaborate.

We agree with the proposal.

**Q3:** Do you agree with the proposed uncleared thresholds? If not, please elaborate, explain for which asset class(es) and, where possible, provide supporting data and elements.

We strongly disagree with proposed new threshold for the uncleared position.

We strongly support within EMIR Refit – introduced in 2019 - 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 the ESMA 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).

Some of our biggest members with a large exposure in ETDs and OTC derivative products are already connected via a clearing broker to a CCP and clear OTC eligible products in line with the EMIR clearing obligation. Furthermore, they could also clear on a voluntary basis OTC derivative instrument which are currently not mandated according to the clearing obligation.

However, 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.

However, we strongly fear that ESMA's proposal to introduce new thresholds for the "uncleared" OTC position will further extend the clearing obligation to our small and mid-sized members with a very limited volume of clearing activity. We strongly disagree with ESMA's proposal to introduce a new threshold for the uncleared position. **Therefore, we propose to set the new threshold for the "uncleared" position as it is currently the case for the clearing obligation for IRS at 3 billion EUR and for credit derivatives at 1 billion EUR.** Our proposal will ensure that the aim of the EU legislator would be reached thereby ascertaining that the introduced clearing scope coverage in 2019 is maintained within EMIR 3.0 and not be extended. Furthermore, the introduction of two different thresholds for the "aggregate" and the "uncleared" position will increase the operational complexity for the (German) Buy-Side as they have to calculate and monitor two different positions compared with the existing practise where only one position needs to be reviewed once a year.

- **Exclusion of FX derivatives from the calculation of the (new) clearing thresholds**

As several times in our position papers repeated, 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.

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 Derivative Trading obligation. Currency derivatives are not mandated for the clearing obligation (please consider ESMA website: [Clearing obligation and risk mitigation techniques under EMIR](#)).

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.

Therefore, we strongly suggest excluding currency derivatives from the calculation of the clearing threshold for Small Financial Counterparties (UCITS/AIF) within EMIR 3.0 ("aggregate" and "uncleared" position) 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.

- Q4:** Do you agree with ESMA's proposal not to introduce in the RTS separate thresholds for the various commodity derivatives sub-asset classes at this stage? If not, please elaborate.
- Q5:** Do you agree with ESMA's proposal to have in the fifth bucket only commodity and emission allowance derivatives? Or do you consider that commodity derivatives should be singled out as a stand-alone category and another category for emission allowance derivatives introduced? Please elaborate.
- Q6:** Do you agree with ESMA's proposal not to introduce a sixth bucket for other derivatives at this stage? If not, please elaborate.
- Q7:** Do you agree with ESMA's proposal not to introduce more granular thresholds for commodity derivatives based on ESG factors at this stage? If not, please elaborate.
- Q8:** Do you agree with ESMA's proposal not to introduce more granular thresholds for commodity derivatives based on crypto-related features at this stage? If not, please elaborate.
- Q9:** Do you consider clarifications should be included in Article 10 of Commission Delegated Regulation (EU) No 149/2013? If yes, please specify and if possible, provide arguments and drafting suggestions.
- Q10:** Do you consider other indicators should be monitored and assessed? If yes, please specify and if possible provide drafting suggestion.

We do not have comments.

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