



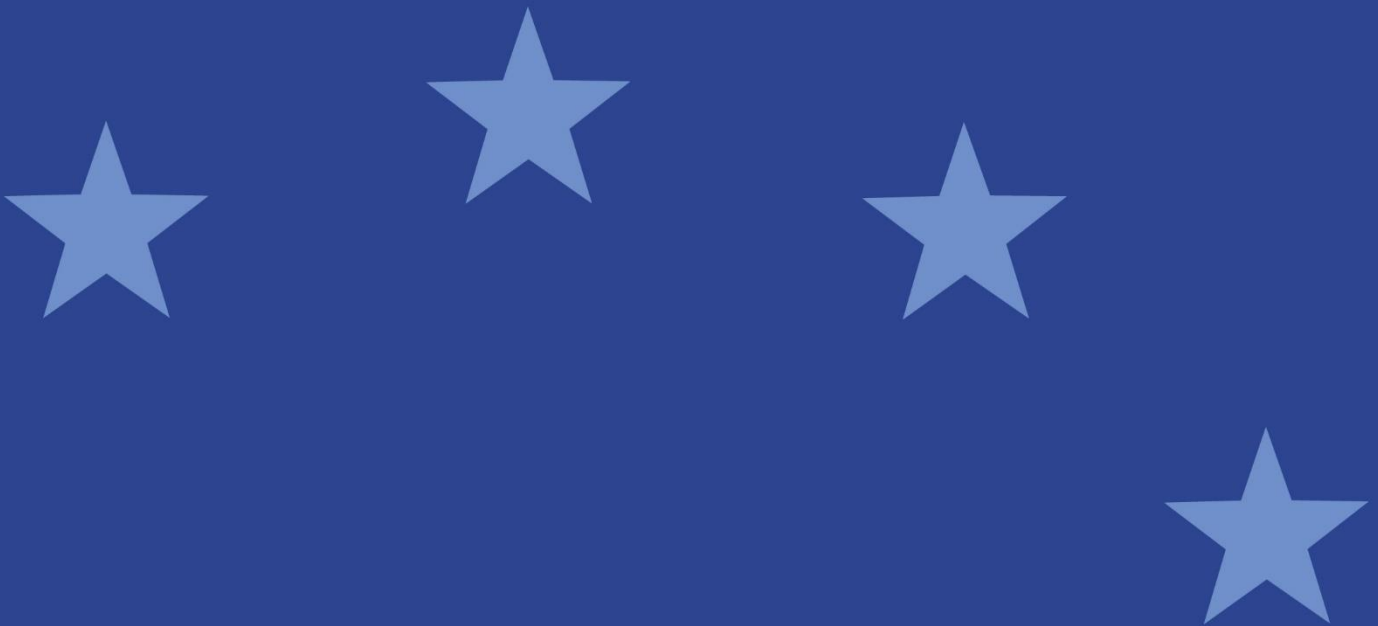
European Securities and
Markets Authority

28 September 2022

ESMA70-451-502

Report on the review of the clearing thresholds under EMIR

Feedback Report



Executive Summary

Reasons for publication

Regulation (EU) 2019/834 (referred to as EMIR Refit) introduced a mandate in EMIR for ESMA to periodically review the clearing thresholds (CTs) and update them when necessary, in order to ensure that the CTs remain appropriate. That periodic review should be accompanied by a report.

ESMA conducted a review of the CTs which was described in a discussion paper (DP) published on 21 November 2021 and ran a public consultation until 19 January 2022. Taking into account the feedback received in relation to commodity derivatives, ESMA published a final report¹ on 3 June 2022 with a draft EMIR RTS proposing to increase the CT for commodity derivatives. The present report looks into the feedback received from market participants during the public consultation besides what has already been covered in the final report on the CT for commodity derivatives. It also includes updated statistics on the coverage of the CTs with 2021 data and elaborates on different initiatives undertaken by ESMA and the National Competent Authorities (NCAs) in relation to the application of the CTs.

Contents

This report presents the key aspects raised by respondents to the public consultation conducted on the basis of the DP (besides the aspects linked to commodity derivatives which have already been addressed in the final report published in June) as well ESMA's considerations and initiatives in relation to the CTs. It also includes updated statistics and simulations on the level of coverage in terms of notional and counterparties for certain changes to the levels of the CTs.

Next Steps

Taking into account the feedback received during the public consultation and ESMA's updated data analysis, ESMA is of the view that the amendments to EMIR proposed in the high-level response² to the European Commission's consultation on the targeted review of EMIR and published in April 2022, would address to a large extent many of the points raised by respondents. While the more urgent aspects relating to the CT for commodity derivatives have been handled in the June Final report. For the other asset classes ESMA will thus not advise implementing further changes to the levels of the CTs.

ESMA will continue monitoring the coverage of the CTs, in line with the EMIR mandate to periodically review the CTs, to ensure that they remain well-calibrated. Furthermore, ESMA is aware of the constant changes in particular in the current market circumstances and will monitor the developments on an on-going basis.

Table of Contents

Executive Summary	3
1 Introduction	5
2 Feedback received to the Discussion Paper on the Review of the CTs	6
3 Additional input to the Review of the CTs	16
4 Conclusions.....	17
Annex I: Simulations (TR data 2021)	18
Annex II: Updated charts (TR data 2021)	21
Methodology.....	21

1 Introduction

1. This report is part of a comprehensive exercise ESMA is undertaking to review the CTs under EMIR. EMIR and the various RTSs on the clearing obligation³ (CO) set-up the regulatory framework for the CO in the European Union (EU). EMIR mandates ESMA to periodically review⁴ the CTs and, when necessary, propose amendments to update them. The aim of such reviews is to ensure that the CTs remain appropriate and take into account any material changes in financial markets.
2. ESMA published a [Discussion Paper on the Review of the CTs \(DP\)](#) on 21 November 2021 and ran a public consultation until 19 January 2022. The feedback to the consultation provided valuable input for the review of the CTs and also on the overall EMIR framework. As a result of the analysis of this feedback ESMA has taken different actions.
3. First, ESMA contributed to the [Consultation on the targeted review of the central clearing framework in the EU](#) conducted by the EC. ESMA submitted and published on 5 April 2022 a [high-level response to the Consultation](#) providing input on a variety of issues. ESMA recommended Level 1 amendments including the need for structural changes in the way the CTs should be calculated (i.e. distinguishing between cleared vs. non-cleared transactions rather than between exchange traded derivatives (ETDs) and OTC derivatives).
4. Second, ESMA published the [Final Report on the RTS on the commodity derivatives CT](#). This report considers the time it will take for ESMA's recommendations for changing Level 1 to be effective and the extraordinary circumstances non-financial counterparties (NFCs) are facing. It also takes into account the lack of an equivalence decision regarding United Kingdom (UK) markets which significantly increased the number of OTC derivatives that, while cleared in recognised CCPs, count toward the CT. In addition, it also considers the significant increase in commodity prices that can lead to a passive breach of the CT. As a result, the report included a proposal to amend the CT for commodity derivatives to increase it by EUR 1 billion, from EUR 3 billion to EUR 4 billion.
5. The present report looks into further elements raised by respondents to the DP that are not specific to commodity derivatives, such as the different regime for financial counterparties (FCs) and NFCs when calculating positions, the scope of the hedging exemption, the asset management sector's concerns and whether intragroup transactions should be excluded from the calculation of positions towards the CTs.
6. In addition, this report also includes two annexes with a set of statistics using data from Trade Repositories (TR) from 2021 (the DP used TR data from 2020). The new statistics reflect the changes in the number of market participants and notional traded

³ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13); Commission Delegated Regulation (EU) 2016/592 of 1 March 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 103, 19.4.2016, p. 5); Commission Delegated Regulation (EU) 2016/1178 of 10 June 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 195, 20.7.2016, p. 3).

⁴ Article 10(4) of EMIR.

in the different asset classes covered by the CTs, this time after the UK withdrew from the EU. It includes statistics on the coverage of CTs across asset classes when looked into at the level of group structures, at the level of counterparties, distinguishing between FCs and NFCs. Additionally, the report also presents some projections or simulations to illustrate the changes in notional and population of counterparties above the CTs when decreasing by 0.5 billion or increasing by 0.5 and 1 billion the different CTs.

7. This report contains an (1) introduction, (2) the feedback received to the public consultation, (3) additional input to the review of the CTs and two annexes. The annexes present: (I) the simulations moving the CTs (based on 2021 data), and (II) statistics presented in the DP updated with TR data from 2021.

2 Feedback received to the Discussion Paper on the Review of the CTs⁵

8. ESMA's public consultation based on the DP ran from 22 November 2021 to 19 January 2022. A total of 29 respondents provided feedback⁶, out of which 9 FCs, 19 NFCs and one academic.
9. Among the FCs, three are asset management associations, three are global market associations, one is a banking association, one is a group with an exchange and a CCP and one is an investment service provider. Sixteen out of the 19 NFCs' responses came from the energy industry. Eight of the responses, with identical feedback are from EFET and its biggest members. The other seven (many of them also EFET members), provided shorter versions of the same feedback with some minor nuances. The list of respondents can be found on ESMA's website⁷.
10. ESMA already addressed the feedback received regarding two issues, the first, in relation to the overall EMIR framework and its functioning⁸. The second, regarding NFCs concerns when entering into commodity derivatives that sought immediate action, in the context of Brexit, the lack of recognition of UK markets⁹ and the current volatility of commodity prices¹⁰.
11. This report thus covers other relevant aspects to the review of the CTs that merited further attention and discussion. ESMA has conducted some checks with NCAs on the groups above the CTs and discussed supervisory cases with NCAs aiming at enhancing supervisory convergence. The outcome of these initiatives has fed into this report and complement the issues raised in the feedback to the DP.

⁵ https://www.esma.europa.eu/sites/default/files/library/esma_70-156-5010_review_of_the_clearing_thresholds_under_emir.pdf

⁶ We have included associations representing FCs and NFCs views respectively in the count.

⁷ <https://www.esma.europa.eu/press-news/consultations/discussion-paper-review-clearing-thresholds-under-emir>

⁸ Providing input to the EC consultation on the targeted review of central clearing in the EU.

⁹ One of the concerns raised by market participants in their feedback to the DP refers to the EMIR design under Article 2a, whereby derivative contracts traded in third-country markets compute as OTC derivative contracts in the calculation for the purpose of the CTs (even if centrally cleared), unless the EC deems that market equivalent to an EU regulated market. This fact, combined with the need to include in the calculation OTC derivatives entered into by all the entities in the same group regardless of whether they are in the EU or a third country, was considered to have a negative impact on EU's competitiveness by some respondents.

¹⁰ <https://www.esma.europa.eu/press-news/esma-news/esma-proposes-eur-1-billion-increase-commodity-derivatives-emir-clearing>

12. In the Annex, ESMA presents updated statistics as well as simulations on the CTs and how they would move if decreasing or increasing the current CTs for the different asset classes. This information can be of value when looking at the different proposals received in the feedback to the discussion paper on how to amend specific CTs.

2.1 Extending the hedging exemption for NFCs to FCs

13. Under EMIR only NFCs benefit from the hedging exemption when calculating their positions in OTC derivatives towards the CTs. According to two respondents, FCs should benefit from the same exemption regime. They argue that the absence of a hedging exemption for FCs is an area where the requirements of EMIR are disproportionate to the systemic risk faced by FCs with their hedging transactions. Notably, they refer to the hedging exemption proposed (under certain circumstances) for FCs under the position limits regime in MiFID^{11, 12}, and they would welcome a similar approach under EMIR. The energy trading firms supported this point.
14. In addition, regarding the way in which FCs and NFCs compute positions in OTC derivatives for the purpose of the CTs, these two respondents consider that FCs should exclude from their group calculations those hedging positions entered into by NFCs pertaining to the same group. The reasoning provided is that in this way entities belonging to the same group would avoid carrying out two different sets of calculations.

Considerations:

15. ESMA considers that overall the CTs have worked in a proportionate manner and appear to be well-calibrated for the purpose of reducing systemic risk. EMIR Refit has introduced a provision for FCs trading lower volumes of OTC derivatives to be exempted from the CO. The statistics ESMA presented in the DP and the updated ones in Annex II show that the percentage of FCs above the CTs range from below 10% and up to 19%, meaning that between 81 and 90% of FCs trading OTC derivatives are already below the CTs after computing their positions. From this point of view, ESMA does not see the need nor the justification to advocate for a hedging exemption for FCs.
16. It is also noted that, in any case and even if excluding NFCs' hedging positions from FCs calculations, counterparties that are part of a group would need to carry out two different sets of calculations. This is because NFCs only take into account NFCs' positions while FCs within a group need to take into account all OTC derivatives entered into by any entity in the group.
17. For completeness, the EC confirmed their interpretation of whether FCs can apply in their calculation the hedging exemption for the NFCs within their group in a recent

¹¹ [Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004.](#)

¹² The Capital Markets Recovery Package adopted by the co-legislators in December 2020 and published in the Official Journal on 26 February 2021 introduced significant changes to the MiFID II commodity framework, including to the position limit regime. ESMA published the [Final Report on Technical standards for commodity derivatives](#), extending the hedging exemption for NFCs to positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity.

Q&A (published within the ESMA EMIR Q&A document on 19 November 2021)¹³. The Q&A essentially clarifies that FCs have to include in their calculations the hedging positions entered into by NFCs in the same group.

2.2 Impact of Brexit on investment funds' activity in equity derivatives

18. Three associations representing the asset management sector responded to the DP. Two of them mentioned the impact Brexit had had on their activity of trading equity derivatives. According to the feedback received from one of them, after Brexit, counterparties continue to enter into derivatives in the UK and this impacts their calculations towards the CTs, especially for equity derivatives. Notably, the equity instruments traded in the UK market are listed options (for instance, calls and puts) and listed equity futures (for instance, those traded on FTSE). One of the respondents expressed that these equity derivatives are only available at a reasonable price on UK trading venues and that an equivalent transaction in the EU is more expensive because the EU buyer would enter into an OTC transaction through a broker, increasing the cost.
19. Similarly, the second respondent referred to UK markets as unique in terms of depth, liquidity and broad participation, noting that currently there is no substitute market with the same characteristics in the EU or in other non-EU countries.
20. In view of the circumstances the asset management sector faces due to Brexit and the lack of recognition of UK markets, one respondent asked for a temporary grandfathering regime to exclude ETDs traded in the UK from the calculation of the CTs until similar ETDs are available in EU-markets. Alternatively, if such grandfathering is not possible, that respondent asked for increasing the CT for equity derivatives set at EUR 1 billion to EUR 2 billion to counterbalance the Brexit effect. With similar arguments and stressing the cost of maintaining access to clearing, the second respondent asked for aligning the equity derivatives CT with the CT for IRDs, set at EUR 3 billion.

Considerations:

21. ESMA is aware of the implications of Article 2a of EMIR in relation to third-country markets that are not declared equivalent to EU regulated markets, in particular with regards to derivatives executed on these markets that qualify as OTC and thus need to be included in the calculation towards the CTs. ESMA proposed in its response to the EC consultation¹⁴ to shift from the current approach of ETD vs. OTC, to adopt a cleared vs uncleared approach instead, i.e. to only count towards the CT those derivatives that are not cleared in an authorised or recognised CCP.
22. Regarding the specific claims of the asset management sector entering into equity derivatives, ESMA considers that in general terms, there are EU alternatives to equity

¹³ EMIR Q&A, OTC Question 3, see: https://www.esma.europa.eu/sites/default/files/library/esma70-1861941480-52_ga_on_emir_implementation.pdf

¹⁴ See [high-level ESMA response to the EC consultation on the EMIR targeted review to the central clearing framework in the EU](#).

derivatives traded in UK venues, although in some cases, the alternatives might have a higher cost and UK equities in EU venues might be less liquid.

23. At the same time, ESMA considers that the CT for equity derivatives seems adequate as it succeeds in covering 98% of the notional and only 9% of the FCs trading this derivatives asset class (2021 data).
24. Furthermore, ESMA is also mindful of the special status of funds in the EMIR calculation framework and thus does not consider it justified to increase the level of the CTs in view of the asset management sector's request. Indeed, funds are the sole entities to calculate positions towards the CT at entity level (i.e. at individual fund level) instead of at group or fund manager level.
25. Overall, considering that the statistics show that less than 10% of FCs entering into equity derivatives are above the CTs, the CT seems to be capturing only the most active market participants. For these reasons, the increase proposed seems unjustified and the claim does not seem to be backed by the data that ESMA reviewed. In addition, the percentage of notional and market participants covered by the CT before and after Brexit remained basically unchanged, showing a stable situation.

2.3 Hedging exemption for FX derivative contracts

26. The three respondents representing the asset management sector expressed in their feedback concerns regarding the calculation methodology for the purpose of the CTs and their activity in FX derivative contracts. They argue that hedging is at the core of funds' activity to protect their investors against currency risks (especially because UCITS funds' shares can be subscribed by natural persons). To hedge these risks funds enter into FX physically settled derivatives (FX forwards and FX swaps).
27. The asset management sector respondents note that the volume of FX transactions they enter into in order to hedge their activity makes them breach the thresholds, which in turn triggers the CO for IRDs and credit derivatives (asset classes in which these funds have marginal activity). The three respondents advocate for a hedging exemption for FX derivatives so these trades do not count in the calculation towards the CTs.
28. In relation to this last point, one of these respondents indicated that excluding FX forwards and swaps from the calculation would also be aligned with the current treatment such instruments benefit from regarding bilateral margining requirements (i.e. with respect to the exemption from the requirement to post initial margin¹⁵).
29. In addition, and as an alternative to the exclusion of FX hedging transactions from the calculation towards the CTs, another respondent proposed to introduce a minimum amount in IRDs positions, set at EUR 500 million, above which FCs+ would then need to start clearing IRDs. In this way, FCs above the FX CT would not be subject to the CO for their IRDs if they do not have a certain volume of activity in that asset class.
30. At the same time, two respondents expressed a strong preference for keeping the CTs as they are today, and proposed instead to extend the "per-asset-class" approach for

¹⁵ See Article 27 in [RTS on margins](#).

NFC's CO to FCs. Meaning that FCs would only become subject to the CO for the asset class in which they breach the CT.

31. However, another respondent considers that with the data available, the CT for FX derivatives appears to be appropriate and that there are no issues to bring to ESMA's attention at this stage.
32. Further, one respondent, in a more general comment, requested ESMA to assess the impact of amending the methodology for the calculation of positions towards the CTs to perform calculations at fund manager level instead than on a fund-by-fund basis.

Considerations:

33. ESMA sees that views regarding the effectiveness of the CT for FX are split. Some respondents see the CT as well-calibrated and some, especially funds, would like to ensure that their activity in FX does not trigger the CO for IRDs and for credit derivatives.
34. Looking at the statistics, ESMA observes that only 8% of the FCs entering into FX derivatives are covered by the CT. This appears to be a proportionate number of entities to achieve a coverage of 94% of the notional traded in FX derivatives (2021 data).
35. In addition, the changes introduced by Refit provide an exemption from the CO for FCs with lower trading volumes, including funds. Moreover, as already mentioned, funds benefit from a special calculation methodology (only counting positions at fund level). These two aspects combined significantly improved the proportionality of the EMIR regime for FCs and in particular funds.
36. For these reasons, ESMA is therefore of the view that no changes are needed regarding the CT for FX derivatives and FCs at this stage.

2.4 Intragroup exemption

37. Some respondents to the DP were critical about the inclusion of intragroup transactions in the calculation of positions to determine which counterparties are above the CTs. They consider that it artificially inflates the gross position of the group.

Considerations:

38. The last ESMA Annual Statistical Report (2021) provides an overview of intragroup trading activity. It indicates that for IRDs, the asset class most traded intra-group, the majority of the trading is booked intra-EU, followed by intragroup transactions with UK entities and then by intragroup transactions with entities from other third countries. Over the period analysed, intragroup transactions' activity has steadily increased. Intragroup transactions represent 9% in terms of notional and 13% in terms of trade count across different classes in OTC derivative markets¹⁶ (this percentages vary depending on the

¹⁶ See in particular the statistics table on page 5 of the ASR: [esma50-165-2001_emir_asr_derivatives_2021.pdf \(europa.eu\)](https://www.esma.europa.eu/press-material/press-conferences-and-events/annual-statistical-report-2021)

asset class, ranging from 31% of notional for equity derivatives to 4% for credit derivatives).

39. Under EMIR, intragroup transactions benefit from a special treatment as group entities can be granted an exemption from the CO, reporting and/or from risk mitigation techniques when certain conditions are met. However, intragroup transactions can also be used to shift risks stemming from the EU facilitating strategic relocations to third countries to escape certain obligations. In part to avoid these risks, EMIR includes an equivalence regime, whereby one of the conditions for these exemptions for intragroups with third-country group entities is whether the third country requirements are deemed equivalent to the EMIR ones.
40. To provide time for the EC to prepare the relevant equivalence decisions necessary under Article 13(2), a temporary regime was introduced in Level 2 (i.e. the Delegated Regulations on the CO¹⁷ and the Delegated Regulation on bilateral margins¹⁸).
41. To date, the EC has issued a total of 8 equivalence decisions under Article 13(2) of EMIR, all relating to bilateral margining, and none for the CO in particular. The temporary regime deferred the date of the CO and the margin requirements application for intragroup transactions between EU and non-EU counterparties belonging to the same group where there is no equivalence decision regarding the non-EU country. In view of the scheduled review of EMIR and the challenges that groups would face if the current expiry of the temporary regime was not changed, the European Supervisory Authorities (ESAs) have proposed amending RTS extending this temporary regime until June 2025.
42. ESMA provided recommendations to the EC in its [high-level response to the Consultation](#), moving away from the equivalence regime under Article 13(2). The EC consultation included a variety of issues and questions, including whether intragroup transactions should be counted in the calculation of positions against the CTs. This issue is thus now for the EC and the co-legislators to consider.
43. In addition, given that the respondents asking for an exclusion of intragroup transactions are energy trading companies and banking trade associations, ESMA considers that the RTS submitted to increase by 1 billion the CT for commodity derivatives should already alleviate some of the more imminent concerns driving the request on the exclusion of intragroup transactions.

2.5 A new category of asset classes – decoupling commodity derivatives from “other asset classes”

44. Currently, Article 11 (a)-(e) of Delegated Regulation 149/2013 sets the CTs and provides for five asset classes under which to classify OTC derivatives for the purpose of the CO: credit, equity, currency, interest rate and a fifth one capturing commodity

¹⁷ [Commission Delegated Regulation \(EU\) 2015/2205 of 6 August 2015](#), [Commission Delegated Regulation \(EU\) 2016/1178 of 10 June 2016](#), [Commission Delegated Regulation \(EU\) 2016/592 of 1 March 2016](#).

¹⁸ [Commission Delegated regulation on margining](#).

derivatives as well as “other OTC derivative contracts” which are not credit, equity, interest rate, FX nor commodity derivatives.

45. Regarding the current classification of assets, a respondent suggested creating a new category for “other derivatives” for derivatives on, for instance, emission allowances or crypto-assets. Another suggestion received was to consider that classes of derivatives that do not fall into the existing five asset classes should not count towards the CTs of the currently existing asset classes.

Considerations:

46. ESMA already provided some guidance on how to classify crypto-assets for the purpose of reporting. The [Final report including Technical standards on reporting, data quality, data access and registration of Trade Repositories under EMIR REFIT](#) includes a flag to identify crypto-derivatives. Under the draft Technical Standards, counterparties will report the derivatives asset class they trade (as they do today) and in addition, there will be a flag to identify if the underlying is a crypto-asset. At the same time, those Technical Standards on reporting establish that “*Where derivatives do not fall within one of the asset classes specified in paragraph 3, the counterparties shall specify in the report the asset class most closely resembling the derivative. Both counterparties shall specify the same asset class.*”¹⁹
47. In addition, ESMA could see merit in the possibility of considering the creation of a new category to avoid using the fifth category for commodity derivatives as a “catch-all” category. Nevertheless, creating categories for new asset classes should be further assessed. First, the Market in Crypto-Asset Regulation, so-called MiCA, which is expected to be adopted in the coming months²⁰, should help clarify situations where a contract is a crypto asset or a financial derivative contract to be counted in the calculation of the CTs. Second, the changes in the area of reporting, which will allow to see the volumes traded in crypto-assets in each of the current asset classes, are not yet in force. Based on these regulatory developments, ESMA will have more data to better assess whether new categories should be created.
48. At the same time, it is also noted that creating new categories for certain contracts should not automatically imply exempting them from the calculation of the CTs, but to find a proportionate threshold calibration for capturing any related systemic risk and thus including them.

2.6 Emission allowances

49. Another aspect raised in the feedback to the DP relates to emission allowances. Two respondents indicated in their responses that they would welcome a definition of emission allowances and a clarification that those are not commodities and that derivatives on emission allowances are not commodity derivatives for the purpose of EMIR or any other regulatory regime. They argue it is unclear whether the term emission allowances refers only to instruments that qualify as “emission allowances” under section C(11) of Annex I to MiFID (i.e. emission allowances that qualify for

¹⁹ Article 4(4) of [Commission Implementing Regulation \(EU\) 2017/105 of 26 October 2016](#).

²⁰ However, it will take longer to enter into force.

recognition under the EU Emission Trading Systems) or if it captures a broader range of assets.

50. According to these respondents, the definition of emission allowances is an issue with overarching implications. So far, emission allowances have been identified as financial instruments under MiFID II but this might still leave room to potential divergent treatments according to different sets of regulations and even interpretations. In addition, under reporting rules, derivatives on emission allowances are reported under the commodity field²¹.

Considerations:

51. The information reported to TRs allows identifying derivatives on emission allowances. Making use of this data, ESMA will continue to monitor the activity in these instruments to ensure that the current framework is fit for purpose considering market trends. In addition, ESMA has recently published two reports on emission allowances and associated derivatives and provided policy recommendations to the EC on how to further supervise trading activity in these instruments²².
52. Furthermore, ESMA notes that the definition of emission allowance under Section C(11) of Annex 1 of MiFID is clear. Also, according to Section C(4) of the same Annex, options, futures, swaps, forward rate agreements and any other derivative contracts relating to emission allowances (whether EUAs or emission allowances from other jurisdictions outside the EU) are to be considered financial instruments and hence when traded OTC they are to be included in the calculation of positions towards the CT under Article 11(e) of Delegated Regulation 149/2013. This however does not mean that emission allowances or derivatives thereof are commodities or commodity derivatives, independently of how they are reported. Indeed, the definition of “commodity derivatives” is provided for in Article 1(1)(30) of MiFIR, which does not include instruments mentioned in Sections C(4) or (11) of Annex 1 of MiFID.

2.7 Aligning equivalence decisions adopted under Article 25 of EMIR and Article 28 of MiFIR

53. One respondent suggested aligning the lists of equivalence decisions under Article 2a of EMIR with equivalence decisions under Article 25 of EMIR (relating to the recognition of a third-country CCP²³) and under Article 28 of MiFIR²⁴ (relating to the obligation to trade on regulated markets, MTFs or OTFs).

²¹ See EMIR Q&As, TR Question 46: <https://www.esma.europa.eu/document/qa-emir-implementation>

²² See the ESMA preliminary report https://www.esma.europa.eu/sites/default/files/library/esma70-445-7_preliminary_report_on_emission_allowances.pdf and the Final Report (March 2022) https://www.esma.europa.eu/sites/default/files/library/esma70-445-38_final_report_on_emission_allowances_and_associated_derivatives.pdf

²³ See list of CCPs recognised to offer services under EMIR https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf

²⁴ See Public register on the trading obligation (page 5) https://www.esma.europa.eu/sites/default/files/library/public_register_for_the_trading_obligation.pdf

Considerations:

54. ESMA notes that the equivalence regime for the purpose of the trading obligation and for the recognition of CCPs are designed to deal with different issues that deserve different analyses and thus an individual and case-by-case assessment. It is also noted that the definition of OTC derivative contracts under EMIR cross-refers to MIFID and that aligning equivalence decisions may simplify and bring clarity with respect to the definition of ETD and OTC derivative contracts across the regulatory frameworks.
55. However, should ESMA's proposal for changes to Level 1 on the CT framework (to move from ETD vs. OTC derivatives to the distinction between cleared and non-cleared derivatives) be followed, decisions under Article 2a would no longer be needed and only equivalence decisions under Article 25 of EMIR would matter to determine whether a derivative has been cleared at an authorised or recognised CCP. Thus only contracts not cleared at an authorised or recognised CCP should count towards the CTs. ESMA thus considers that its proposal to change Level 1 would solve the concern on the alignment of equivalence decisions.

2.8 Statistics in the Discussion Paper do not show the impact of Brexit

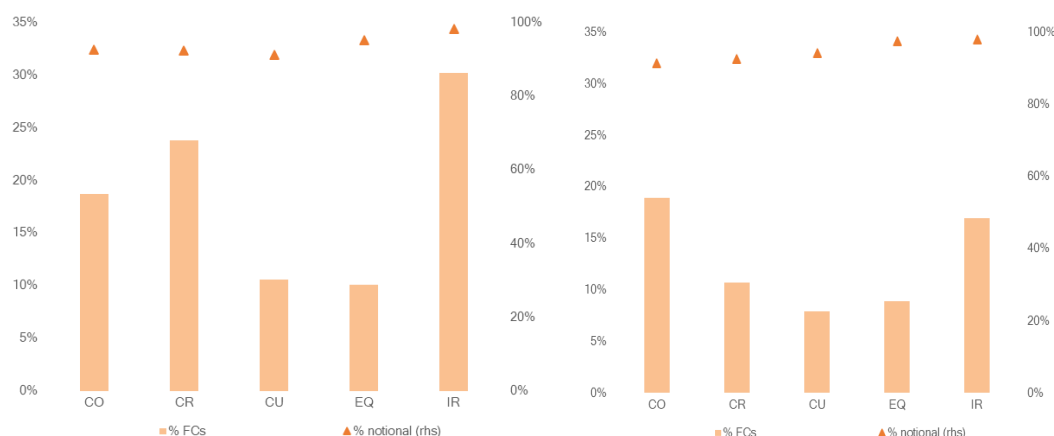
56. Another issue raised in the feedback by several respondents was the fact that the statistics presented in the DP only included 2020 data from TRs. These respondents mentioned TR data from 2020 does not account for the impact of Brexit and more up to date statistics should be displayed in the context of the review of the CTs.

Considerations:

57. The DP included data updated up to 2021 for the notifications received from counterparties' calculations of positions under Articles 4a and 10 of EMIR combined with 2020 data from TRs. The DP clearly disclosed the methodological approach taken and anticipated that the following report would present statistics using 2021 TR data (Annex II includes an overview of the methodology used).
58. ESMA carried out a series of checks with all NCAs to further clean the data used for the statistics presented in the DP and in this report (on the checks performed, see section 3, below). As a result of these bilateral checks, ESMA identified some NFCs that were possibly misreporting their positions. The relevant NCAs followed up with those entities and asked them to address the situation. These corrections are not reflected in the statistics presented, which use data from 2021. Therefore, due to the misreporting spotted, our statistics might overestimate the CTs' coverage for NFCs in terms of notional traded. Nevertheless, the amendments to the reports submitted to TRs by entities subject to EMIR will inform future reports and the ongoing monitoring of the clearing framework by NCAs and ESMA.
59. This report presents updated statistics using information received through the notifications in 2021 and TR data from 2021. The relevant charts can be found in Annex II. In addition, the figure below shows a comparative table (2021 and 2020) showing the evolution in the coverage of the CTs.

Coverage CTs TR data 2021					Coverage CTs TR data 2020			
CLASS	FC+	FC NOTIONAL	NFC+	NFC NOTIONAL	FC+	FC NOTIONAL	NFC+	NFC NOTIONAL
CO	19%	91%	2%	35%	19%	91%	2%	26%
CR	11%	93%	8%	54%	24%	92%	11%	57%
CU	8%	94%	1%	23%	11%	91%	1%	19%
EQ	9%	98%	2%	82%	10%	95%	1%	84%
IR	17%	98%	1%	39%	30%	98%	1%	32%

60. Furthermore, the following graphs show that in general terms the picture for FCs and NFCs after Brexit shows a certain stability. While the percentage of FCs above the CTs has slightly decreased, the notional covered by the CTs remained at a similar level in 2021 than in 2020 in general terms (not much variation for commodities, currency and equity derivatives). However, we observe a significant decrease in IRDs (from 30% to 17%) that we will continue to monitor to have a better understanding of the reasons that might have caused it.

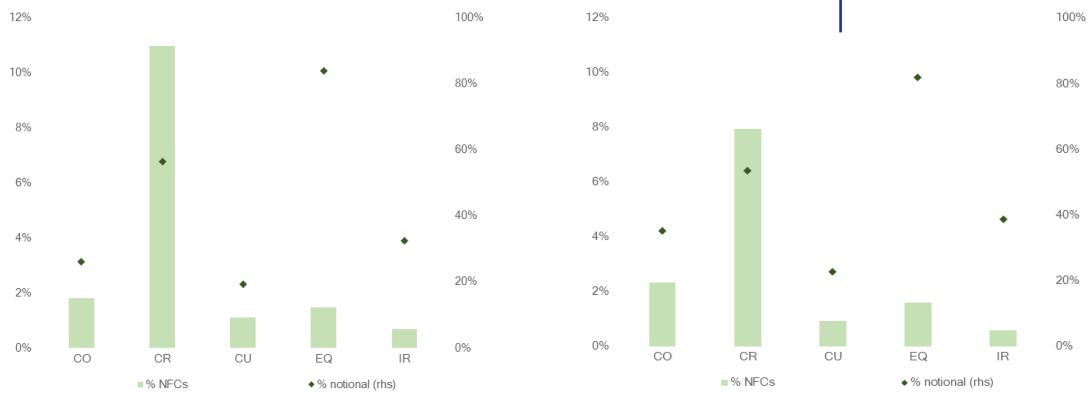


Note: Percentage of FCs above the threshold and share of total notional (rhs), 2020. Sources: TR data, GLEIF, EMIR Notification, ESMA

Note: Percentage of FCs above the threshold and share of total notional (rhs), 2021. Sources: TR data, GLEIF, EMIR Notification, ESMA

Asset Class	2021 FC+ count	2020 FC+ count
CO	101	128
CR	256	646
CU	1,049	1,701
EQ	560	717
IR	1,192	1,400

61. Looking at the next graphs on the evolution of NFCs in 2020 and 2021 we observe a relatively stable picture in terms of percentage of NFCs+ and notional covered by the CTs after Brexit.



Note: Percentage of NFCs above the threshold and share of total notional (rhs), 2020.
Sources: TR data, GLEIF, EMIR Notification, ESMA

Note: Percentage of NFCs above the threshold and share of total notional (rhs), 2021.
Sources: TR data, GLEIF, EMIR Notification, ESMA

Asset class	2021 NFC+ count	2020 NFC+ count
CO	63	44
CR	23	26
CU	203	167
EQ	64	63
IR	389	304

3 Additional input to the Review of the CTs

3.1 Checks performed on the basis of TR and notifications

63. ESMA published in its DP in November 2021 a number of statistics based on data from TRs and data from the notifications submitted by market participants that are above the CTs. These statistics aimed at mapping the population of groups and entities covered by the CTs and included also some projections on how that population would change if the current levels of the CTs moved. Those statistics were the basis of the analysis performed to assess whether the CTs are well-calibrated.

64. According to EMIR, entities that are above the CTs (or those choosing not to calculate their positions) have to notify ESMA and their NCA. To enhance the quality and accuracy of the data set used for the review of the CTs, ESMA staff engaged in bilateral checks with NCAs to reconcile the population of entities and groups that are above the CTs across the EU. Some of these checks focused on reviewing the list of NFCs above the CTs with each NCA. This exercise helped identifying entities that had not properly notified either ESMA or the relevant NCA as well as spotting entities that were misreporting some of their contract details to the TR. As a follow-up exercise, where a deviation was found, NCAs contacted these entities and asked them to amend it (e.g., some NFCs, through their submitting agent entities in several cases, had not properly flagged their hedging activity when reporting and thus appeared above the CTs on TR

data). As a result, ESMA is confident that the quality of the data to continue monitoring the CTs in the future is improving.

65. In parallel, ESMA checked with NCAs whether the statistics used for this report included any of the entities that while being subject to reporting to TRs are exempted from the CO under EMIR²⁵. Those entities were removed from the statistics on the coverage of the CTs.

3.2 Short survey on the supervision of NFCs

66. ESMA launched a short survey to ask NCAs about their supervisory activity in relation to NFCs entering into OTC derivatives and with regards to their compliance with the CT framework. The results of the survey shed some light on the supervisory actions undertaken in different jurisdictions and the checks performed regarding how hedging transactions are reported. One key finding was that NCAs take a risk-based approach when supervising EMIR requirements and NFCs activity. In many cases, this area had not been at the top of NCAs' supervisory priorities. ESMA and the NCAs will continue working on convergent supervisory practices.

67. Furthermore, ESMA hosted discussions among NCAs on supervisory cases. It was an opportunity for NCAs to exchange experiences on the treatment of EMIR data for the purpose of the CTs, on the supervision of the CO for NFCs and on the outcome of some bilateral checks done with certain entities as a consequence of spotting misreporting of hedging positions or the absence of due CT notifications.

4 Conclusions

68. ESMA has provided detailed recommendations to amend and enhance the CTs framework in its high-level response to the EC consultation on the targeted review of EMIR. In addition, in the immediate term and after analysing the feedback received to the DP, ESMA submitted a draft RTS proposing to increase the CT for commodity derivatives by EUR 1 billion in June 2022. At this stage, in view of the situation with the other asset classes and taking into account that the proposed Level 1 changes would address to a large extent many of the points raised by stakeholders, ESMA sees no need to advise further changes to the level of the CTs.

69. ESMA will continue monitoring the coverage of the CTs, in line with the EMIR mandate to periodically review the CTs, to ensure that they remain well-calibrated. In addition, ESMA stands ready to review the level of the CTs at any point in time should the current market conditions change. Moreover, any future change in Level 1 that would impact the current CT framework would need to be accompanied by a subsequent review of the level of the CTs to ensure they remain fit for purpose.

²⁵ According to Article 1(4).

Annex I: Simulations (TR data 2021)

1. In this Annex we present three scenarios which correspond to simulations of the impact of slightly modifying the current CTs. This exercise allows to observe the impact of increasing and decreasing the thresholds for FCs and NFCs and for each asset class.
2. The first simulation decreases the current thresholds by EUR 0.5 billion respectively (i.e., 1 billion - 0.5 billion for credit and equity derivatives, and 3 billion - 0.5 billion for IRDs, currency derivatives and commodity derivatives).
3. The second simulation increases the current CTs by EUR 0.5 billion respectively (i.e., 1 billion + 0.5 billion for credit and equity derivatives, and 3 billion + 0.5 billion for IRDs, currency derivatives and commodity derivatives).
4. The third simulation increases the current CTs by EUR 1 billion respectively (i.e., 1 billion + 1 billion for credit and equity derivatives, and 3 billion + 1 billion for IRDs, currency derivatives and commodity derivatives).
5. The simulations are run using the same methodology presented in the statistics of the DP and the updated ones in Annex II but the position of the counterparties and groups is computed only using TR data. The information from the notification cannot be used in the simulation as the counterparties report their positions against the current threshold (and when applying different thresholds, the information in the notifications is no longer valid). In addition, for comparability of the results across the different thresholds, we recompute (only for the exercise of simulations) the percentages of notional and number of counterparties above the CTs but using only TR data.

Table 1: Coverage with current CTs

Asset class	Subject CO?	Counterparties	Notional	Groups	Groups notional	FCs	FCs notional	NFCs	NFCs notional
CO	N	98%	33%	99%	33%	93%	11%	99%	79%
CO	Y	2%	67%	1%	67%	7%	89%	1%	21%
CR	N	93%	11%	94%	11%	93%	8%	94%	71%
CR	Y	7%	89%	6%	89%	7%	92%	6%	29%
CU	N	98%	15%	99%	15%	95%	7%	99%	83%
CU	Y	2%	85%	1%	85%	5%	93%	1%	17%
EQ	N	95%	3%	97%	3%	94%	3%	98%	19%
EQ	Y	5%	97%	3%	97%	6%	97%	2%	81%
IR	N	95%	6%	99%	6%	87%	3%	98%	52%
IR	Y	5%	94%	1%	94%	13%	97%	2%	48%

Table 2: Simulation 1 (CTs -€0.5bn)

Asset class	Subject CO?	Counterparties	Notional	Groups	Groups notional	FCs	FCs notional	NFCs	NFCs notional
CO	N	98%	32%	99%	32%	93%	11%	99%	76%
CO	Y	2%	68%	1%	68%	8%	89%	1%	24%
CR	N	87%	7%	89%	7%	86%	5%	91%	56%
CR	Y	13%	93%	11%	93%	14%	95%	9%	44%
CU	N	97%	14%	98%	14%	94%	6%	99%	83%
CU	Y	3%	86%	2%	86%	6%	94%	1%	17%
EQ	N	94%	3%	95%	3%	91%	2%	98%	18%
EQ	Y	6%	97%	5%	97%	9%	98%	2%	82%
IR	N	95%	6%	98%	6%	86%	3%	98%	52%
IR	Y	5%	94%	2%	94%	14%	97%	2%	48%

Table 3: Simulation 2 (CTs +€0.5 bn)

Asset class	Subject CO?	Counterparties	Notional	Groups	Groups notional	FCs	FCs notional	NFCs	NFCs notional
CO	N	98%	37%	99%	37%	94%	15%	99%	82%
CO	Y	2%	63%	1%	63%	6%	85%	1%	18%
CR	N	95%	12%	96%	12%	95%	10%	94%	75%
CR	Y	5%	88%	4%	88%	5%	90%	6%	25%
CU	N	98%	16%	99%	16%	95%	8%	100%	86%
CU	Y	2%	84%	1%	84%	5%	92%	0%	14%
EQ	N	96%	4%	98%	4%	95%	3%	98%	20%
EQ	Y	4%	96%	2%	96%	5%	97%	2%	80%
IR	N	96%	6%	99%	6%	87%	3%	99%	53%
IR	Y	4%	94%	1%	94%	13%	97%	1%	47%

Table 4: Simulation 3 (CTs +€1bn)

Asset class	Subject CO?	Counterparties	Notional	Groups	Groups notional	FCs	FCs notional	NFCs	NFCs notional
CO	N	98%	37%	99%	37%	94%	15%	99%	83%
CO	Y	2%	63%	1%	63%	6%	85%	1%	17%
CR	N	95%	13%	97%	13%	95%	11%	95%	77%
CR	Y	5%	87%	3%	87%	5%	89%	5%	23%
CU	N	98%	18%	99%	18%	96%	10%	100%	87%
CU	Y	2%	82%	1%	82%	4%	90%	0%	13%
EQ	N	97%	5%	98%	5%	96%	4%	99%	20%
EQ	Y	3%	95%	2%	95%	4%	96%	1%	80%
IR	N	96%	8%	99%	8%	90%	4%	99%	56%
IR	Y	4%	92%	1%	92%	10%	96%	1%	44%

Annex II: Updated charts (TR data 2021)

1. The pie charts presented in this annex correspond to the groups, counterparties, FCs and NFCs and are divided into different asset classes. For each asset class, the first pie chart (left) shows the number of groups, entities, counterparties, FCs or NFCs above the CT. The second pie chart (right) looks at the notional covered by the CT for the different counterparties.

Methodology

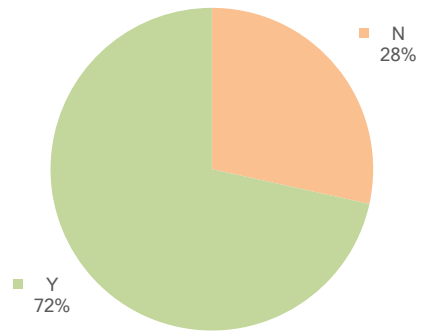
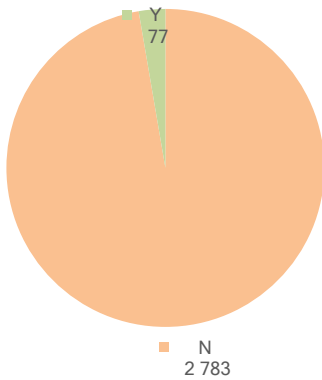
2. This section describes the methodology used for the preparation of the charts.
3. The methodology to assess whether the groups, entities and notional are subject to the CO is the same described in the Discussion Paper on the review of the CTs with updated data from TRs from 2021.
4. The assessment is performed using the information from EMIR TR data and from the notifications reported by entities on their positions against the thresholds. We start with the identification of groups and the entities belonging to a group using the information from GLEIF level 2 data and the notifications received from entities.
5. For each group identified, we calculated the monthly positions, summing the notional amount for each asset class of all the contracts outstanding on a given date reported to TRs²⁶ and deducing the transactions entered into for reducing risks directly relating to the commercial activity or treasury financing activity.
6. For each group we then calculate a 12-month average. We compare the resulting number for each asset class with the relevant CTs to determine whether the amount exceeds the relevant CTs for any of the asset classes. After having identified the groups (and FCs and NFCs belonging to each group) above the CT, we look at their trade-state data, (which shows information about only outstanding transactions at the end of the day). The statistics below present the share of groups above the CTs, the number of FCs and NFCs and the notional traded per asset class.
7. We complement the information reported in EMIR data and ESMA's calculations with the notifications received under Arts. 4a and 10 of EMIR Refit. The resulting information is then used to determine whether a group is above the CT. When a discrepancy exists between TR data and the notifications submitted by the counterparties, we privileged the source where a counterparty is considered above the CT. For example, if a counterparty results below the CT according to the group activity as reported to TRs but has notified ESMA, it is considered above.
8. There are a number of possible reasons explaining these discrepancies between the calculations and the notifications, including misreporting of certain fields (such as hedging or sector), differences in the assumptions and methodology used by counterparties or ESMA to run the position calculations, different reference dates used for the different calculations, etc. as well as potential problems with some notifications.

²⁶ The specific dates used are: 2021-01-15, 2021-02-11, 2021-03-12, 2021-04-15, 2021-05-14, 2021-06-17, 2021-07-15, 2021-08-13, 2021-09-17, 2021-10-15, 2021-11-12, 2021-12-17.

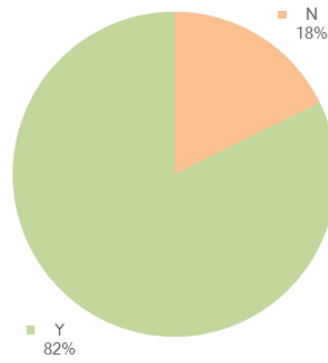
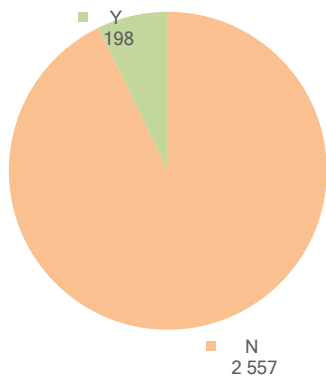
To address these issues, ESMA conducted bilateral checks of data with NCAs (especially in relation to NFCs).

Statistics for groups

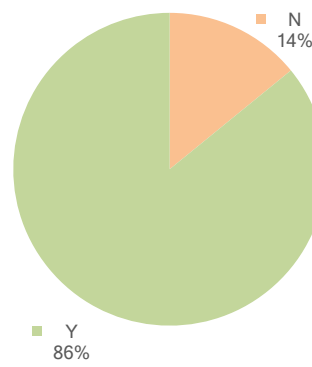
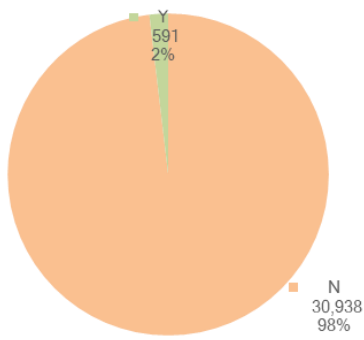
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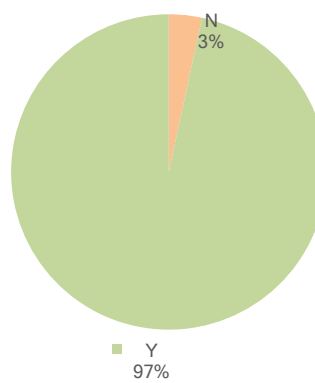
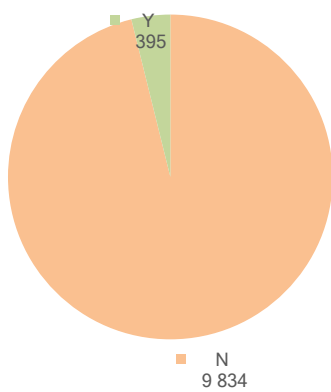
Credit derivatives



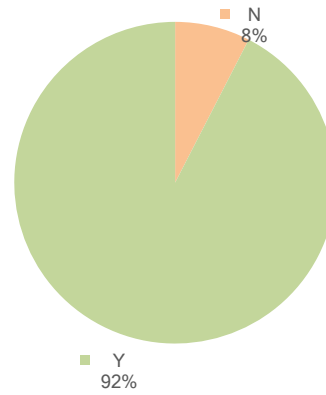
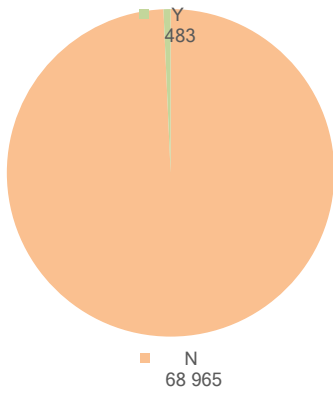
Currency derivatives



Equity derivatives

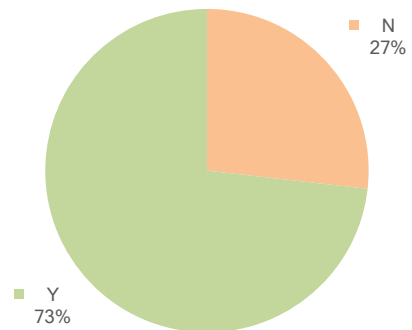
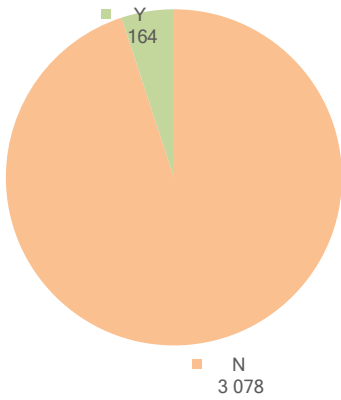


IRDs

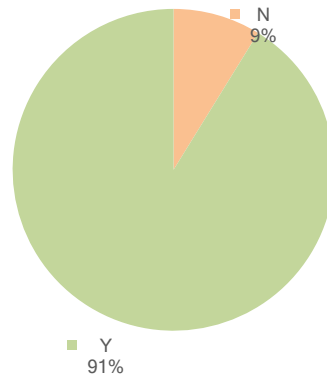
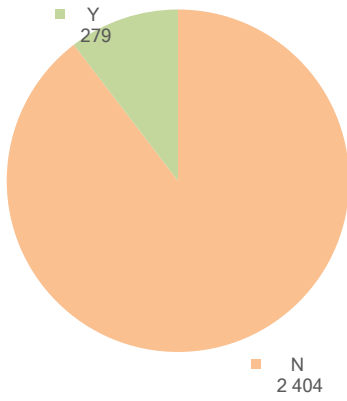


Statistics for counterparties

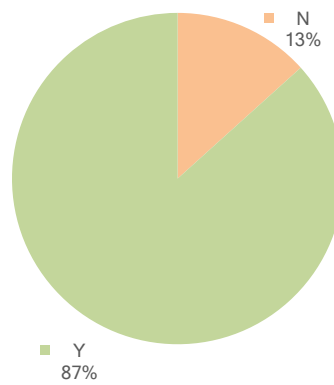
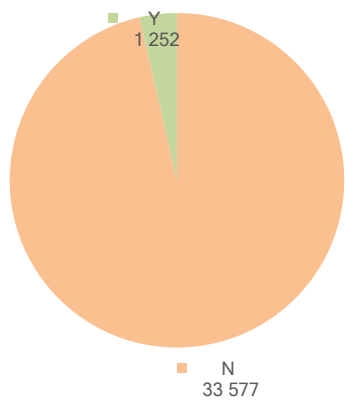
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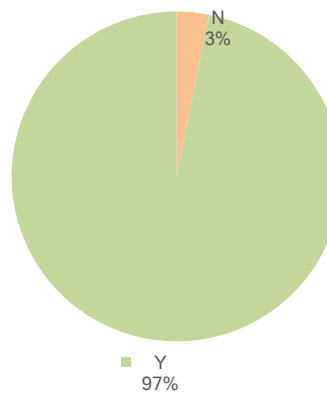
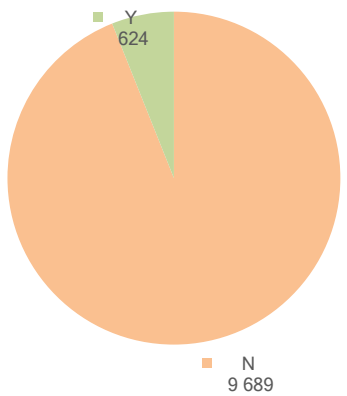
Credit derivatives



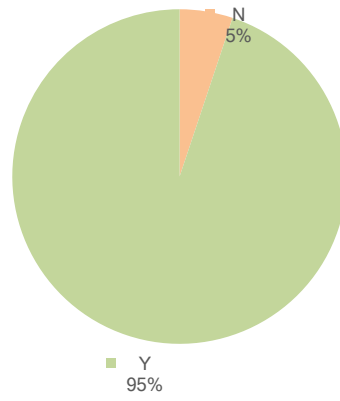
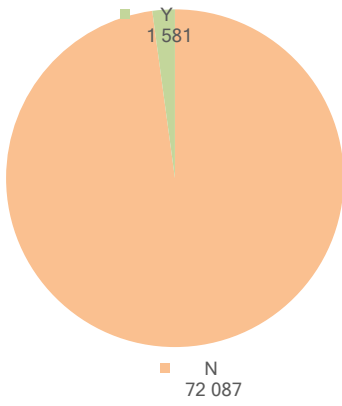
Currency derivatives



Equity derivatives

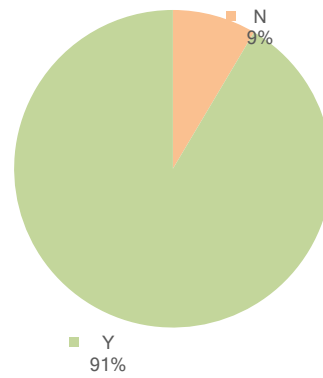
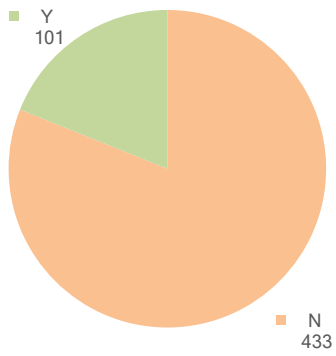


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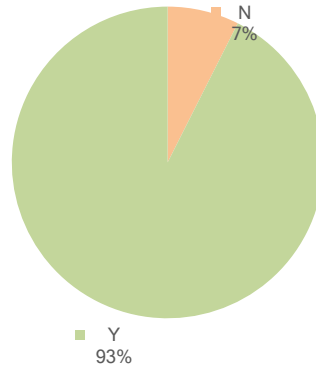
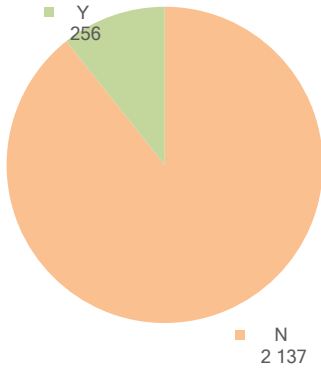


Statistics for FCs

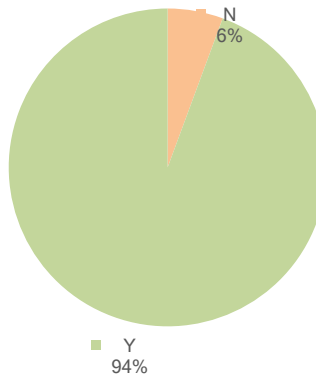
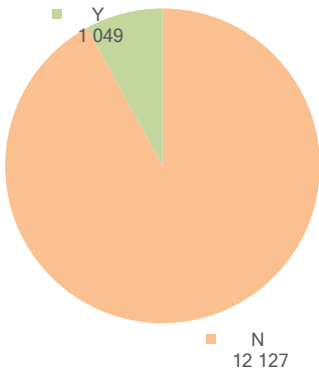
Commodity derivatives



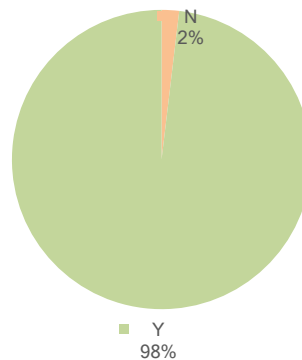
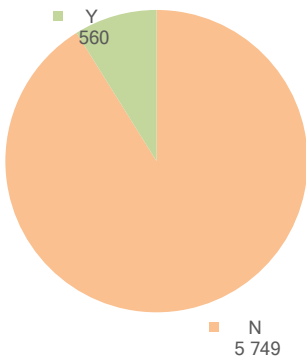
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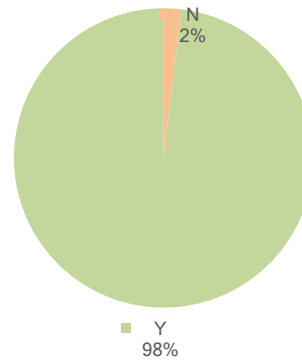
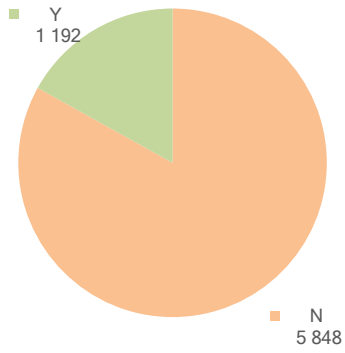
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Equity derivatives

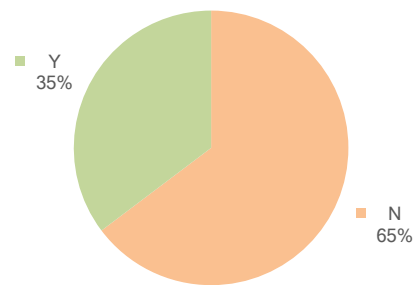
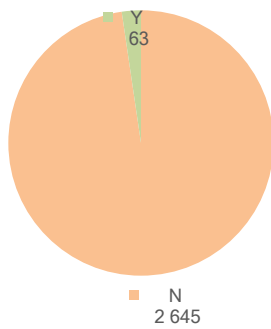


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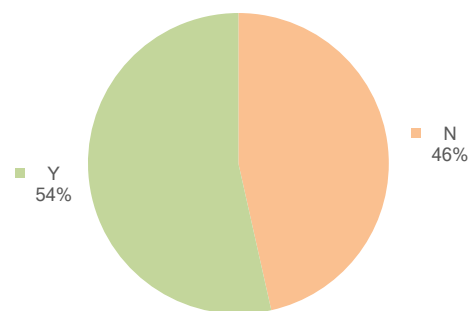
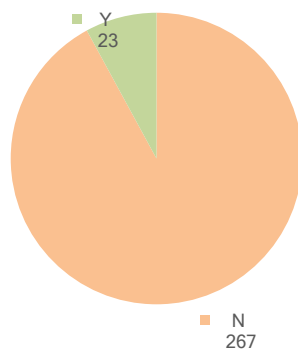


Statistics for NFCs

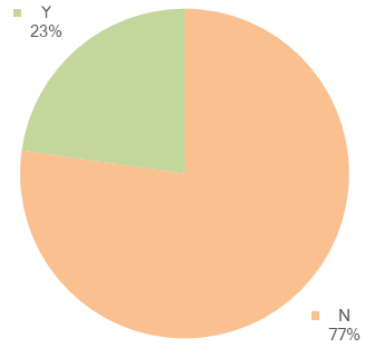
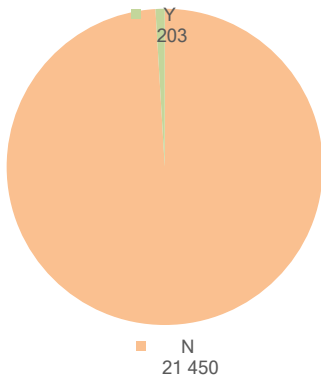
Commodity derivatives



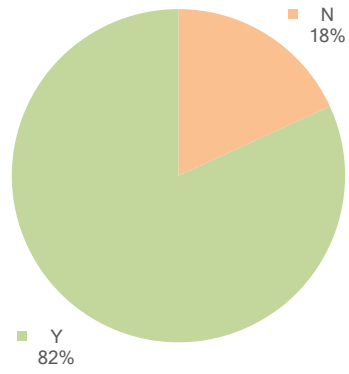
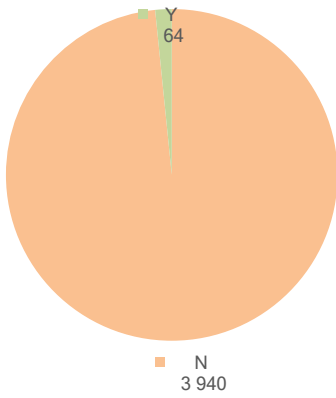
Credit derivatives



Currency derivatives



Equity derivatives



IRDs

